

IT-05-88/1-PT
D1400 - D1388
15 July 2010

1400
SMS

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-88/1-PT

IN THE REFERRAL BENCH

Before Judge Alphons Orie, Presiding
Judge O-Gon Kwon
Judge Kevin Parker

Registrar: Mr. John Hocking

Date Filed: 15 July 2010

THE PROSECUTOR

v.

MILORAD TRBIĆ

PUBLIC

PROSECUTION'S THIRTEENTH PROGRESS REPORT

The Office of the Prosecutor
Mr. Serge Brammertz

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-88/1-PT

THE PROSECUTOR

v.

MILORAD TRBIĆ

PUBLIC

PROSECUTION'S THIRTEENTH PROGRESS REPORT

1. Pursuant to the Referral Bench's Decision on Referral of Case Under Rule 11 *bis* with Confidential Annex ("Referral Decision") of 27 April 2007, the Prosecution hereby files its thirteenth progress report in this case.
2. The Decision on referral ordered:

...the Prosecutor to file an initial report to the Referral Bench on the progress made by the Prosecutor's Office of Bosnia and Herzegovina in this case six weeks after transfer of the evidentiary material. Thereafter, the Prosecution shall file a report every three months. These reports shall include information on the course of the proceedings before the competent national court after commencement of trial, and shall include any reports or other information received from any international organizations also monitoring the proceedings.¹
3. The twelfth progress report in the *Trbić* case was filed on 26 April 2010.²
4. Following the agreement between the Chairman in Office of the Organization for Security and Co-operation in Europe's Mission to Bosnia and Herzegovina (the "OSCE") and the Office of the Prosecutor ("OTP"), the Prosecution received OSCE's twelfth report on 12 July 2010.³

¹ *Prosecutor v. Milorad Trbić* ("Trbić case"), Case No. IT-05-88/1-PT, Referral Decision, p. 26.

² *Trbić case*, Prosecution's Twelfth Progress Report, 26 April 2010 ("Prosecution's Twelfth Progress Report").

³ OSCE's Twelfth Report in the *Milorad Trbić* Case Transferred to the State Court pursuant to Rule 11 *bis*, July 2010 ("Report").

5. The Report provides a summary of the written trial judgement and its main findings and legal analysis. The written judgement was published on 29 April 2010, while it had been orally rendered on 16 October 2009.
6. OSCE reports that during the proceedings a large amount of documentary evidence was presented. The Prosecution tendered 1121 exhibits and the Defence tendered 7 exhibits. The Prosecution called 38 witnesses and 3 expert witnesses while the Defence called 8 witnesses and one expert witness.⁴
7. OSCE reports that the Trial Chamber found that, as the Security Officer in the Organ for Security and Intelligence Affairs in the Zvornik Brigade, Milorad Trbić participated in a joint criminal enterprise (JCE) with Colonel Ljubiša Beara, Lieutenant Colonel Vujadin Popović, Lieutenant Drago Nikolić and others, with the common purpose and plan to capture, detain, summarily execute and bury all able bodied Bosniac males from the Srebrenica enclave, who were brought into the Zvornik Brigade zone of responsibility. This included crimes committed at the detention sites in Orahovac, Ročevići, and Petkovci, as well as the execution sites near Lažete, Kozluk, and Petkovci Dam. As a member of the JCE, Trbic was found to have committed Genocide, in violation of Article 171(a), killing members of the group, and Article 171(b), causing serious bodily or mental harm to members of the group. The specific acts committed by the Defendant constituted supervising, directing, and coordinating Army of Republika Srpska (VRS) soldiers who secured, transported, detained, and carried out the execution and the subsequent burials.⁵
8. OSCE reports that the Trial Chamber found that Milorad Trbić participated in a smaller JCE than the one described in the indictment. The smaller JCE involves only the Zvornik Brigade area of responsibility, which was a part of a larger operation conceived by VRS Main Staff Officers. Furthermore, the Trial Chamber specified Trbić's role as that of a "joint actor", finding

⁴ Report p. 2.

