



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-T

Date: 1 December 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: 1 December 2010

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON PROSECUTION MOTION FOR ORDER REQUIRING
PARTICULARS OF ACCUSED'S ALIBI DEFENCE**

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 seized of the “Prosecution’s Motion for an Order Requiring the Accused to Provide Sufficient Particulars of His Alibi Defence”, filed on 8 March 2010 (“Motion”), and hereby renders its decision thereon.

I. SUBMISSIONS OF THE PARTIES

A. Motion

1. The Motion requests that pursuant to Rules 67(B) and 73(A) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), the Trial Chamber issue an order to Zdravko Tolimir (“the Accused”) to provide sufficient particulars of his alibi defence.¹ The Prosecution states that the Accused’s notification of intent to offer the defence of alibi was given in “Zdravko Tolimir’s Submission with a Pre-Trial Brief pursuant to Rule 65 *ter* (F) and Notification of the Defence of Alibi in Respect of Some Charges”, (“Accused’s Pre-Trial Brief”).² The Prosecution submits, however, that this notice of alibi was insufficiently detailed to fulfil the requirement of Rule 67(B).³

2. The Prosecution submits that Rule 67(B)(i)(a) requires that the Accused specify the place where he claims to have been present; the identities of witnesses; and any other evidence upon which he intends to rely to establish the alibi.⁴ The Prosecution states that pursuant to Rule 67(C), failure to provide such notice will not limit the Accused from testifying about the alibi defence, but that a Trial Chamber may preclude the Accused from leading other evidence of the alibi.⁵

3. The Prosecution states that while neither the Statute of the Tribunal nor the Rules give a definition of “alibi”, the term has been taken to be a denial by the Accused that he was in a position to commit a crime with which he is charged.⁶ The Prosecution submits that raising the defence of alibi does not shift the burden of proof to the Accused, but only requires the Accused to produce evidence likely to raise reasonable doubt regarding the Prosecution’s case, thereby requiring the Prosecution to eliminate the reasonable possibility that the alibi is true.⁷ The Prosecution further submits that the notice requirement for a defence of alibi is essential to upholding the fairness and

¹ Motion, para. 1.

² *Ibid.* (citing paras. 36–44, 232 and 261 of the Accused’s Pre-Trial Brief).

³ *Ibid.*, paras. 1, 9.

⁴ *Ibid.*, para. 9.

⁵ *Ibid.*, para. 2.

⁶ *Ibid.*, paras. 3–5.

⁷ *Ibid.*, paras. 3–6.

accuracy of the trial by allowing the Prosecutor to discharge its responsibility to investigate the alleged alibi.⁸

4. Turning to the alibi notice contained in the Accused's Pre-Trial Brief, the Prosecution submits that it is insufficiently particular because it contains general assertions rather than specific factual information.⁹ The Prosecution argues that the lack of detail as to the nature and extent of the alibi or as to the locations at which the Accused claims to have been, unfairly disadvantages the Prosecution by unreasonably allowing for surprise evidence.¹⁰ The Prosecution submits that timely and sufficiently-detailed notice of the alibi defence will allow the Prosecution to investigate the alibi claims; prepare its case on the facts at issue regarding the alibi defence; address the alibi in its case-in-chief; and challenge the alibi in cross-examination.¹¹

B. Response

5. On 22 March 2010, the Accused submitted a motion for an extension of time to file a response.¹² On 25 March 2010, the Prosecution filed its "Response to Accused's Motion for Extension of Deadline for Filing a Response to the Prosecution Motion" in which it stated that it did not object to the Accused's request for an extension of time.¹³ On 25 March 2010, the Chamber orally granted the Accused's motion for an extension, issuing a deadline of 12 April 2010 for the response.¹⁴ On 12 April 2010, the Accused submitted his "Response to the Prosecution's Motion for an Order Requiring the Accused to Provide Sufficient Particulars of His Alibi Defence" ("Response"), which was filed in English on 19 April 2010. In the Response, the Accused rejects the Prosecution's claims and argues that the details he has given with respect to his alibi are sufficient to meet the requirements of Rule 67(B).¹⁵

6. The Accused states that in his Pre-Trial Brief, alibi is mentioned only in relation to the crimes alleged in paragraphs 21 to 23 and 29(C) of the Third Amended Indictment.¹⁶ The Accused notes that the Accused's Pre-Trial Brief gives sufficient detail to support his alibi when considered as a whole; a fact which he says is confirmed by a "series of Prosecution motions to expand the

⁸ *Ibid.*, paras. 7–8.

