



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-03-69-T
Date: 29 March 2010
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 29 March 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON STANIŠIĆ DEFENCE MOTION ON THE FORM
OF THE INDICTMENT**

Office of the Prosecutor

Mr Dermot Groome

Counsel for Jovica Stanišić

Mr Geert-Jan Alexander Knoops
Mr Wayne Jordash

Counsel for Franko Simatović

Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 3 November 2009, the Stanišić Defence filed the “Defence Motion on the Form of the Indictment” (“Motion”), in which it requested an order to the Prosecution to particularise the Prosecution’s case against Jovica Stanišić (“the Accused”) on the Indictment.¹ On 17 November 2009, the Prosecution responded to the Motion, opposing it.² The Simatović Defence did not respond to the Motion.

2. Previously, on 30 September 2009, the Stanišić Defence had sought an extension of the word limit to 8,000 words for the Motion, seeking to file a single motion with both arguments for ‘good cause’ and on the merits.³ On 6 October 2009, the Prosecution responded to the Word Limit Motion, opposing it and requesting the Chamber to order the Stanišić Defence to file a separate ‘good cause’ motion.⁴ On 13 October 2009, the Stanišić Defence requested leave to reply to the Word Limit Response.⁵ On 15 October 2009, the Chamber granted the Word Limit Motion in part by allowing the filing of a single motion including ‘good cause’ and ‘merits’ arguments, without, however, taking a position on whether any good cause existed. The Chamber also extended the word limit to 6,000 words for the Motion and denied the Request to Reply. The parties were informed of this decision through an informal communication. On 16 November 2009, the Prosecution sought an extension of the word limit to 4,000 words for the Response.⁶ On the same day, the Stanišić Defence indicated through an informal communication that it did not oppose the Prosecution Word Limit Request. On 17 November 2009, the Chamber granted the Prosecution Word Limit Request and informed the parties accordingly through an informal communication.

II. SUBMISSIONS OF THE PARTIES

3. The Stanišić Defence submits that the Chamber’s previous decision on Defence preliminary motions of 14 November 2003 was rendered without the benefit of subsequent information essential to a proper assessment of the sufficiency of the Indictment’s specificity.⁷ It argues that this

¹ Motion, para. 34.

² Prosecution Response to Defence Motion on the Form of the Indictment, 17 November 2009 (“Response”), paras 1, 30.

³ Public Defence Motion Seeking Variation of Word Limit for Motion on the Form of the Indictment, 30 September 2009 (“Word Limit Motion”), paras 1, 4, 8.

⁴ Prosecution Response to Jovica Stanišić’s Motion Seeking Variation of Word Limit for Motion on the Form of the Indictment, 6 October 2009 (“Word Limit Response”), paras 1, 13-14.

⁵ Defence Application Seeking to Reply to Prosecution Response to Variation of Word Limit for Motion on the Form of Indictment, 13 October 2009 (“Request to Reply”), paras 1-2.

⁶ Urgent Prosecution Motion to Exceed Word Limit, 16 November 2009 (“Prosecution Word Limit Request”), paras 2-3.

⁷ Motion, paras 3-4.

subsequent information is contained in the Prosecution's pre-trial brief and its opening statement.⁸ The Stanišić Defence submits that the Indictment defects are significant and that regardless of whether the Motion is timely or not, judicial intervention is essential to secure the right of the Accused to a fair trial.⁹ According to the Stanišić Defence, the Indictment "fails in almost all respects to provide clear and specific detail of the alleged actions of the Accused to allow effective preparation".¹⁰

4. The Stanišić Defence contends that the Prosecution's pre-trial brief and its opening statement paint a different picture than the information on which the Chamber's decision of 14 November 2003 was premised.¹¹ According to the Stanišić Defence, the case against the Accused in November 2003 alleged criminal responsibility through a "quasi-political role [...] as Milošević's number two", whereas subsequent information seems to allege criminal responsibility as more directly linked to the acts of direct perpetrators.¹² The Stanišić Defence submits that those facts underpinning the charges of direct involvement of both accused are material to the Indictment and should be pleaded with sufficient particularity.¹³ The Stanišić Defence submits that the allegations are sweepingly general and fail to outline the Accused's "concrete acts" underpinning his criminal liability.¹⁴ Furthermore, the Stanišić Defence notes certain points of confusion arising from "contradictions" between the Indictment, the pre-trial brief, and the Prosecution's opening statement.¹⁵ The Stanišić Defence argues that the pleading of the alleged joint criminal enterprise's common purpose is impermissibly vague as it does not specify an approximate date when the common purpose evolved to include all crimes charged in the Indictment.¹⁶ Moreover, the Stanišić Defence contends that allegations related to the conduct of the Accused and of Franko Simatović are not pleaded with sufficient particularity in the Indictment.¹⁷

