



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-94-1-T
Date: 14 November 1995
Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge McDonald, Presiding
Judge Stephen
Judge Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 14 November 1995

PROSECUTOR

v.

DUŠKO TADIĆ a/k/a "DULE"

DECISION ON THE DEFENCE MOTION ON THE FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger

Mr. William Fenrick
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orié

Mr. Milan Vujin

I. INTRODUCTION

On 23 June 1995 the Defence filed a preliminary Motion on the Form of the Indictment seeking to dismiss the indictment against the accused, Dušan Tadić. On 7 July 1995 the Prosecutor filed a Response to the Motion.

The indictment was first confirmed on 13 February 1995. In August 1995 the Prosecutor sought leave to amend the indictment and the amended indictment (“the Indictment”) was confirmed on 1 September 1995. Consequently, on 4 September 1995 the Defence filed a second motion relating to the amended indictment, in comparable wording to the original Motion (together referred to as “the Motion”), and the Prosecutor filed a second response on 26 September 1995.

The Motion was heard on 24 October 1995 and the decision on the Motion was reserved to this day.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. Introduction

1. By this Motion the Defence seeks alternative orders: dismissal of all charges not in conformity with what it contends to be the proper form of an indictment before this International Tribunal or, alternatively, an order for the amendment of the Indictment to provide greater specificity and avoid alleged multiple jeopardy for one and the same act.

2. The Indictment is accordingly attacked on two distinct grounds: that the allegations made are imprecise and that each distinct allegation of fact gives rise to a number of distinct offences which are alleged not in the alternative but cumulatively. We deal first with the attack on the ground of imprecision.

B. Imprecision

3. The objection of imprecision is founded on what is said to be the failure of the Indictment to provide in many instances what the Defence describes as “a unique and factual description of both the criminal offence and the participation of the accused in that offence”. It should, it is said, state for each count the specific behaviour of the accused at a specific time and place.

4. The Indictment contains thirty-six counts, arising out of nine incidents described in paragraphs 4 to 12 of the Indictment. The contents of paragraph 4 and the three counts to which it gives rise are, for the moment, put to one side.

1. Paragraphs 5 to 12 of the Indictment

5. Paragraphs 5 to 12 each contain a description of acts alleged to have been committed by, or participated in by, the accused. In paragraphs 5 to 10 the precise location in question, within Omarska prison camp, is identified. In paragraphs 11 and 12, concerned with events occurring, in one case, during the transfer of prisoners to a prison camp and, in the other,

during the rounding up of residents in two Bosnian villages, there is no precise location given but the general locality where the events occurred is described.

6. In seven of these eight cases a particular event is described, and is given an approximate date, sometimes expressed as “about” or “around” a specific date, sometimes as having occurred between certain dates. Paragraph 6 is an exception in that it relates in part to a prolonged course of conduct, the beating of prisoners, “during the period” of two specified months, and in part to a particular incident of sexual mutilation occurring during that course of conduct. So far as involvement of the accused is concerned, each of paragraphs 5 to 12 attributes specific conduct to the accused, either acting alone or in participation with others. In each case the relevant counts cite a particular Article of the Statute of the International Tribunal (“the Statute”) and give a brief description of the particular conduct alleged.

7. The Rules of the International Tribunal require, in Rule 47(B), that the indictment set forth the name and particulars of the suspect and, echoing the words of Article 18 of the Statute, “a concise statement of the facts of the case and of the crime with which the suspect is charged”. These eight paragraphs provide those particulars; they identify the accused, state paragraph by paragraph the facts of each incident and in separate counts specify particular provisions of international humanitarian law that have been violated by him. Rule 47(B) has accordingly been complied with and it follows that, in relation to paragraphs 5 to 12 and the counts under these paragraphs, the Motion founded on lack of specificity of the Indictment is denied.

8. Article 21(4)(a) and (b) of the Statute entitle an accused, in the determination of a charge against him, to be informed in detail of the nature and cause of charges against him and to have adequate time and facilities for the preparation of his defence. Rules 66 (A) and 67 (A)(i) provide for additional material to be made available to an accused, being copies of the supporting material which accompanied the indictment when confirmation was sought and the names of the witnesses to be called in proof of guilt of the accused. This is material which is not available to the Trial Chamber but it is common ground that it has been duly supplied to the accused. If the Defence considers that, nevertheless, the material currently before it is not adequate to permit of the preparation of a defence to any of counts 4 to 36 it is

open to it, by motion under Rule 54, to seek further particulars. Any such motion should state with particularity the respect in which a specified count, read in the light of the paragraph which precedes it, is said to require any and what further particulars. Any such motion should, however, only be made after a refusal by the Prosecution of a request for further particulars which specifies the counts in question, the respect in which it is said that the material already in the possession of the Defence is inadequate and the particulars necessary to remedy that inadequacy.