⁹ *Ibid.*, paras. 9–11.

¹⁰ *Ibid.*, para. 12.

¹¹ *Ibid.*, para. 13.

¹² Motion for Extension of Deadline for Filing a Response To the Prosecution Motion, 24 March 2010 (English translation), 22 March 2010 (BCS original), para. 3.

¹³ Response to Accused's Motion for Extension of Deadline for Filing a Response to the Prosecution Motion, 25 March 2010, para. 2.

¹⁴ T. 873 (25 March 2010).

¹⁵ Response, para. 3.

¹⁶ *Ibid.*, para. 2.

witness and exhibit lists”.¹⁷ The Accused submits that the “basic defence case” and the “nature of the defence of the Accused” are set out clearly in the Pre-Trial Brief, which “provides more than enough information” about the role of the Accused in the events of July 1995.¹⁸

7. The Accused further submits that an alibi defence is not limited to the Accused’s location at the relevant period, but also includes the Accused’s capacity to carry out the crimes alleged.¹⁹ The Accused states that he is not required to present evidence to prove his innocence.²⁰ The Accused submits that he will rely on evidence disclosed by the Prosecution and that the Prosecution has had more time and resources to consider this evidence.²¹

8. The Accused states that he was in Žepa continuously from 12 July 1995 until the end of July 1995, and from his location in Žepa it was not possible for him to commit the crimes alleged.²² The Accused submits that because it is undisputed that he was in Žepa from 12 July, he does not intend to call any “special witnesses”.²³ Furthermore, the Accused states that “the documents to which the Defence refers in its Pre-Trial Brief clearly indicate where Zdravko Tolimir was, what activities he engaged in and under what circumstances”.²⁴ The Accused further submits that the “views and evidence” referred to in the Accused’s Pre-Trial Brief “provide the Chamber and the Prosecution with sufficient information on the position of the Defence”.²⁵ The Accused states that the Indictment, the Prosecution’s Pre-Trial Brief, opening statements, and 65 *ter* list “contain a sufficient number of facts on which to base an alibi”.²⁶ The Accused submits that the Prosecution will not be in an unfavourable position or be surprised by the lack of alibi information because the Defence will be required to disclose the evidence upon which it will rely before the Defence phase of the trial.²⁷

9. The Accused submits that the Prosecution is already in possession of the necessary alibi information, understands the position of the Accused, and has already conducted the relevant investigations.²⁸ The Accused states that the Prosecution’s request to the Chamber to have the Accused “provide fresh evidence and factual claims sounds somewhat strange” given the

¹⁷ *Ibid.*, para. 3.

¹⁸ *Ibid.*, paras. 4–7.

¹⁹ *Ibid.*, paras. 8–11.

²⁰ *Ibid.*, para. 12.

²¹ *Ibid.*, para. 15.

²² *Ibid.*, paras. 2, 17.

²³ *Ibid.*, para. 17.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*, para. 20.

²⁷ *Ibid.*, para. 22.

²⁸ *Ibid.*, paras. 24–26.

Prosecution's request to the Chamber to instruct the Accused that he is not required to make statements about the facts of the case.²⁹ Lastly, the Accused submits that an expert report and documents quoted therein are relevant to his alibi defence,³⁰ but that not all the documents quoted in the report have been disclosed to the Defence and he asks the Prosecution to make these documents available.³¹

C. Reply

10. On 26 April 2010, the Prosecution filed the "Prosecution Motion for Leave to Reply and Reply Concerning Its Motion for an Order Requiring the Accused to Provide Sufficient Particulars of His Alibi Defence," ("Reply"). In its Reply, the Prosecution seeks leave to reply to the Motion and submits that the Accused (1) continues to disregard the disclosure obligations of Rule 67(B); (2) ignores the importance to his alibi defence of detailing his daily whereabouts; (3) misconstrues well-settled disclosure requirements as shifting the burden; and (4) conflates these disclosure requirements with his right against self-incrimination.³² The Prosecution argues, therefore, that the Response is without merit and should be rejected in its entirety.³³

II. APPLICABLE LAW

11. Rule 67 provides in relevant part:

Rule 67 - Additional Disclosure

- (B) Within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*:
- (i) the defence shall notify the Prosecutor of its intent to offer:
 - (a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;
 - (b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence; and
 - (ii) the Prosecutor shall notify the defence of the names of the witnesses that the Prosecutor intends to call in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with paragraph (i) above.

