



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-02-58-PT
Date: 24 March 2005
Original: English

BEFORE THE PRE-TRIAL JUDGE

Before: Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Order of: 24 March 2005

PROSECUTOR

v.

LJUBIŠA BEARA

DECISION ON PROSECUTION MOTION TO AMEND THE INDICTMENT

The Office of the Prosecutor

Mr. Peter McCloskey
Ms. Antoinette Issa

Counsel for the Accused

Mr. John Ostojic

I, IAIN BONOMOY, Judge of Trial Chamber III 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 (“International Tribunal”),

HAVING BEEN ASSIGNED, pursuant to Rule 65 *ter*(A) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), as the Pre-Trial Judge in the case of *Prosecutor v. Ljubiša Beara* by an Order dated 22 November 2004,

BEING SEISED of the “Motion to Amend the Indictment” (“Motion to Amend”), filed confidentially by the Office of the Prosecution (“Prosecution”) on 26 November 2004, including the supporting material provided in an annex to the Motion to Amend,

NOTING the original indictment against Ljubiša Beara (“the Accused”), which was filed and confirmed on 26 March 2002 (“Current Indictment”),

NOTING the “Request to Prosecution in Relation to its Motion to Amend the Indictment”, filed on 10 February 2005, in which I requested the Prosecution to identify with specificity the supporting materials on which it relies as providing sufficient evidence in respect of each proposed amendment,

NOTING the “Response to the Pre-Trial Judge’s Request in Relation to the Prosecution’s Motion to Amend the Indictment”, filed confidentially on 24 February 2005, in which the Prosecution indicates how the supporting material provided is intended to relate to each proposed amendment,

NOTING that the Defence has filed no response to either of the Prosecution’s submissions,

NOTING that the amendments proposed by the Prosecution fall into six general categories:

- (1) deletion of the alternative count of complicity in genocide;
- (2) addition of a separate count of conspiracy to commit genocide;
- (3) deletion of factual allegations for which there is insufficient factual basis;
- (4) clarification of the elements of the crime of extermination;
- (5) new allegations relating to forcible transfer, both as an aspect of the alleged joint criminal enterprise and in relation to the separate count charging forcible transfer as a crime against humanity; and
- (6) minor factual and grammatical corrections,

CONSIDERING that Rule 50(A)(ii) of the Rules provides that “leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment[s]”, *i.e.*, leave to amend shall be denied if the material provided does not meet the *prima facie* standard,

CONSIDERING that the material submitted by the Prosecution establishes a *prima facie* case against the Accused in relation to the proposed amendments, with the exception of one factual allegation of an act committed in furtherance of the alleged conspiracy to commit genocide,

CONSIDERING that the basic principle guiding the exercise of judicial discretion in relation to a motion to amend an indictment is whether the amendments result in unfair prejudice to the accused,¹

CONSIDERING that while “regard must be had to the circumstances of the case as a whole,”² and appropriate weight given to “the exceptional character of criminal proceedings involving war crimes, including the general complexity and difficulties necessarily inherent in the investigation of such crimes”,³ two factors in particular are considered when determining whether amending an indictment would cause unfair prejudice: (1) notice, or whether the Accused is given an adequate opportunity to prepare an effective defence; and (2) whether granting the amendments will result in undue delay,⁴

CONSIDERING that pre-trial proceedings in this case have just begun, so amending the indictment at this stage, even if it should include new charges, will neither deny the Accused an adequate opportunity to prepare his defence nor cause undue delay,

CONSIDERING that a proposed amendment results in the inclusion of a new charge if it introduces “a new basis for conviction...not previously reflected in the indictment...that is factually and/or legally distinct from any already alleged”,⁵

¹ See, e.g., *Prosecutor v. Halilović*, Case No. IT-01-48-PT, “Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment”, 17 December 2004 (“Halilović Decision”), at para. 22; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, “Decision on Form of Further Amended Indictment and Prosecution Application to Amend”, 26 June 2001 (“Brđanin & Talić Form of Indictment Decision”), at para. 50.

² *Prosecutor v. Mejjakić et al.*, Case No. IT-02-65-PT, “Decision on the Consolidated Indictment,” 21 November 2002 (“Mejjakić Decision”), at p. 3.

³ *Brđanin & Talić*, “Decision on Filing of Replies”, 7 June 2001 (“Brđanin & Talić Replies Decision”), at para. 3.

⁴ Halilović Decision, *supra* n. 1, at para. 23.

⁵ Halilović Decision, *supra* n. 1, at para. 30.

CONSIDERING that the amendments the Prosecution seeks to make would result in the inclusion of two new charges in the indictment:

- (1) the replacement of the alternative count of complicity in genocide with a separate count of conspiracy to commit genocide clearly alleges a different crime and therefore introduces a distinct basis for conviction;
- (2) the proposed amendments to paragraph 17 of the Current Indictment expand the common purpose of the alleged joint criminal enterprise, and provide a distinct basis for conviction of forcible transfer, because:
 - (a) the Current Indictment does not include an allegation that the common purpose of the joint criminal enterprise included the forcible transfer of the Bosnian Muslim men and boys who were eventually executed;
 - (b) a plain reading of the relevant paragraph does not lead to the conclusion that this allegation was necessarily implied in the indictment's description of the common purpose;⁶
 - (c) in the Current Indictment's present form, the modes of liability available to express the Accused's participation in the forcible transfer of Bosnian Muslim men and boys are limited to those expressed in Article 7(1), with the exception of commission, because the Prosecution specifically limited commission to participation in the joint criminal enterprise; and
 - (d) granting leave to amend this paragraph would result in the inclusion of a new basis for conviction of the Accused, *i.e.*, the allegation that he committed forcible transfer through his participation in the joint criminal enterprise,

CONSIDERING that Rule 50(B) of the Rules provides that “[i]f the amended indictment includes new charges and the accused has already appeared before a Trial Chamber..., a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges”,

CONSIDERING that Rule 50(C) of the Rules provides that “[t]he accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges”,

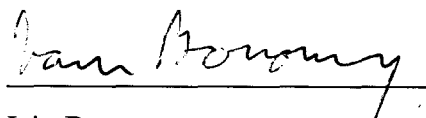
PURSUANT TO Rules 50 and 65 *ter* of the Rules,

⁶ See *Brđanin and Talić*, “Decision on Form of Fourth Amended Indictment”, 23 November 2001, at para. 12.

HEREBY ORDER AS FOLLOWS:

1. The Prosecution is granted leave to make the proposed amendments to the Current Indictment, with the exception of the proposed insertion of paragraph 38.2(d), and is directed to file the amended indictment within seven days of the date of this order;
2. A further appearance to enable the Accused to enter a plea on the two new charges in the amended indictment will be held on **Tuesday, 5 April 2005, at 4 p.m.**; and
3. The Accused shall have thirty days from the date of the filing of the amended indictment to file preliminary motions in respect of the new charges.

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



Iain Bonomy
Pre-Trial Judge

Dated this twenty-fourth day of March 2005
At The Hague
The Netherlands

[Seal of the Tribunal]