5. The Prosecution contends that the Motion is more than a year late and that no good cause has been shown to justify this delay.¹⁸ It submits that the Stanišić Defence challenged the Original Indictment on similar grounds and that the Chamber dismissed the challenges on 14 November

⁸ Ibid.
⁹ Motion, paras 3, 14.
¹⁰ Motion, para. 13.
¹¹ Motion, paras 4-6.
¹² Motion, paras 4-5.
¹³ Motion, paras 9-11.
¹⁴ Motion, paras 14, 18.
¹⁵ Motion, paras 22-25.
¹⁶ Motion, para. 26.
¹⁷ Motion, paras 27-33.
¹⁸ Response, paras 1, 15.

2003.¹⁹ The Prosecution submits that the Motion should more appropriately be treated as a motion for reconsideration, as similar arguments have already been submitted on previous occasions.²⁰

6. On the merits, the Prosecution argues that the Stanišić Defence confuses the distinction between ‘material facts’ and evidence, and submits that specific issues raised by the Stanišić Defence have either been previously addressed and adjudicated by the Chamber or are sufficiently pleaded in the Indictment.²¹

III. APPLICABLE LAW

7. Rule 72 (A) (ii) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) provides that “preliminary motions, being motions which [...] allege defects in the form of the indictment, shall be [...] brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A) (i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84”. According to Tribunal jurisprudence, as a general rule, the Defence cannot raise issues in relation to an amended indictment which could have been raised in relation to the original indictment, but were not.²² According to Rule 127 of the Rules, a Trial Chamber may, on good cause being shown by motion, enlarge or reduce any time prescribed by or under the Rules.

8. Pursuant to elementary principles of criminal pleading, it is not sufficient for an indictment to charge a crime in generic terms.²³ An indictment shall, pursuant to Article 18 (4) of the Statute, contain “a concise statement of the facts and the crime or crimes with which the accused is charged”. Similarly, Rule 47 (C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth a concise statement of the facts of the case. The Prosecution’s obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21 (2) and (4) (a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the

¹⁹ Response, paras 3-4, 16.

²⁰ Response, para. 13.

²¹ Response, paras 19-29.

²² *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 15; *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, Decision on Filing of Replies, 7 June 2001, para. 7; *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, 30 June 2006, paras 32, 35.

Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution's case with enough detail to inform a defendant clearly of the charges against him so that it allows him to prepare his defence.²⁴

IV. DISCUSSION

9. The Chamber considers it appropriate to briefly recount the prior litigation with regard to the Indictment in this case. The Original Indictment in this case was presented for confirmation on 24 April 2003. Judge Carmel Agius confirmed a revised version of the Original Indictment on 1 May 2003. On 3 September 2003, the Stanišić Defence filed a preliminary motion on the form of the Indictment. The Pre-Trial Chamber partly granted the motion on 14 November 2003 and instructed the Prosecution to file an amended indictment within 30 days of the decision. The Amended Indictment was filed on 9 December 2003. On 7 January 2004, the Stanišić Defence filed a motion alleging a defect in the Amended Indictment, which the Pre-Trial Chamber dismissed on 29 January 2004. On 6 May 2005, the Prosecution requested leave to amend the Amended Indictment. Leave was granted by the Pre-Trial Chamber on 16 December 2005 and the Second Amended Indictment was filed on 20 December 2005. On 21 December 2005, the Stanišić Defence requested certification to appeal the Pre-Trial Chamber's decision of 16 December 2005. The Pre-Trial Chamber denied certification to appeal on 8 February 2006. On 9 March 2006, the Stanišić Defence filed a motion alleging defects in the form of the Second Amended Indictment. The Pre-Trial Chamber partly granted the motion on 12 April 2006 and ordered the Prosecution to submit a revised indictment. The Revised Second Amended Indictment was filed on 15 May 2006. On 4 February 2008, the Pre-Trial Chamber, pursuant to Rule 73 *bis* (D) of the Rules, ordered a reduction of the scope of the Revised Second Amended Indictment. On 11 February 2008, the Prosecution requested leave to further amend the Indictment to provide greater specificity. On 4 July 2008, the Pre-Trial Chamber granted the Prosecution's request. The operative Indictment in this case, the Third Amended Indictment, was filed on 10 July 2008.