⁵ Report pp. 2-3.

that his level of participation was such that he was neither a principal planner nor a simple tool of the planners.⁶

9. OSCE notes several improvements in the clarity of Trial Chamber's reasoning, as well as in certain technical aspects of the written verdict. First, the Panel's analysis is well structured and easy to follow. After explaining the relevant legal provisions, the Panel applies the law to the specific facts in the case, rather than simply recount the evidence. Second, throughout the Judgment, the Panel makes frequent references to the jurisprudence of the ICTY, ICTR and the Court of BiH and incorporates the legal reasoning from these decisions into its analysis. Particularly positive is the fact that, when discussing certain procedural aspects of the trial affecting the rights of the Accused, such as the admissibility of the Defendant's prior statements, the Trial Panel takes into account the requirements of the European Convention on Human Rights (ECHR) and provides a detailed analysis of the relevant ECHR decisions. Furthermore, unlike other written judgments of the Court of BiH, the present Judgment contains an Annex with the important procedural decisions, a list of injured parties who filed compensation claims, a list of evidence, as well as a list of cases cited. This contributes to the clarity of the Judgment and represents a positive new practice, according to OSCE.⁷
10. OSCE also notes as a good practice the fact that the Trial Chamber accepted a total of 104 facts established by the ICTY in the *Prosecutor v. Krstić* and *Prosecutor v. Blagojević and Jokić*. They concern the relevant events in Srebrenica and do not relate to the acts, conduct, or mental state of Milorad Trbić.⁸
11. OSCE also emphasises the fact that the Judgment relies heavily on the statements given by the Accused, in the capacity of suspect, to investigators of the Office of the Prosecutor (OTP). The Trial Panel's decision to admit these six statements was accompanied by a thorough analysis of their admissibility, with reference to the relevant provisions of

⁶ Report p. 3.

⁷ Report p. 4.

⁸ *Ibid*

applicable laws. The analysis included the admissibility of those statements, whether they can be used against the accused who chose to remain silent at trial and how much weight should be given to those statements when deciding about the guilt of the Accused.⁹

12. The Trial Chamber provided a thorough and well reasoned analysis of aggravating and mitigating circumstances that were considered while deliberating about the appropriate sentence. OSCE further points out the effects on custody because of the delay in producing the written judgement. According to the latest amendments of the Criminal Procedure Code of Bosnia and Herzegovina; in exceptional circumstances a person convicted in the first instance could be detained up to 15 months in the period between the oral announcement of the judgement and the finalization of the appellate verdict. Because of the delay between the announcement and production of the written judgement, at this point of time Milorad Trbić had already spent 9 months in custody. OSCE expects that the Appellate Chamber would be able to render and produce the appellate verdict before 27 January 2011 but also does not exclude the possibility that Milorad Trbić could be released before the final judgement is produced, because of the complexity of the case and the large amount of documentary evidence.¹⁰

13. The English version of the judgement is available on the web page of the Court of Bosnia and Herzegovina. As it contains almost 500 pages, the Prosecution hereby provides a link to the verdict for the Referral Bench.¹¹ If the Referral Bench deems it necessary, the Prosecution could separately provide the print-out of the judgement.

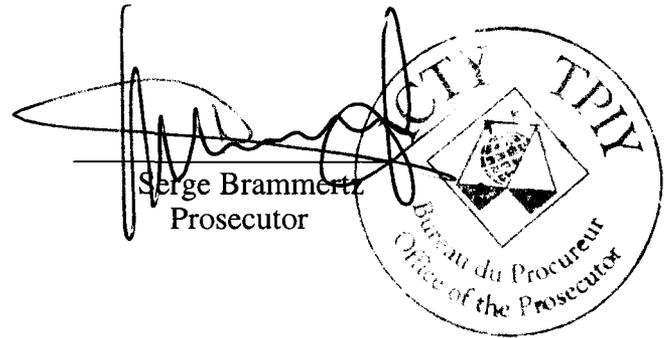
⁹ Report p. 5.