²⁹ *Ibid.*, paras. 27–28.

³⁰ *Ibid.*, Para. 26 (stating that a report by expert Viktor Bezruchenko entitled "The Fall of Žepa Military Narrative", ERN: 634942-6349976, and the documents quoted therein "cover clearly and with enough precision the period from 12 July to late July 1995, clearly speak of the nature of the activities of Ždravko Tolimir in the critical time period in the Žepa sector").

³¹ *Ibid.*, para. 29.

³² Reply, para. 2.

³³ *Ibid.*

- (C) Failure of the defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.
- (D) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.

III. DISCUSSION

12. As a preliminary matter, the Chamber considers that the Accused has indicated his intent to offer an alibi defence. Paragraphs 36 to 44 of the Accused's Pre-Trial Brief appear under the heading of "Alibi" and discuss, in general terms, the Accused's intent to pursue an alibi defence: "One of the arguments of the Defence is that the Accused was not in a position to commit or aid and abet in the commission of the alleged crimes charged in the Indictment."³⁴ Similarly, the Accused indicates his intent to pursue an alibi defence by stating the following:

In view of the fact that in the period during which the Prosecution asserts that Zdravko Tolimir was informed about the (actually non-existent) killing plan, he was in a location where he could not monitor any VRS unit, and it cannot be concluded from any of his communications that he monitored, had professional supervision or anything else over the 65th Protection Regiment or the 10th Sabotage Detachment and that, as soon as the civilians were evacuated from the Žepa enclave, he transferred to the Krajina area in order to perform his duties related to the Croatian armed forces' offensive operations, with regard to the charges of inhumane conduct toward civilians and prisoners of war from Srebrenica, and the alleged operations of burial and reburial, the alibi defence will be used.³⁵

13. Furthermore, in Part V of the Accused's Pre-Trial Brief entitled "Notification of the Defence of Alibi and Requests" the Accused states the following:

[The Accused] was at such locations and carried out such duties that made it impossible for him to monitor, professionally supervise, control or exercise any influence over VRS units engaged in Srebrenica and along the axes of movement of columns of Muslims, and he was certainly not in a position to exercise professional supervision or anything else over the 65th Protection Regiment or the 10th Sabotage Detachment, since he did not have, could not have and was not given an opportunity to exercise control, supervision or anything else over MUP units, and that immediately after civilians were evacuated from Žepa he went to Krajina to carry out his duties concerning defence from offensive operations of the Croatian armed forces, so the defence of alibi is offered in respect of the charges for the alleged killings, inhumane acts against civilians and prisoners in connection with Srebrenica and the alleged operation of burial and reburial.³⁶

[...]

The defence of alibi is offered in respect of the charges of the alleged killings referred to in paragraphs 21.1-21.16 of the Amended Indictment, the opportunistic killings referred to in paragraphs 22, 22.1-22.4 and the charges of the burial and reburial referred to in paragraph 23 of the Amended Indictment.³⁷

³⁴ Accused's Pre-Trial Brief, para. 36.

³⁵ *Ibid.*, para. 232.

³⁶ *Ibid.*, para. 261.

³⁷ *Ibid.*, para. 262.

14. The Chamber notes that Rule 67(B)(i)(a) requires the defence to provide the Prosecutor notice of an intent to offer the defence of alibi and imposes requirements regarding the specificity of any such notification. As stated above, the Accused has clearly given notice of his intent to offer a defence of alibi in his Pre-Trial Brief, therefore, the Chamber considers that the specificity requirements of Rule 67(B)(i)(a) are triggered.

15. Having found that the Accused has notified the Prosecutor of his intent to offer the defence of alibi, the next question before the Chamber is whether the notice given by the Accused meets the level of specificity required by Rule 67(B)(i)(a) so as to be considered effective notice within the meaning of the Rule. Because the Chamber finds the Rule to be clear in its requirements, the Chamber need not look any further than the plain language of the Rule to answer this question.³⁸

16. Rule 67(B)(i)(a) clearly states that if an accused intends to use the defence of alibi, he must provide notification to the Prosecutor and this notification shall specify (1) the place or places at which the accused claims to have been present at the time of the alleged crime; (2) the names and addresses of witnesses; and (3) any other evidence upon which the accused intends to rely to establish the alibi.

