



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: 1 October 2008

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost, Pre-Trial Judge

Registrar: Mr. Hans Holthuis

Decision of: 1 October 2008

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON SECOND PRELIMINARY MOTION ON THE
INDICTMENT PURSUANT TO RULE 72 OF THE RULES**

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 the “Preliminary Motion Pursuant to Rule 72 (A) (i), (ii) with a Request for [Confirmation of the Understanding] of Certain Allegations in the Indictment”, submitted by the Accused Zdravko Tolimir on 28 July 2008 and filed in the English version on 8 August 2008 (“Second Preliminary Motion”),¹ which includes the Accused’s submissions on (1) the Tribunal’s lack of jurisdiction, and (2) the defects in the form of the Indictment, and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. Zdravko Tolimir was arrested on 31 May 2007. On 4 June 2007, the initial appearance of Tolimir took place before Judge Prost.²

2. The Prosecution had disclosed the material referred to in Rule 66 (A)(i) of the Rule of Procedure and Evidence (“Rules”) within 30 days from the Accused’s initial appearance, in accordance with that same rule.³ The 30-day time period that runs after disclosure of such material to file preliminary motions under Rule 72 (A) was suspended on the ground that the Accused had no counsel.⁴ However, on 14 September 2007, at the first status conference, after having inquired about the Accused’s understanding of his election of self-representation,⁵ the Pre-Trial Judge set a deadline of 45 days starting from 17 September 2007 for him to file preliminary motions pursuant to Rule 72 (A).⁶ On 25 September 2007, the Accused sought an extension of time for the filing of preliminary motions, which was denied by the Pre-Trial Judge on 19 October 2007.⁷

¹ Preliminary Motion Pursuant to Rule 72 (A) (i), (ii) with a Request for Clarification of the Meaning of Certain Allegations in the Indictment, with Annexes I and II, 28 July 2008 (BCS version), 8 August 2008 (English version). On 11 August 2008, Tolimir filed a “Submission Concerning Notification of Erroneous Translation of the Preliminary Motion Pursuant to Rule 72 (A) (i), (ii) with the Request for Confirmation of the Understanding of Certain Allegations in the Indictment with Corrected Version of the Translation”, 14 August 2008 (English version), in which he claimed that the English translation of his motion contained a number of mistakes and omissions and attached a “corrected” English version. In a submission filed on 18 August 2008, Tolimir requested that the 11 August 2008 “corrected” translation of his motion be withdrawn and replaced by a new copy attached therein. See Submission Concerning Notification of “Incorrect Copy” of Corrected Version of the Preliminary Motion Pursuant to Rule 72 (A) (i), (ii) with the Request for Confirmation of the Understanding of Certain Allegations in the Indictment Annexed to the Accused’s Submission of 11 August 2008, 18 August 2008.

² Order Designating Judge for Initial Appearance, 1 June 2007.

³ Further Appearance, T. 42–44 (3 July 2007). The Prosecution stated that the material was delivered to the Registry for handing over to the Accused on 27 June 2007. The Registrar confirmed that attempts were made to serve the material on the Accused. *Ibid.* T. 42–43 (3 July 2007).

⁴ Further Appearance, T. 44–45 (3 July 2007).

⁵ Status Conference, T. 54–59 (14 September 2007).

⁶ *Ibid.*, T. 98–100 (14 September 2007).

⁷ Decision on Motion for Suspension of Time Limit for Filing of Preliminary Motions, 19 October 2007.

