



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-T

Date: 14 September 2006

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 14 September 2006

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

**DECISION ON REMOVAL OF CHARGES
AGAINST MILORAD TRBIĆ AND ZDRAVKO TOLIMIR**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Julie Condon for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

TRIAL CHAMBER II of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”);

NOTING the “Submission pursuant to the Trial Chamber’s Decision on Further Amendments and Challenges to the Indictment and Motion Seeking Leave to Make Additional Minor Corrections” and the “Indictment”, filed together on 4 August 2006, in which the Prosecution purported to remove the charges against two former Accused in Case No. IT-05-88, Milorad Trbić and Zdravko Tolimir;

NOTING the “Order on Operative Indictment and Severance of Case against Zdravko Tolimir”, issued on 15 August 2006 (“Order on Operative Indictment”), in which the Trial Chamber expressed its view that the Prosecution had removed the charges against Trbić and Tolimir from the Indictment in accordance with the “Decision on Severance of Case against Milorad Trbić” of 26 June 2006 and the oral order of 13 July 2006;¹

BEING SEISED OF the “Joint Defence Response to the Prosecution Submission filed on 4 August 2006 and Motion to Remove Paragraphs 38, 44, 74 and 82 from the Second Consolidated Indictment”, filed jointly on 16 August 2006 (“Defence Motion”) by the co-Accused in Case No. IT-05-88 (collectively, “co-Accused”), in which the co-Accused seek an order that the Prosecution remove paragraphs 38, 44, 74, and 82 from the Indictment on grounds including the following:

- a. although the Prosecution removed the names of Trbić and Tolimir from the first page of the Indictment, “the operative text of the Indictment still refers to the role, actions and individual responsibility of Zdravko Tolimir and Milorad Trbić”;²
- b. paragraphs 38 and 74 of the Indictment “give the impression that Zdravko Tolimir is in fact being tried in this trial”,³ and “[t]he same analysis applies to paragraphs 44 and 82 with respect to Milorad Trbić”;⁴
- c. neither the jurisprudence,⁵ the Statute, nor the Rules of Procedure and Evidence (“Rules”) “authorizes the Prosecution to expose in the Indictment the acts and role of other persons”;⁶ and
- d. “[t]he acts, role and criminal responsibility of Zdravko Tolimir and Milorad Trbić may cause confusion in the Indictment” in Case No. IT-05-88;⁷

¹ See *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, and Pandurević*, Case No. IT-05-88-PT (“*Popović et al.*”), Oral Order, T. 311–312 (13 July 2006).

² Defence Motion, para. 5.

³ *Ibid.* para. 6.

⁴ *Ibid.* para. 7.

⁵ *Ibid.* para. 8.

⁶ *Ibid.* para. 10.

NOTING the “Prosecution’s Response to ‘Joint Defence Response to the Prosecution Submission filed on 4 August 2006 and Motion to Remove Paragraphs 38, 44, 74 and 82 from the Second Consolidated Indictment’”, filed in a timely manner on 1 September 2006 (“Prosecution Response”),⁸ in which the Prosecution requests the Trial Chamber to deny the Defence Motion on grounds including the following:

- a. the removal of the names of Trbić and Tolimir from the cover page and the counts of the Indictment make it clear “who the seven Accused are in this case”;⁹
- b. “[t]he jurisprudence of Trial Chamber II shows that it is proper for an Indictment to contain relevant information pertaining to the conduct and role of an individual alleged to be [a] member[] of a joint criminal enterprise (JCE), following severance of the individual JCE member from the indictment”;¹⁰
- c. the co-Accused have no standing to argue that the Indictment prejudices Trbić or Tolimir;¹¹ and
- d. “the experienced professional Judges of this Trial Chamber will not be ‘confused’ by the paragraphs at issue”;¹²

NOTING the “Joint Defence Reply to Prosecution Response to Defence Motion to Remove Paragraphs 38, 44, 74 and 82 from the Indictment”, filed jointly by the co-Accused on 6 September 2006 (“Reply”), in which the co-Accused seek leave pursuant to Rule 126 *bis* of the Rules to reply to the Prosecution Response, and reiterate their objections to the Indictment on grounds including the following:

- a. the paragraphs at issue do not merely concern the acts and behaviour of Tolimir and Trbić, but also contain legal qualifications of their alleged acts, and therefore give the impression that Tolimir and Trbić “are judged in the present case or that they have been judged and convicted for the alleged crimes”;¹³ and
- b. even though the Indictment may not be confusing to the judges, it must also be understood “by the Defence and the accused”;¹⁴

NOTING that the Prosecution has removed the names of Trbić and Tolimir from the cover page and all counts of the Indictment;

CONSIDERING that the Trial Chamber has already determined that “the Indictment is no longer subject to preliminary challenge”;¹⁵

⁷ *Ibid.*

⁸ *See Popović et al.*, Oral Order, T. 1080 (30 August 2006).

⁹ Prosecution Response, para. 3.

¹⁰ *Ibid.* para. 5.

¹¹ *Ibid.* para. 6.

¹² *Ibid.* para. 7.

¹³ Defence Reply, para. 10.

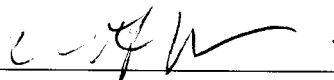
¹⁴ *Ibid.* para. 12.

CONSIDERING that, in certain circumstances, it is permissible for an indictment to discuss the relevant conduct of persons not charged therein, including where such conduct is said to have been realised in furtherance of a joint criminal enterprise in which the accused are alleged to have participated;¹⁶

CONSIDERING that, on the whole, it is clear that the Indictment charges only the seven co-Accused with crimes under the Statute of the Tribunal;

PURSUANT TO Rules 54 and 126 *bis* of the Rules, hereby **GRANTS** the co-Accused leave to file the Defence Reply and **DENIES** the Defence Motion in its entirety.

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



Carmel Agius
Presiding

Dated this fourteenth day of September 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁵ Order on Operative Indictment, p. 2.

¹⁶ See *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000, para. 16.