



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-05-88/2-PT

Date: 10 February 2010

Original: English

IN TRIAL CHAMBER II

Before: Judge Christoph Flügge, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: Mr. John Hocking

Decision of: 10 February 2010

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON ACCUSED'S PRELIMINARY MOTION PURSUANT TO
RULE 72 (A) (ii)**

Office of the Prosecutor

Mr. Peter McCloskey

The Accused

Zdravko Tolimir

THIS TRIAL CHAMBER 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”), is seised of “Preliminary Motion pursuant to Rule 72 (A) (ii)”, submitted on 6 January 2010 and filed in English on 12 January 2010 (“Preliminary Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. On 4 November 2009, the Prosecution filed the “Prosecution’s Motion to Amend the Second Amended Indictment, with Appendices A-D” (“Motion to Amend”). In response, on 24 November 2009 the self-represented Accused Zdravko Tolimir (“Accused”) submitted the “Response to the Prosecution’s Motion to Amend the Second Amended Indictment”, which was filed in English on 2 December 2010 (“Response to the Motion to Amend”). On 9 December 2009, the Trial Chamber issued its “Decision with Reasons to Follow on Prosecution Motion to Amend the Second Amended Indictment” (“Decision on the Motion to Amend”), granting the Motion to Amend and ordering that the Third Amended Indictment (“Indictment”) shall be the Operative Indictment. The Decision was followed on 16 December 2009 by the “Written Reasons for Decision on Prosecution Motion to Amend the Second Amended Indictment” (“Written Reasons”). On 6 January 2010, the Accused then filed the Preliminary Motion, to which the Prosecution responded on 26 January 2010 in its “Prosecution’s Response to the Accused Tolimir’s Preliminary Motion Pursuant to Rule 72 (A) (ii)” (“Response”).

II. SUBMISSIONS OF THE PARTIES

A. Preliminary Motion

2. The Accused submits in the Preliminary Motion that paragraph 23.1 of the Indictment is formally deficient.¹ Paragraph 23.1, which is headed “Foreseeable Targeted Killings of Muslim Leaders”, states:

On or about 27 July 1995, VRS personnel seized Mehmed Hajrić, Amir Imamović and Avdo Palić, three Bosnian Muslim leaders from Žepa, imprisoned them and subsequently executed them and buried their bodies in a mass grave in Vragolovi, Rogatica Municipality. These targeted killings were the natural and foreseeable consequence of the Joint Criminal Enterprise to forcibly transfer the Muslim populations of Srebrenica and Žepa.

Firstly, the Accused submits that the wording of the charge contained in paragraph 23.1 does not follow from the supporting materials enclosed with the Motion to Amend.² Secondly, he submits

that the Indictment is not in line with the Prosecution's Pre-Trial Brief, as the new paragraph 23.1 is worded 'totally differently' from what would follow from the allegations in the Pre-Trial Brief.³ Thirdly, the Accused submits that paragraph 23.1 in the context of the counts of the Indictment does not contain any element connecting the Accused with the alleged killings and that paragraph 23.1 is vague and allows the Prosecution to model its case on the outcome of the presentation of evidence, which could lead the Prosecution to amend the Indictment again during trial.⁴ Finally, according to the Accused, the supporting materials do not support the conclusion that the deaths of the three Bosnian Muslim leaders from Žepa were the result of killings, that these alleged killings were targeted or that they were the natural and foreseeable consequence of the alleged Joint Criminal Enterprise.⁵ The Accused also submits that there are no factual assertions in the Indictment that could lead to the conclusion that the killings were the natural and foreseeable consequence of the alleged Joint Criminal Enterprise.⁶

3. To eliminate these defects, the Accused submits that the charges should include the grounds for the assertion that the three Bosnian Muslim leaders were killed unlawfully,⁷ and the alleged facts on which the Prosecution bases its conclusions that the alleged killings were targeted, that they were the natural and foreseeable consequence of the forcible transfer of the population of Žepa and that they were foreseeable to the Accused.⁸

4. The Accused submits that paragraph 23.1 of the Indictment, whether viewed in isolation or in the context of the Indictment, leads the Accused to the conclusion that the Prosecution has not set out its charges with enough detail to inform him clearly of them so that he may prepare his defence.⁹ The Accused therefore requests that the Trial Chamber order the Prosecution to cure the defects of the indictment.¹⁰

5. The Accused further requests that the Trial Chamber order the Prosecution to amend the Pre-Trial Brief in order to cure the discrepancies that allegedly arise between the Indictment and the Pre-Trial Brief as a result of the number and content of amendments made to the Indictment.¹¹

¹ Preliminary Motion, paras. 8–19.

² *Ibid.*, para. 8.

³ *Ibid.*, para. 9.

⁴ *Ibid.*, para. 10.

⁵ *Ibid.*, para. 11.

⁶ *Ibid.*, para. 11.

⁷ *Ibid.*, paras. 12–13.