3. On 30 October 2007, within the time-limit prescribed by the Pre-Trial Judge, the Accused submitted the “Preliminary Motions on the Indictment in Accordance with Rule 72 of the Rules”, (“Original Preliminary Motions”),⁸ which included the Accused’s submissions on (1) the Tribunal’s lack of jurisdiction, (2) the defects in the form of the Indictment, and (3) the severance of counts.⁹

4. On 14 December 2007, the Trial Chamber rendered its decision denying the Original Preliminary Motions (“Decision of 14 December 2007”).¹⁰

5. On 22 August 2008, the Prosecution filed its response to the Second Preliminary Motion (“Response”)¹¹. On 26 August 2008, the Accused filed his reply (“Reply”).¹²

II. SUBMISSIONS OF THE PARTIES

A. Motion

6. With regard to the timing of the filing of the Second Preliminary Motion, the Accused submits that since his legal adviser “took receipt of the material disclosed in accordance with Rule 66 (A) (i) on 2 July 2008 and the Indictment which he forwarded to the accused in accordance with statements given pursuant to the decision of the pre-trial judge of 30 June 2008, the requirements under Rule 72 (A) of the Rules have been met to allow this preliminary motion to be filed”.¹³

⁸ Preliminary Motions on the Indictment in Accordance with Rule 72 of the Rules, 30 October 2007 (BCS version), 7 November 2007 (English version) (“Original Preliminary Motions”).

⁹ The Prosecution responded on 21 November 2007, requesting that the Motion be dismissed in its entirety (Prosecution Response to the Accused’s Preliminary Motion on the Indictment, Public with Confidential Appendices, 21 November 2007). On 3 and 4 December 2007 the Prosecution filed a confidential supplement to the Response and a corrigendum of the same (Supplement to Prosecution Response to the Accused’s Preliminary Motion on the Indictment, confidential, 3 December 2007; Supplement to Prosecution Response to the Accused’s Preliminary Motion on the Indictment – Correction, confidential, 4 December 2007).

¹⁰ Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules, 14 December 2007.

¹¹ Prosecution’s Response to Accused Tolimir’s Preliminary Motion Pursuant to Rule 72 (A) (i) and (ii), 22 August 2008 (“Response”).

¹² Request Pursuant to Rule 126 *bis* with Attached Reply to the Prosecution’s Response to Accused Tolimir’s Preliminary Motion, 26 August 2008 (“Reply”).

¹³ Second Preliminary Motion, para. 1. The Trial Chamber recalls that on 6 August 2007 the Accused elected to conduct his own defence in this case pursuant to Rule 45(F) of the Rules. *See* Submission by the Accused to the Registrar for Leave to Conduct his own Defence or to Appoint Counsel of his own Choosing Pursuant to Article 21.4(d), and Rule 45(F) and Amended Rule 62 (C) of the Rules, 6 August 2007 (BCS version), 10 August 2007 (English version). *See also* Notification by the Deputy Registrar, 27 August 2007. Since July 2007, the Accused has refused to receive disclosed materials from the Prosecution, as well as documents from other organs of the Tribunal. His refusal was initially premised on an issue of appointment of counsel, but subsequently and most predominantly on his claim that the materials and documents provided to him were not in the Serbian language, in the Cyrillic script. *See e.g.*, Procès Verbal, 25 September 2007; Procès Verbal, 27 June 2008. On 11 January 2008, the Registry assigned Mr. Predrag Milovancević and Mr. Vuk Sekulić, as legal adviser and case manager to the Accused, with effect from 3 January 2008, in order to assist him in the preparation of his defence, respectively. (*See* Registrar’s Notification Regarding the Assignment of Legal Assistance to the Accused, 11 January 2008). On 18 March 2008, Aleksandar Gajić, was assigned as a second legal adviser. On 30 June 2008, a status conference was held for the purpose of addressing the Accused’s continuous refusal to abide by the rulings of the Tribunal and accept service of the documents in this case. The Pre-Trial Judge informed the Accused that his continuous refusal to accept

7. The Accused argues that “the sole purpose” of the motion is (1) to challenge the Tribunal’s jurisdiction with regard to Counts 1 (Genocide) and 2 (Conspiracy to commit Genocide), “pursuant to Rule 72 (A) (i) and (iv)”¹⁴; and (2) to allege defects in the form of the Indictment, pursuant to Rule 72 (A) (ii).¹⁴