17. As to the Rule's first requirement that an accused specify the place or places at which he claims to have been present at the time of the alleged crime, the Chamber notes that the Accused's Pre-Trial Brief does not specify in relation to his alibi defence such a place or places. The Chamber further notes that although the Response indicates that the Accused was at an unspecified location in Žepa from 12 July 1995 until the end of July 1995, it does not specify the place or places within Žepa where the Accused was located.

18. As a preliminary matter, the Chamber agrees in principle with the Accused's submission that an alibi defence entails more than only the physical location of the Accused. In the classic alibi defence, it is normally sufficient for the Accused to show that he was at a different location than where the alleged crime occurred and it will be evident that if he was at the place he claims to have been, he could not have committed the crime. In other words, the causal relationship between the location of the Accused and his inability to commit the crime will be so obvious that it will not need to be stated.

19. However, depending on the nature of the alleged crime, the causal relationship may need to be further established. In cases, such as the present case, where an accused could have committed the alleged crimes in any one of a number of locations, a mere assertion that an accused was in a

³⁸ *Prosecutor v. Tadić*, Case No. IT-94-1-T-A, Judgement, 15 July 1997, para. 284.

particular location at a particular time would appear to be insufficient unless a causal relationship was eventually shown to exist between the whereabouts of an accused and his inability to commit the crimes charged.

20. However, Rule 67(B)(i)(a) addresses neither the substantive elements of an alibi defence nor the type of causal relationship that must eventually be shown between an accused's physical location and his capacity to commit the crimes alleged in order for his alibi defence to succeed. Instead, 67(B)(i)(a), which appears under the section entitled "Additional Disclosure", deals only with the *disclosure and notice* requirements for a party intending to offer an alibi defence.

21. Therefore, although the Accused correctly points out that the presentation of an alibi defence may ultimately consist of more elements than the location of the accused at the time relevant to the crimes charged, this does not change the type of information or level of specificity required for effective *notice* of that alibi defence pursuant to Rule 67(B)(i)(a). In this regard, the Chamber considers significant that fact that the drafters of the Rule chose the language of "place or places" and did not require the alibi notice to also contain submissions concerning the effect of such "place or places" on an accused's capacity to commit the alleged crimes.

22. Turning to the Accused's assertion that he was in Žepa from 12 July 1995 until the end of July 1995, the Chamber notes that the purpose of Rule 67(B)(i)(a)'s notice requirement is to give the Prosecution the opportunity to effectively and efficiently investigate the alleged alibi.³⁹ The Chamber considers both the plain language and the purpose of Rule 67(B)(i)(a) to imply that an accused intending to use the defence of alibi must provide the Prosecution with notice that describes with *specificity* the relevant physical location(s) the accused will claim to have been at the time(s) of the alleged crimes. However, an accused is only obliged to provide the level of specificity that he will ultimately use to try to establish his alibi. Therefore, if the Accused's alibi will seek to establish only that he was in Žepa at a particular time without further specificity, he is not obliged to provide a more detailed alibi notice. Conversely, if the Accused's alibi will seek to establish his location in Žepa with greater specificity, he is obliged to provide that level of specificity in his alibi notice in order to give the Prosecution the opportunity to properly investigate this alibi.

³⁹ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, para. 241; *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Appeal Judgement, 1 June 2001, para. 111; *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, Decision on Jérôme Bicomumpaka's Notice of Alibi, 7 July 2005, paras. 3–5.

23. As to the Rule's second requirement that an accused provide the names and addresses of any witnesses upon which he intends to rely to establish his alibi defence, the Chamber notes that the Accused's Pre-Trial Brief does not contain reference to any proposed alibi witnesses. The Chamber further notes that the Response states in paragraph 17 the following: "As it is undisputed both by the Prosecution and the Defence that Zdravko Tolimir was in Žepa from 12 July, the Defence does not intend to call any special witnesses."⁴⁰

24. The Chamber considers that the plain language and purpose of Rule 67(B)(i)(a) require an accused to provide the Prosecution with the name and address of any witness upon whom he intends to rely to establish his alibi. Although the Accused's statement regarding alibi witnesses could be interpreted to mean that he will not call his own witnesses to help establish his alibi defence, the Chamber considers that the Accused's reference to "special witnesses" is unclear in this regard.