2. Paragraph 4 of the Indictment

9. There remains paragraph 4. The paragraph alleges conduct by the accused over a period of a little more than six months. The conduct alleged is very various in character, involving attack, destruction and plunder of residential areas described only as Bosnian Muslim and Croat, the seizure and imprisonment under brutal conditions in three named prison camps of “thousands” of persons, described only as Muslims and Croats and the “deportation and/or expulsion” of the majority of Muslim and Croat residents of Opstina Prijedor by force or threat of force. To this is then added the subjecting of unspecified Muslims and Croats inside and outside those camps to a campaign of terror including “killings, rapes, assaults and other physical and psychological abuse”.

10. These allegations are followed by three counts to which they are said to give rise, being the counts of persecution on political, racial and/or religious grounds, of deportation and, lastly, of unlawful deportation or transfer or unlawful confinement of a civilian.

11. The nature of the three counts alleged under paragraph 4 are significant. Counts 1 and 2 allege respectively persecution on political, racial and/or religious grounds and deportation, both under Article 5 of the Statute, the Article concerned with crimes against humanity. The very nature of the criminal acts in respect of which competence is conferred upon the International Tribunal by Article 5, that they be “directed against any civilian population”, ensures that what is to be alleged will not be one particular act but, instead, a course of conduct. When the particular crime against humanity is persecution on the grounds alleged,

with the aura of continuity over a period that that conveys, it becomes the more certain that this will be so.

12. However, paragraph 4 clearly enough does not, in its very generalised form, provide the accused with any specific, albeit concise, statement of the facts of the case and of the crimes with which he is charged. It says nothing specific about the accused's conduct, about what was the nature and extent of his participation in the several courses of conduct which are alleged over the months in question. What is more, as mentioned above, what the paragraph does allege, albeit in the most general of terms, is at least six, and perhaps several more, quite distinct types of conduct. There may be good reason, in the case of the first two counts, with their charges of crimes against humanity under Article 5 of the Statute, to allege that what occurred was in the nature of a "widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds", to quote the Report of the Secretary-General in presenting the draft Statute of the Tribunal to the Security Council, at paragraph 48. However, there should nevertheless be some clear identification of particular acts of participation by the accused in such an attack. Paragraph 4 of the Indictment does not contain any such description.

13. No less specificity is called for in whatever facts are alleged in support of the third count, that of a grave breach of the Geneva Conventions of 1949 under Article 2(g) of the Statute. Moreover, that count itself at present alleges, in the alternative, three acts widely different in their character: deportation, transfer and confinement and does not make clear which of these is alleged; if more than one, each should be the subject of a separate count.

14. It follows that in relation to paragraph 4 and the three counts under it the Motion succeeds. If the Prosecution is to persist in relation to the matters alleged in that paragraph, the Indictment should be further amended so as to provide the necessary degree of specificity. It will be for the Prosecutor to determine the form of the amendment but it might well take the form of a number of separate paragraphs, each dealing with a specific act or course of conduct followed by counts flowing from it. The Prosecutor has leave, accordingly, within 30 days of delivery of this Decision to amend paragraph 4 of the Indictment as he may be advised.

C. Cumulative Charges

15. Turning now to the second ground of attack on the Indictment, it is complained that the Indictment alleges, in respect of each paragraph alleging criminal conduct by the accused, several distinct offences, expressed as cumulative rather than as in the alternative.

16. The only ground urged in support of this complaint is that it is contrary to the law of the former Yugoslavia and of the Republic of Bosnia and Herzegovina. This is said to be material if there are convictions in respect of any of the counts and there therefore arise questions of penalty.

17. There appears to be dispute as between the parties as to the requirements of Yugoslavia law and the law of its successor States. In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading.

18. It follows that in relation to this second ground of attack on the Indictment the Motion is denied.

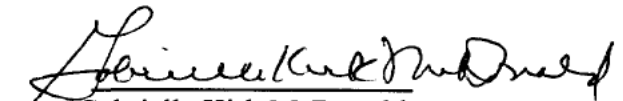
III. DISPOSITION

For the foregoing reasons

THE TRIAL CHAMBER

PURSUANT to Rule 72

- (1) **GRANTS THE MOTION** insofar as it relates to paragraph 4 of the Indictment;
- (2) **GRANTS** leave to the Prosecutor to amend paragraph 4 of the Indictment within thirty days of delivery of this Decision; and
- (3) **DISMISSES** the motion in all other respects.


Gabrielle Kirk McDonald
Presiding Judge

Dated this fourteenth day of November 1995
At The Hague
The Netherlands

[Seal of the Tribunal]