8. The Accused further submits that the wrong or imprecise translation of certain allegations in the Serbian version of the Indictment also constitutes a formal defect. Since he relies on the Serbian version of the Indictment, if the translation contains substantive defects, these will inevitably lead to “either a failure to understand the charges or a misapprehension of them [...]”.¹⁵

9. The Accused requests leave to exceed the word-limit, given the “substantive nature of the issues raised, the gravity of the charges, the numerous claims of defects in the Indictment, and the need for the arguments of the accused to be presented in a clear and unequivocal way [...]”.¹⁶

1. Challenges to the jurisdiction

10. The Accused submits that the allegations concerning opportunistic killings, reburial operation, and forcible transfer of women and children are “beyond the scope of Article 4 of the Statute”.¹⁷ It is alleged, *inter alia*, that the opportunistic killings and the reburial operation were not carried out with genocidal intent, that the reburial operation is not an element of the crimes of genocide or conspiracy to commit genocide, and that forcible transfer is not an act of genocide unless it falls within Article 4(2)(e) and that it cannot be considered as an element that is relevant for establishing any of these two crimes.¹⁸ Further, the Accused claims that paragraph 24 is

documents in this case and disallowing his legal team to do so amounted to “substantial and persistent obstruction” and was impeding the expeditious advancement of the case. Further, the Trial Chamber was of the opinion that this pre-trial behaviour, when considered as a whole, established that continued self-representation would substantially and persistently obstruct the proper and expeditious conduct of the trial. The Accused was then given a final warning that unless he instructed the Registry by 4 July 2008 that he was prepared to accept all material which had been and would be provided to him in BCS in the Latin or Cyrillic script, the Trial Chamber would issue an order for the appointment of counsel (T. 173, 176–177, 30 June 2008). On the same day, Mr. Gajić filed a document with the authorisation of the Trial Chamber, indicating that the Accused’s legal advisers would receive all documents served in this case to the Accused by the Registry or the Prosecution and subsequently transmit them to the Accused. *See* Statements in Accordance with the Decision of the Pre-Trial Judge of 30 June 2008 Concerning Disclosure, 30 June 2008 (BCS version), 1 July 2007 (English version); *see also* Corrigendum to Statement in Accordance with the Decision of the Pre-Trial Judge of 30 June 2008 Concerning Disclosure, 3 July 2008. The Accused subsequently confirmed this in a submission dated 4 July 2008. *See* Submission of the Accused to the Registrar of the Tribunal and the Pre-Trial Chamber Pursuant to the Order of the Pre-Trial Judge Dated 30 June 2008 on Disclosure, 4 July 2008 (BCS version), 9 July 2008 (English version).

¹⁴ Second Preliminary Motion, para. 3.

¹⁵ Second Preliminary Motion, para. 5.

¹⁶ Second Preliminary Motion, para. 6.

¹⁷ Second Preliminary Motion, paras. 7–12.

¹⁸ Second Preliminary Motion, paras. 8–10. The Accused submits that the third form of the JCE, in particular with regard to opportunistic killings as charged in the Indictment, is not applicable to the crime of genocide because “it conflicts with the express requirement that the act must be committed with genocidal intent”, and “the actus reus of genocide should be committed with *dolus directus*.” *Ibid.*, para. 15.

incorrect as it includes an allegation of forcible transfer rather than “destruction”, as indicated in the relevant heading.¹⁹ The Accused concludes that the Tribunal does not have jurisdiction to consider the allegations contained in paragraphs 10(b) and 22–24 so as “to establish whether the accused committed the crime[s] of genocide or conspiracy to commit genocide”.²⁰

11. The Accused stresses that the Tribunal does not have jurisdiction on acts which the Prosecution does not allege to have been committed with genocidal intent,²¹ and that, in order for the Tribunal to have jurisdiction on the crime of genocide and conspiracy to commit genocide, it is the accused and not the perpetrator who must have the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. In this respect, it is submitted that paragraph 88 of the Indictment, related to the *mens rea* for the crime of genocide (“the accused and/or perpetrator acted with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”) is incorrect.²²