¹⁰ Report p. 6.

¹¹ http://www.sudbih.gov.ba/files/docs/presude/2009/386_Milorad_Trbic_1st_instance_verdict_16_10_2009.pdf

14. Attached to this report is a copy of the OSCE Report.

Word Count: 1,180



Dated this fifteenth day of July 2010
At The Hague
The Netherlands

INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-88/1-PT

THE PROSECUTOR

v.

MILORAD TRBIĆ

PUBLIC

ANNEX A
TO

PROSECUTION'S THIRTEENTH PROGRESS REPORT

Twelfth Report in the
Milorad Trbić Case
Transferred to the Court of BiH pursuant to Rule 11bis

July 2010

EXECUTIVE SUMMARY

The case of Milorad Trbić (hereinafter also *Defendant* or *Accused*) is the sixth case transferred from the International Criminal Tribunal for the former Yugoslavia (ICTY) to the BiH State Court pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence (RoPE). This constitutes the twelfth Report of the OSCE Mission to Bosnia and Herzegovina ("Mission"), covering the period between 19 April and 19 July 2010.

On 16 October 2009, the Trial Panel rendered the oral verdict, finding Milorad Trbić guilty of Genocide, and sentencing him to 30 years' long-term imprisonment. The written verdict was published on 29 April 2010. The Defendant remains in custody due to the risk of flight and the threat to public security.

The present report provides a brief summary of the Trial Panel's main findings and its legal analysis. The Mission is pleased to note an overall improvement in the structure of the written verdict, and the Trial Panel's increased reliance on the Court of BiH, ICTY, International Criminal Tribunal for Rwanda (ICTR), and European Court of Human Rights (ECtHR) case law. Furthermore, this report contains the Mission's observations regarding the Panel's treatment of a number of important issues, namely: the acceptance of ICTY facts and evidence, the use of prior statements given by the Accused during the investigation, the sentencing criteria, and the effects of the delay in the production of the written verdict on the terms of custody. Particular attention is given to the Trial Panel's assessment of the admissibility of Milorad Trbić's prior statements, given the implications of the use of such statements, otherwise rarely available in cases before the Court of BiH, when the defendant chooses to remain silent during the trial.

SUMMARY OF THE VERDICT

During the first instance proceedings, the Trial Panel was presented with a large amount of documentary evidence, namely 1121 exhibits tendered by the Prosecution, and 7 Defence exhibits. The Prosecution called 38 witnesses and 3 experts, while the Defence summoned 8 witnesses and one expert. The trial lasted from 8 November 2007 to 28 September 2009.

The Panel found that, as the Security Officer in the Organ for Security and Intelligence Affairs in the Zvornik Brigade, Milorad Trbić participated in a joint criminal enterprise (JCE) with Colonel Ljubiša Beara, Lieutenant Colonel Vujadin Popović, Lieutenant Drago Nikolić and others, with the common purpose and plan to capture, detain, summarily execute and bury all able bodied Bosniac males from the Srebrenica enclave, who were brought into the Zvornik Brigade zone of responsibility. This included crimes committed at the detention sites in Orahovac, Ročevići, and Petkovci, as well as the execution sites near Lažete, Kozluk, and Petkovci Dam.

As a member of the JCE, Trbić was found to have committed Genocide, in violation of Article 171(a), killing members of the group, and Article 171(b), causing serious bodily or mental harm to members of the group. The specific acts committed by the Defendant constituted supervising, directing, and coordinating Army of Republika Srpska (VRS) soldiers who secured, transported, detained, and carried out the execution and the subsequent burials

and reburials of a large number of Bosniac men. Trbić was also convicted for personally murdering a number of captured Bosniac men. Moreover, Trbić was found to have coordinated the provision of logistical support needed to carry out the executions and burials.