10. The Chamber notes that no preliminary motions challenging the Third Amended Indictment were filed within the time frame set by Rule 72 (A) of the Rules. Before the Chamber can turn to the merits of the Motion, it must be satisfied that good cause has been demonstrated in that the

²³ *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("Kupreškić Appeal Judgement"), para. 98.

Motion could not have been brought within the time frame set forth in Rule 72 (A) of the Rules. In the event that good cause can be demonstrated to raise an issue after a time frame set by the Rules, a party still needs to address the Chamber promptly and without undue delay. The new circumstances upon which the Stanišić Defence bases its challenges to the Indictment stem from the Prosecution's pre-trial brief and its opening statement. The Prosecution's final consolidated pre-trial brief was submitted on 15 May 2007. In relation to challenges stemming from the Prosecution's pre-trial brief, the Stanišić Defence has not demonstrated that good cause existed to file the Motion over two years after the submission of the brief. The Prosecution's initial opening statement was presented on 28 and 29 April 2008, a renewed opening statement was heard on 9 and 10 June 2009. In relation to challenges stemming from the Prosecution's opening statement, the Stanišić Defence has equally not demonstrated that good cause existed to file the Motion several months after the Prosecution's opening statement. In addition, the Stanišić Defence argues that while the Indictment is vague and broadly pled and subsequent notice might have been specific, it also gave rise to further defect which would necessitate a particularisation *on the Indictment*.²⁵ In this respect, the Chamber recalls its decision of 17 July 2007 where it held, after a request from the Stanišić Defence alleging that the Prosecution's pre-trial brief was a covert amendment of the Indictment²⁶, that the indictment is the primary accusatory instrument, and that any other accusatory instrument cannot add charges or material facts amounting to charges.²⁷ The pre-trial brief and the opening statement particularise the alleged case against an accused and can assist the defence in its preparations. The Chamber notes in this respect that criminal liability is measured by considering whether evidence has proven the allegations contained in the *Indictment*, not in the pre-trial brief or in the opening statement. A pre-trial brief or an opening statement cannot, as a matter of principle, lead to making an indictment defective.

11. In conclusion, the Chamber finds that the Stanišić Defence neither filed a preliminary motion alleging defects in the form of the Indictment within the time frame set by Rule 72 (A) of the Rules nor demonstrated good cause why the Motion could not have been brought within the time frame set forth in Rule 72 (A) of the Rules.

²⁴ Kupreškić Appeal Judgement, para. 88; see also Decision on Defence Preliminary Motions, 14 November 2003, pp. 4-5.

²⁵ Motion, para. 34.

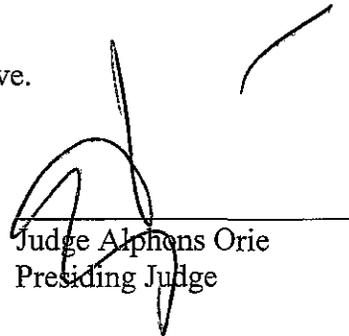
²⁶ Defence Motion to Declare Prosecution Pre-Trial Brief in Violation of Article 21, Rule 65 *ter* (E) (ii) (Additional Witnesses) And Rule 50 (Amendment of Indictment), And Request for Leave to Exceed Page Limit, 5 June 2007, para. 6.

²⁷ Decision on Defence Motion to Reject Prosecution's Final Pre-Trial Brief of 2 April 2007, 17 July 2007, para. 18.

V. DISPOSITION

12. For the foregoing reasons, the Chamber **DENIES** the Motion.

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



Judge Alphons Orié
Presiding Judge

Dated this 29th of March 2010
At The Hague
The Netherlands

[Seal of the Tribunal]