12. Tolimir therefore requests that: (1) paragraphs 10(b), 22, 23, 24 of the Indictment be removed “from the part of the Indictment where there are assertions which [...] substantiate Counts 1 and 2 of the Indictment, as well as all references in the paragraphs of these counts on the parts of the Indictment in which assertions from these paragraphs will be contained”; (2) the term “opportunistic killings” from paragraph 10(a) and the words “and/or perpetrator” from paragraph 88 be removed.²³

13. The Accused further claims that neither genocide nor conspiracy to commit genocide can be committed through participation in a JCE.²⁴ In particular, the Accused submits that “[c]onspiracy to commit genocide is the act of creating a JCE, and it goes against basic logic to charge the accused with conspiracy to commit genocide through his alleged participation in a JCE”.²⁵ It is alleged that “the act of conspiracy can be carried out only through direct participation in [the] conclusion of an agreement[;] the ‘realisation’ of a conspiracy to commit genocide is not encompassed by Article 4(3)(b) of the Statute”; rather, such realisation would constitute genocide, if performed through any of the acts listed in Article 4 (2) of the Statute.²⁶ Thus, the Accused submits that it is not within the

¹⁹ Second Preliminary Motion, para. 11.

²⁰ Second Preliminary Motion, para. 12.

²¹ Second Preliminary Motion, para. 17.

²² Second Preliminary Motion, paras. 13–17.

²³ Second Preliminary Motion, para. 18.

²⁴ Second Preliminary Motion, paras. 19–27.

²⁵ Second Preliminary Motion, para. 20.

²⁶ Second Preliminary Motion, paras. 21–22.

Tribunal's jurisdiction to "examine the realization of the alleged 'agreement' and 'conspiracy' in the context of the charge of conspiracy to commit genocide".²⁷

14. The Accused concludes that it is outside the Tribunal's jurisdiction to establish responsibility for genocide and for conspiracy to commit genocide on the basis of the JCE theory.²⁸

15. The Accused therefore requests the Trial Chamber either (i) to find that it does not have jurisdiction with regard to Counts 1 and 2 of the Indictment, (ii) to order the Prosecution to amend the Indictment "in accordance with the Chamber's understanding of the legal issues raised [in the motion] pertaining to the scope of the Tribunal's jurisdiction", or (iii) to confirm that the Accused is charged with conspiracy to commit genocide on the basis of his participation in a JCE.²⁹

2. Challenges to the form of the Indictment

16. The Accused alleges several challenges to the form of the Indictment.³⁰ Among his main claims are (i) insufficient information as to the allegations on conspiracy to commit genocide;³¹ (ii) imprecise and incorrect allegations on the JCE to murder the able-bodied Muslim men and JCE to forcibly transfer and deport the Srebrenica and Žepa Muslim population, in particular with regard to their time-frame,³² and to Tolimir's role and actions in the two JCEs;³³ (iii) insufficient information with regard to the allegations in Counts 3 (Extermination), 4 and 5 (Murder under Articles 3 and 5 of the Statute),³⁴ Count 6 (Persecution),³⁵ Count 7 (Forcible Transfer)³⁶ and 8 (Deportation);³⁷ (iv) incorrect allegations on the alleged individual criminal responsibility under Article 7(1);³⁸ (v) "illogicalities" concerning the roles of Ljubiša Beara and Vujadin Popović;³⁹ (vi) inadequate translation of specific terms and expressions in the Serbian version of the Indictment.⁴⁰

²⁷ Second Preliminary Motion, para. 22.

²⁸ Second Preliminary Motion, paras. 23–26.

²⁹ Second Preliminary Motion, para. 27.

³⁰ Second Preliminary Motion, paras. 28–96.

³¹ Second Preliminary Motion, paras. 28–29.