The Trial Panel acquitted Trbić of all other charged offences¹ falling outside of the responsibility of the Zvornik Brigade, namely those in Potočari and at other locations in Bratunac, including the Vuk Karadžić School, stadium and meadow in Sandići and Kravica. The Panel held that there was insufficient evidence presented to prove involvement of the Defendant in those operations.

The Trial Panel provided a rather thorough analysis of all of the elements of Genocide, relying heavily on ICTY jurisprudence,² as well as on that of the ICTR³ and the Court of BiH.⁴ It then applied these elements to the facts presented in the case and, specifically, to the acts of the Defendant.

Also detailed was the Trial Panel's examination of the existence of the JCE and the Defendants participation therein. First, the Panel noted that JCE, as a mode of liability, is implicit in Article 180(1) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), which is derived from and is identical to Article 7(1) of the ICTY Statute.⁵ In its assessment of the basis of the JCE charged in the Indictment, the Trial Panel relied on the ICTY⁶ and Court of BiH⁷ jurisprudence.

Thus, the Panel found that Milorad Trbić participated in a JCE, however, not the one described in the Amended Indictment.⁸ In the Amended Indictment, the Prosecution charged the Defendant with crimes committed as part of a larger JCE in the areas of responsibility of the Zvornik and Bratunac Brigades. However, the Panel narrowed the scope of the JCE, finding that Trbić was part of a smaller JCE involving only the Zvornik Brigade area of responsibility, which was, nonetheless, "the aim of a larger operation conceived by VRS Main Staff Officers."⁹ Furthermore, the Panel specified Trbić's role as that of a "joint actor," finding that his level of participation was such that he was "neither a principal planner nor a simple tool of the planners."¹⁰

¹ Article 171(a), killing members of the group, Article 171(b), causing serious bodily or mental harm to members of the group, Article 171(c), deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and Article 171(d), imposing measures intended to prevent births within the group.

² *Prosecutor v. Krstić*, Trial Judgment (2 August 2001), *Prosecutor v. Brđanin*, Trial Judgment (1 September 2004), *Prosecutor v. Blagojević and Jokić*, Trial Judgment (17 January 2005), etc.

³ *Prosecutor v. Nindabahizi*, Trial Judgment (15 July 2004), *Prosecutor v. Akayesu*, Trial Judgment (2 September 1998), *Prosecutor v. Kayishema and Ruzindana*, Trial Judgment (21 May 1999), etc.

⁴ *Prosecutor v. Stupar et al.*, Trial Judgment (29 July 2008), *Rašević and Todović*, Trial Judgment (28 February 2008).

⁵ Trial Judgment, paras. 203-206.

⁶ *Prosecutor v. Tadić*, Appeal Judgment (15 July 1999), *Prosecutor v. Brđanin*, Trial Judgment (1 September 2004), *Prosecutor v. Krstić*, Trial Judgment (2 August 2001), *Prosecutor v. Krnojelac*, Appeal Judgment (17 September 2003), *Prosecutor v. Krajišnik*, Appeal Judgment (17 March 2009), etc.

⁷ *Rašević and Todović*, Trial Judgment (28 February 2008).

⁸ Trial Judgment, para. 765.

⁹ Trial Judgment, paras. 750, 840.

¹⁰ Trial Judgment, para. 765.

The Trial Panel referred all compensation claims filed during the trial to civil proceedings and relieved the Defendant of the obligation to pay for the costs of the trial, due to poor financial standing. In the Annex to the Trial Judgment, the Trial Panel provided the list of names of 841 injured parties who sought compensation and the amounts sought, where available. However, the Panel referred these parties to civil action, on the grounds that "the process of establishing the facts in terms of the amounts of the claim would require a longer time."¹¹

SPECIFIC ISSUES RELATED TO THE WRITTEN VERDICT

Improvements in the structure of the Judgment

The Mission is pleased to note several improvements in the clarity of Trial Panel's reasoning, as well as in certain technical aspects of the written verdict. First, the Panel's analysis is well structured and easy to follow. After explaining the relevant legal provisions, the Panel applies the law to the specific facts in the case, rather than simply recount the evidence. Second, throughout the Judgment, the Panel makes frequent references to the jurisprudence of the ICTY, ICTR and the Court of BiH and incorporates the legal reasoning from these decisions into its analysis. Particularly positive is the fact that, when discussing certain procedural aspects of the trial affecting the rights of the Accused, such as the admissibility of the Defendant's prior statements, the Trial Panel takes into account the requirements of the European Convention on Human Rights (ECHR) and provides a detailed analysis of the relevant ECtHR decisions.