⁸ *Ibid.*, para. 14.

⁹ *Ibid.*, para. 17.

¹⁰ *Ibid.*, para. 19.

¹¹ *Ibid.*, paras. 20, 21.

B. Response

6. The Prosecution submits in response that the Accused fails to establish any basis for the relief he requested in respect of the alleged defects in the form of the Indictment.¹² According to the Prosecution, the Indictment taken as a whole sufficiently provides the facts underlying the new charge set forth in paragraph 23.1 and is sufficiently detailed to allow the Accused to prepare his defence.¹³ The Prosecution further submits that the Indictment, supplemented by the associated supporting materials, the Pre-Trial Brief, the Motion to Amend and the Prosecution's Rule 65ter Witness Summaries,¹⁴ gives the Accused ample notice of the material facts charged at paragraph 23.1.¹⁵

7. With regard to the foreseeability of the killings as set out in paragraph 23.1, the Prosecution submits that the Indictment and supporting materials make it clear that, in the context of the Srebrenica operation that took place just prior to the Žepa operation and in which thousands of Bosnian Muslims were captured and killed, there was a real prospect of Bosnian Muslim leaders from Žepa being harmed.¹⁶ According to the Prosecution, the materials sufficiently show that the Accused was aware of the detention and capture of the three Bosnian Muslim leaders by the VRS shortly after thousands of other Bosnian Muslims taken into VRS custody had been killed, and thereby "provide the material facts necessary to allege that the murders of the three Bosnian Muslim leaders were the natural and foreseeable consequence of the forcible transfer JCE".¹⁷

8. In response to the Accused's request to amend the Pre-Trial Brief, the Prosecution submits that there is no requirement for such action following the amendment of an Indictment.¹⁸ The Prosecution further submits that the Indictment and associated materials sufficiently explain the facts supporting the charges against the Accused, so that the Accused is properly notified of the case against him without amendments of the Pre-Trial Brief.¹⁹

9. The Prosecution thus requests that the Preliminary Motion be denied in all respects.²⁰

¹² Response, para. 2.

¹³ *Ibid.*, para. 11.

¹⁴ See Prosecution Notice of Filing of 65ter Witness List, Witness Summaries and Exhibit List, 15 October 2008, Confidential Appendix B.

¹⁵ Response, para. 14.

¹⁶ *Ibid.*, para. 15.

¹⁷ *Ibid.*, para. 18.

¹⁸ *Ibid.*, paras. 2, 19.

¹⁹ *Ibid.*, para. 19.

²⁰ *Ibid.*, para. 20.

III. APPLICABLE LAW

10. Article 18(4) of the Statute of the Tribunal (“Statute”) and Rule 47(C) of the Rules of Procedure and Evidence (“Rules”) provide that an indictment shall contain a concise statement of the facts of the case and the crimes with which the accused is charged under the Statute. The provisions should be interpreted together with the rights of the accused set out in Article 21(2) and, in particular, Article 21(4)(a) and (b) of the Statute, which entitle the accused to be informed of the nature and cause of the charges against him in a language he understands, and to have adequate time and facilities for the preparation of his defence. These provisions translate into an obligation on the part of the Prosecution to plead the material facts underpinning the charges with enough detail to inform the accused clearly of the charges against him so that he may prepare his defence.²¹

11. The materiality of a particular fact depends on the nature of the Prosecution case and the alleged criminal conduct with which the accused is charged. The materiality of facts such as the identity of the victims, the time and place of the events alleged in the indictment and the description of those events depends upon the proximity of the accused to those events and, therefore, the form of individual responsibility with which the accused is charged. It has been established in the jurisprudence of the Tribunal that the precise details to be pleaded as material facts are the acts of the accused himself, not the acts of those persons for whose acts he is alleged to be responsible.²² Furthermore, where the scale of the crimes renders it impractical to require a high degree of specificity regarding, for example, the identity of the victims, the Prosecution does not need to identify every victim in the indictment in order to meet its obligation of specifying the material facts of the case.²³

IV. DISCUSSION

A. Form of the Indictment

12. Both Parties set out in some detail their views on whether or not the evidence supports the allegations made in paragraph 23.1 of the Indictment. Specifically, there is discussion of whether the evidence supports the Prosecution’s assertions that the deaths of the three Bosnian Muslim leaders were the result of killings, that the killings were unlawful and targeted, that they were a natural and foreseeable consequence of the Joint Criminal Enterprise to forcibly remove the Muslim

²¹ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 (“*Blaškić Appeal Judgement*”), para. 209 (citing *Prosecutor v. Kupreškić, Kupreškić, Kupreškić, Josipović, and Šantić*, Case No. IT-95-16-A, Judgement, 23 October 2001 (“*Kupreškić et al. Appeal Judgement*”), para. 88).

²² *Blaškić Appeal Judgement*, *supra* note 21, para. 210.