³² Second Preliminary Motion, paras. 30–35. Tolimir stresses that opportunistic killings on the basis of the third form of JCE, especially with regard to the JCE to murder the able-bodied Muslim men, is unclear and should be removed from the Indictment. *Ibid.*, paras. 36–37.

³³ Second Preliminary Motion, paras. 38–59 (with regard to JCE to murder the able-bodied Muslim men), and 60–69 (with regard to JCE to forcibly transfer and deport the Srebrenica and Žepa Muslim population).

³⁴ Second Preliminary Motion, paras. 70–71, 74–75.

³⁵ Second Preliminary Motion, paras. 76–78.

³⁶ Second Preliminary Motion, paras. 81–84.

³⁷ Second Preliminary Motion, paras. 76–77.

³⁸ Second Preliminary Motion, paras. 72–73.

³⁹ Second Preliminary Motion, paras. 85–87.

⁴⁰ Second Preliminary Motion, paras. 88–96.

17. The Accused submits that the defects in the form of the Indictment “are such that the charges in Counts 1 and 2 [...] do not fall within the Tribunal’s jurisdiction”, and that “they lead to a misapprehension of the charges or allow them to be modulated [...].”⁴¹

B. Response

18. The Prosecution submits that the Motion is wholly without merit and should be dismissed in all respects.⁴²

19. First, the Prosecution requests leave to exceed the word-limit for responses.⁴³

20. According to the Prosecution, the Second Preliminary Motion merely restates arguments already raised by the Accused in the Original Preliminary Motions and expressly or implicitly addressed by the Trial Chamber in its Decision of 14 December 2007.⁴⁴ It is submitted that nothing in the Second Preliminary Motion suggests that the Trial Chamber’s decision failed to account for, or inadequately addressed, the issues now articulated.⁴⁵ The Prosecution submits that the Second Preliminary Motion fails to identify any grounds for reconsideration.⁴⁶

21. The Prosecution however submits that should the Trial Chamber consider the arguments advanced by the Accused on the merits, they should be dismissed.⁴⁷ While the Accused contests the jurisdiction of the Tribunal to consider various substantive allegations in the Indictment concerning Counts 1 and 2, these allegations are essentially challenged as a matter of form, and as such they should be considered in the context of the well-established general pleading principles.⁴⁸

22. With regard to the Accused’s jurisdictional claims, the Prosecution submits that “neither these contentions, nor their underlying basis reveal any cognizable ground for the remission of jurisdiction in this case, much less demonstrate any defect in the form of the Indictment rising to the level of legal insufficiency”.⁴⁹ Instead, it is submitted that the arguments advanced “demonstrate

⁴¹ Second Preliminary Motion, para. 97.

⁴² Response, para. 1.

⁴³ Response, para. 3. The Prosecution submits that the Response addresses a lengthy motion and requires, *inter alia*, some discussion of the relevant procedural background. *Ibid.*

⁴⁴ Response, paras. 2, 12–18.

⁴⁵ Response, para. 13.

⁴⁶ Response, paras. 2, 19–20.

⁴⁷ Response, para. 21.

⁴⁸ Response, para. 22.

⁴⁹ Response, para. 24.

only a remarkable misconstruction of the [...] Indictment”, and in the context of the Decision of 14 December 2007, “exhibit a profound misapprehension of well-settled Tribunal jurisprudence”.⁵⁰

23. The Prosecution further claims that all of the substantive allegations contained in the Indictment are identical to the operative indictment in the *Popović et al.* case and their sufficiency and form have thus been exhaustively considered by the Trial Chamber in that case.⁵¹ Furthermore, the Decision of 14 December 2007 had clearly determined that “the Indictment contains a sufficient amount of information on the crimes charged” and that the material facts supporting each mode of liability are “adequately pleaded in the Indictment in order to allow the Accused to prepare his defence”.⁵²