25. As to the Rule's third requirement that an accused specify any other evidence upon which he intends to rely to establish his alibi, the Chamber notes that the Accused has made general references in this regard to his Pre-Trial Brief, the Prosecution's 65 *ter* list, and various filings by the Prosecution. However, with the exception of one report,⁴¹ the Accused has not provided specifics regarding other evidence upon which he intends to rely to help establish his alibi.

26. Again, the Chamber first turns to the plain language of Rule 67(B)(i)(a) to help determine the level of specificity required for effective notice with regard to additional evidence. The Chamber notes that the word "specify" is used. This would seem to preclude general or vague references. The Chamber does not consider the Accused's general assertions that other evidence of his alibi is already within the possession of, known to, or able to be discovered by the Prosecution to reach the level of specificity required for effective notice. The Chamber also considers that the purpose of Rule 67(B)(i)(a) to prevent surprise and allow the Prosecution to investigate the alibi would be undermined if an accused could fulfil the notice requirement by simply stating, without specificity, that the Prosecution already has the required information.

27. Turning to the other issues raised in the submissions, the Chamber notes that in discussing the obligation to provide an alibi notice, the Accused makes references to his onus to establish the alibi and to a shifting of the burden of proof from the Prosecution to the Defence. However, what the Prosecution's Motion is requesting and what Rule 67(B)(i)(a) requires is simply a *notice and disclosure* regime triggered by the intent to offer an alibi as part of one's defence. This notice does

⁴⁰ Response, para. 17.

⁴¹ *Ibid.*, para. 26.

not create an onus for the Accused to establish the alibi, nor does it shift the burden of proof to the Accused.⁴² The requirement of the Rule is that the Accused provide a sufficiently-detailed notice of the alibi so that the Prosecution can investigate the claim.

28. The Chamber also notes the distinction between the Accused's roles as a criminal defendant and as a self-represented Accused. With this in mind, the Chamber sees no danger of self-incrimination with regard to fulfilling the notice requirements of Rule 67(B)(i)(a), nor does it consider that providing sufficiently detailed notice of an alibi defence is related to the Accused's right not to express his opinion about the facts of the case. The Chamber notes that Rule 67(B)(i)(a) does not require an accused to give evidence or answer any questions about the facts of the case. Instead, the Rule requires the Defence to provide *notice* as to what evidence, if any, the Defence intends to rely to establish the alibi. In this regard, the Chamber emphasizes the difference between the obligation to disclose potential evidence and the eventual production of that evidence at trial.

29. Finally, the Chamber notes that failure to provide the Prosecution with the level of specificity required by Rule 67(B)(i)(a) and the present Decision, although not preventing the Accused from testifying about his alibi pursuant to Rule 67(C), could nonetheless lead the Chamber to prohibit the Accused from leading other evidence of the alibi and may affect the Chamber's evaluation of the reliability of the alibi defence.⁴³

IV. DISPOSITION

For these reasons, pursuant to Rules 67, 89 and 126 *bis* of the Rules, the Chamber hereby **GRANTS** the request of the Prosecution for leave to reply, **GRANTS** the Prosecution's Motion **IN PART** and **ORDERS** the Accused by 17 December 2010 to:

1. provide greater specificity as to the place or places at which he claims to have been present at the time of the alleged crimes, if such greater specificity will be used in seeking to establish his alibi defence;
2. provide the names and addresses of any witnesses upon whom he intends to rely in seeking to establish his alibi defence or, in the alternative, give notification that he does not intend to rely upon any witnesses for this purpose; and

⁴² *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002, para. 15.

⁴³ *Kalimanzira v. Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010, paras. 54, 56, 70–71; *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, Decision on Jérôme Bicomumpaka's Notice of Alibi, 7 July 2005, para. 5; *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Decision, 11 January 1999, p. 3.

3. provide notification of any other evidence he intends to rely upon in seeking to establish his alibi defence or, in the alternative, give notification that he does not intend to rely upon any other evidence for this purpose.

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



Judge Christoph Flügge

Presiding Judge

Dated this 1st day of December 2010
At The Hague
The Netherlands

[Seal of the Tribunal]