²³ *Kupreškić et al. Appeal Judgement*, *supra* note 21, paras. 89–90.

population from Srebrenica and Žepa and that the Accused is linked to the killings. However, the Trial Chamber notes that it has previously examined the evidence in the context of the Decision on the Motion to Amend and found it sufficient to establish a *prima facie* case pursuant to Article 19(1) of the Statute and Rule 50(A)(ii).²⁴ At this point in the proceedings, a *prima facie* case is all that is required. Further submissions on the strength of the evidence should be raised during the course of trial.²⁵ This finding of the Trial Chamber extends to all the points discussed by the Parties in the Preliminary Motion and the Response with regard to evidentiary matters.

13. The Accused also submits that the wording of the alleged factual basis of paragraph 23.1 is vague and leaves room for the Prosecution to model its case on the result of the presentation of evidence. In the Kupreškić Appeals Judgement the Appeals Chamber held that “the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.”²⁶ The Trial Chamber considers that paragraph 23.1 sets out adequately all the material facts relevant to the Foreseeable Targeted Killings of Muslim Leaders, including the identity of the victims and the estimated time and location of the events alleged and the mode of responsibility with which the Accused is charged. The Trial Chamber finds that the foreseeability of the alleged killings is adequately pleaded given the context of the Indictment as a whole. Therefore, the Trial Chamber is of the view that paragraph 23.1 is pleaded with enough detail to inform the Accused clearly of the charge against him so that he may prepare his defence.

14. The Trial Chamber concludes that the Indictment contains no formal defects and that it does not need to be amended.

B. Amendment of the Prosecution’s Pre-Trial Brief

15. The requirements for a pre-trial brief are laid down in Rule 65ter(E)(i), which states that the final version of the pre-trial brief shall include, amongst other things, a summary for each count of the evidence which the Prosecution intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused.

16. In the present case, it is clear what evidence the Prosecution intends to bring regarding the new charges added to the Indictment following the Decision on the Motion to Amend, because the

²⁴ Written Reasons, para. 31.

²⁵ See Written Reasons, para. 31.

²⁶ *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Appeals Judgement, 23 Oct 2001, para. 88.

Prosecution appended this evidence to its Motion to Amend.²⁷ However, neither Pre-Trial Brief nor the Motion to Amend contains any summary of the evidence the Prosecution intends to bring regarding the Bišina Killings.²⁸ The Pre-Trial Brief does contain a summary of evidence regarding the Žepa killings, but it is in a section headed “Uncharged killings: murder of the Bosnian Muslim leaders from Žepa” and does not cover the recently-received evidence on Avdo Palić’s remains which the Prosecution presents in the Motion to Amend.²⁹

17. There is no express requirement, under the Statute or the Rules, for a pre-trial brief to be amended following the amendment of the indictment. However, this does not mean that the Trial Chamber does not have the discretion to order a pre-trial brief to be amended if the Trial Chamber considers this to be in the interest of justice given the circumstances of the particular case, or if the Trial Chamber finds that the pre-trial brief does not meet the requirements of Article 65*ter*(E)(i).³⁰

18. The Trial Chamber is of the view that since the Accused is representing himself, the Indictment and the Pre-Trial Brief should fully and adequately set out in sufficient detail the Prosecution’s case, as is required in the Rules, to enable the Accused to prepare his defence. The assistance that amendment of the Pre-Trial Brief may provide to the Accused outweighs the relatively minor burden upon the Prosecution required by such an amendment. The Trial Chamber therefore considers that for this reason, the Pre-Trial Brief should be amended so as to reflect the amendments of the Indictment, which were allowed in the Decision on the Motion to Amend.

V. DISPOSITION

19. For these reasons, pursuant to Rules 54, 65*ter*(E) and 72, the Trial Chamber hereby **GRANTS** the Preliminary Motion **IN PART**, and **DECIDES** as follows:

- (a) The Prosecution shall file no later than Tuesday 16 February 2010 an amended version of the Pre-Trial Brief which conforms fully to the Indictment; and
- (b) The Preliminary Motion is denied in all other respects.

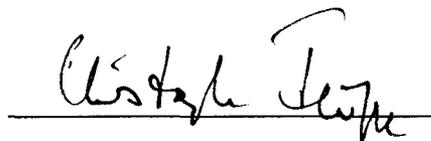
²⁷ Motion to Amend, Appendix D. *Cf. Ibid.*, paras. 45, 50 (footnotes 27, 28, 34 and 35).

²⁸ Indictment, para. 21.15.2.

²⁹ Pre-Trial Brief, paras. 199–201; Motion to Amend, para. 51.

³⁰ *See for example* Oral Decision in *Prosecutor v. Stanišić*, Case No. IT-04-79-PT, Status Conference on 18 January 2007, T. 71–74.

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



Christoph Flügge
Presiding

Dated this 10th day of February 2010
At The Hague
The Netherlands

[Seal of the Tribunal]