24. The Prosecution submits that the Second Preliminary Motion fails to raise any tenable grounds establishing the inability of the Accused to formulate a defence to the charges against him.⁵³

25. Finally, with regard to the Accused’s claim that certain sections of the Indictment suffer from poor translation or insufficient exactness, the Prosecution submits that it relies on the English version of the Indictment as authoritative and sees no reason to depart from the translation thus far provided. In any event, it is submitted that these issues are not the proper subject of a motion challenging the jurisdiction of form of an indictment.⁵⁴

C. Reply

26. The Accused submits that the Reply is necessary because the Prosecution introduced new elements not raised in the Second Preliminary Motion and because of it misinterpreted certain arguments of the Accused.⁵⁵

27. The Accused claims that the arguments and requests included in the Second Preliminary Motion are “completely different” and “new” from those stated in the Original Preliminary

⁵⁰ Response, para. 24.

⁵¹ Response, para. 25, citing *Prosecutor v. Popović et al.*, *Prosecutor v. Trbić*, Case Nos. IT-05-88-PT, IT-05-88/1-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, para. 37.

⁵² Response, para. 26, citing Decision of 14 December 2007, paras. 51 and 62.

⁵³ Response, para. 27. What it is claimed, that “the defects in form are such that they lead to a misapprehension of the charges or allow them to be modulated”, clearly fails to meet the threshold standard established by the Tribunal’s jurisprudence for demonstrating the legal insufficiency of an indictment. *Ibid.*, citing Second Preliminary Motion, para. 97.

⁵⁴ Response, para. 28.

⁵⁵ Reply, p. 2.

Motion.⁵⁶ They have therefore not yet been considered by the Trial Chamber, “neither expressly [nor] implicitly”.⁵⁷

28. The Accused also stresses that the fact that jurisdictional issues concerning Articles 4 and 7 of the Statute were not raised and considered in the *Popović et al.* case should not constitute a bar for the Accused to raise them in the present case.⁵⁸ The motions are different and the Trial Chamber may reach different conclusions on certain points.⁵⁹ Issues on which the Trial Chamber has decided upon in the *Popović et al.* case should not be considered as *res judicata* for the purpose of the present case.⁶⁰

29. The Accused submits that his jurisdictional arguments are separate from those challenging the form of the Indictment.⁶¹ In particular, he claims that the Prosecution made charges which are not within the Tribunal’s jurisdiction, such as whether the reburial operation, the forcible transfer and the opportunistic killings are acts covered by Article 4(2) of the Statute; whether acts not committed with genocidal intent are covered by Article 4 of the Statute; whether certain elements are to be considered elements of a particular crime; whether JCE is applicable to the crimes of genocide or conspiracy to commit genocide.⁶² He further submits that the relationship between conspiracy to commit genocide and JCE has not been established in the Tribunal’s jurisprudence.⁶³ The Accused stresses that the issues at stake are conspiracy as a separate crime and conspiracy as a separate mode of liability.⁶⁴ The Accused claims that the application of the JCE in order to establish the crimes of genocide and conspiracy to commit genocide “is contrary, does not exist and never existed in international customary law”.⁶⁵

30. With regard to the alleged wrong or imprecise translation of certain parts of the Indictment, the Accused submits that it is on the Prosecution to provide the correct translation of the Indictment, and such errors are “formal defects” that could easily be eliminated.⁶⁶

⁵⁶ Reply, paras. 2, 4.

⁵⁷ Reply, para. 3. The Accused mentions, as examples, that the Trial Chamber did not consider (i) the use of the term “likely” in a “very serious accusation concerning opportunistic killings”; (ii) whether the reburial operation and opportunistic killings are acts of genocide that are included in Article 4 of the Statute; and (iii) any of the questions concerning the jurisdiction of the Tribunal in relation to Counts 1 and 2 of the Indictment. *Ibid.*

⁵⁸ Reply, para. 6.

⁵⁹ Reply, para. 6.

⁶⁰ Reply, para. 6.