Furthermore, unlike other written judgments of the Court of BiH, the present Judgment contains an Annex with the important procedural decisions, a list of injured parties who filed compensation claims, a list of evidence, as well as a list of cases cited. This contributes to the clarity of the Judgment and represents a positive new practice.

Acceptance of facts established by the ICTY

The Mission would like to point out, as a good practice, the fact the Trial Panel accepted at the very beginning of the first instance proceedings¹² a total of 104 facts established by the ICTY in *Prosecutor v. Krstić* and *Prosecutor v. Blagojević and Jokić*. As highlighted in previous Mission's reports,¹³ judicial economy and the equality of arms are best respected when such decisions are made as early as possible in the proceedings. These adjudicated facts were accepted pursuant to the *Law on the Transfer of Cases*. They concern the relevant events in Srebrenica, and, in accordance with the rights of the accused, do not relate to the acts, conduct, or mental state of the Defendant. The Panel also accepted a number of expert reports and transcripts of witness testimony, pursuant to the same law.

Use of prior statements of the Accused

It is important to emphasize that the Judgment relies heavily on the statements given by the Accused, in the capacity of suspect, to ICTY investigators and the Office of the Prosecutor (OTP). The Trial Panel's decision to admit these six statements was accompanied by a

¹¹ Trial Judgment, para.873.

¹² 13 December 2007.

¹³ See, for example, Fifth Report on the case of Paško Ljubičić, December 2007.

thorough analysis of their admissibility, with reference to the criminal procedure codes of the Socialist Federal Republic of Yugoslavia (SFRY) and BiH, as well as the ICTY RoPE.¹⁴

First, the Trial Panel determined that the statements to the ICTY investigators and the OTP were given in accordance with the RoPE,¹⁵ and would be admissible in the proceedings before the ICTY. The Panel further noted that ICTY investigators enjoy the same *status* as the “authorized official persons” mentioned in the CPC BiH and that the mentioned statements would also be admissible at the Court of BiH under Article 78 of the CPC BiH.¹⁶ The Panel also relied on the relevant decisions of the ECtHR in its analysis.¹⁷

After deciding that the statements were obtained legally, the Panel examined whether such statements can be used as evidence against the accused who chose to exercise his right to remain silent at trial. The Panel first determined that the use of statements in this situation is not precluded by Article 78 of the CPC BiH. Next, the Panel examined the jurisprudence of the ECtHR, which decided this issue under Article 6 of the ECHR, from which the right to remain silent is derived. Relying on a number of ECtHR decisions,¹⁸ the Panel found that the admission of the statements into evidence does not violate Milorad Trbić’s right to remain silent.¹⁹ In its explanation, the Panel pointed out that the right to remain silent is not absolute, and that the accused waived this right when he gave the statements, fully aware of his status as a suspect and the possible consequences of his actions.²⁰

Finally, the Panel proceeded to determine how much weight should be given to out-of-court statements when deciding on the guilt of the Accused. Finding that the Court of BiH has not defined a standard, the Panel turned to the “trustworthiness” standard established by the United States Supreme Court,²¹ requiring that the Prosecution “introduce substantial independent evidence which would tend to establish the trustworthiness of the [confession].”²² The Trial Panel followed this rule in its assessment of the prior statements of the Accused, which were highly incriminatory and revealing of the extent of his involvement in the crimes. Consequently, it dismissed certain parts of the Accused’s statements because there was no evidence to corroborate the occurrence of the event.²³ The Panel rejected the Defence’s claim that the statements were given under duress, because the Defence did not present any evidence to substantiate this claim.²⁴

Sentencing

¹⁴ Trial Judgment, paras. 84-164.

¹⁵ Trial Judgment, paras. 142-151.

¹⁶ Article 78(2) provides: *At the beginning of the questioning, the suspect shall be informed of the charge against him, the grounds for the charge and he shall be informed of the following rights: (...) (c) the right to comment on the charges against him, and to present all facts and evidence in his favour and that, if he does so in the presence of the defence attorney, the statement made is allowed as evidence at the main trial and may, without his consent, be read and used at the main trial...*

¹⁷ Trial Judgment, paras. 119-123.

¹⁸ Trial Judgment, paras. 152-155.

¹⁹ Trial Judgment, para. 152.

²⁰ Trial Judgment, para. 153.

²¹ Trial Judgment, paras. 158-162.

²² Trial Judgment, para. 158.

²³ Trial Judgment, para. 159.

²⁴ Trial Judgment, paras. 127, 139.

In the section of the Judgment related to sentencing, the Trial Panel provided a thorough and well reasoned analysis of a number of aggravating and mitigating circumstances that were considered in meting out punishment. In particular, the Panel found that Trbić's cooperation with ICTY investigators was a mitigating circumstance, while the fact he misled the investigators on several occasions constituted an aggravating factor.²⁵ Also, the facts the Defendant was "pivotal in implementing the criminal plan in the Zvornik area of responsibility" and that he never took action to save any lives were seen as an aggravating factor.²⁶ The Defendant's conduct during the trial, which was "appropriate and met the Panel's expectations" was seen as neither aggravating nor mitigating.²⁷

Delay in the production of the written verdict and the effects on custody

In its last report,²⁸ the Mission expressed concern regarding the fact that, although the oral verdict had been pronounced in October 2009, the written verdict had yet to be rendered.²⁹ As noted above, the written verdict was issued on 29 April 2010, six months after the oral verdict, and well beyond the 30 day deadline provided for in Article 289(1) of the CPC BiH. While the complexity of the case, the amount of evidence, and the thoroughness of the Trial Panel's analysis³⁰ partly justify the delay in the production of the written judgment, it is important not to lose sight of the potential consequences this delay may have with regard to the appeal process.

As noted in the Mission's last report, due to an amendment in the provision on the length of time in custody between the announcement of the oral verdict and the finalization of the appellate verdict, the defendant may remain in custody for up to fifteen months in exceptional cases.³¹ Thus, in the present case, the Defendant may remain in custody for a remaining maximum period of nine months. While it would be reasonable to expect that the Appellate Panel will be able to render the appellate verdict in this period, the complexity of the case and the large amount of documentary evidence, as well as the length of the appellate proceedings in some other cases, render realistic the possibility that Milorad Trbić will be released before the final judgment is announced.

²⁵ Trial Judgment, para.862-863.

²⁶ Trial Judgment, para. 861, 858.

²⁷ Trial Judgment, para. 865.

²⁸ From April 2010.

²⁹ In line with Article 289(1) of the Criminal Procedure Code of Bosnia and Herzegovina, the Presiding Judge sent several letters to the President of the Court in the past six months, explaining the reasons for the delay in the preparation of the written verdict. They include, *inter alia*, the complexity of the case and the large amount of evidence.

³⁰ Including the provision of procedural decision in the Annex.

³¹ Article 138(3) of the Criminal Procedure Code of Bosnia and Herzegovina provides: "After pronouncing the first instance verdict, the custody may last no longer than additional nine months. Exceptionally, in complex cases and for important reasons the Appellate Panel may extend custody for additional six months. If during that period no second instance verdict to alter or sustain the first instance verdict is pronounced, the custody shall be terminated and the accused shall be released. If within the prescribed deadlines the second instance verdict is pronounced reversing the first instance verdict, the custody shall last for no longer than another year after pronouncement of the second instance verdict."