⁶¹ Reply, paras. 10–12.

⁶² Reply, paras. 12–13.

⁶³ Reply, para. 14.

⁶⁴ Reply, paras. 15, 16–19.

⁶⁵ Reply, para. 20.

⁶⁶ Reply, para. 21.

31. Concerning the timing of the filing of the Second Preliminary Motion, the Accused submits that at the time when he filed the Original Preliminary Motions, he was not in a position to be informed in detail about the content of the Indictment, nor about the supporting material.⁶⁷

III. APPLICABLE LAW

A. Rule 72 (A)

32. Rule 72 (A) reads in the relevant parts that “[p]reliminary motions, being motions which (i) challenge jurisdiction; (ii) challenge defects in the form of the indictment [...] shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A)(i) [...]”.

B. Reconsideration

33. According to the jurisprudence of the Tribunal, a Chamber has “inherent discretionary power to reconsider a previous decision in exceptional cases if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice”.⁶⁸ A party urging reconsideration must satisfy the Trial Chamber of particular circumstances justifying reconsideration in order to avoid injustice.⁶⁹

IV. DISCUSSION

34. The Accused bases his Second Preliminary Motion on the fact that he has only received the relevant material recently.⁷⁰ He submits that at the time when he filed the Original Preliminary Motions, he was not in a position to be informed in detail about the content of the Indictment, nor about the supporting material.⁷¹

35. The Trial Chamber recalls that, after the Accused made his election to represent himself, the Pre-Trial Judge, during the status conference of 14 September 2007, clearly outlined to him the consequences of his decision, including the fact that he would be responsible to file written submissions in accordance with the Rules and practice directions of the Tribunal within the

⁶⁷ Reply, para. 22.

⁶⁸ See, for example, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-AR73.1, Decision on Zdravko Tolimir’s Request for Reconsideration of Appeals Chamber’s Decision of 28 March 2008, 18 June 2008, para. 8.

⁶⁹ See, e.g., Decision on Defence Motion Requesting Reconsideration or Certification of Decision Admitting Exhibits with Testimony of Witness 168, 20 July 2007, p. 5.

⁷⁰ See *supra* para. 6.

⁷¹ See *supra* para. 31, referring to Reply, para. 22.

prescribed deadlines.⁷² Subsequently, the Pre-Trial Judge set the deadline for filing preliminary motions.⁷³ The Trial Chamber notes that by virtue of his election to represent himself, the Accused has asserted his ability to conduct his case without legal assistance.⁷⁴ The Accused eventually filed the preliminary motions within the time-limit after the Trial Chamber denied any extension of time.⁷⁵ On 14 December 2007, the Trial Chamber issued its decision on the preliminary motions.⁷⁶ Thus the preliminary motions pursuant to Rule 72 have already been submitted by the Accused and decided upon by the Trial Chamber.

36. The Accused in the Reply specifically states that his motion does not constitute a request for reconsideration but rather a new motion.⁷⁷ However, the Trial Chamber has, in the interests of justice, carefully considered the arguments advanced by the Accused to determine whether there was anything in those arguments that would justify a reconsideration of the Decision of 14 December 2007. According to the jurisprudence of the Tribunal, a Chamber has “inherent discretionary power to reconsider a previous decision in exceptional cases if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice”, and a party urging reconsideration must satisfy the Trial Chamber of particular circumstances justifying reconsideration in order to avoid injustice.⁷⁸ The Accused has not argued and the Trial Chamber does not find that a clear error of reasoning in its Decision of 14 December 2007 has been demonstrated or that reconsideration is necessary to prevent an injustice.

37. Insofar as the motion alleges challenges to the jurisdiction, the Trial Chamber has considered those arguments and notes that while couched as such, they do not relate to the jurisdiction of the Tribunal. Rather the points raised constitute issues of law and evidence which can be properly advanced and argued during the course of trial.

⁷² Status conference, 14 September 2007, T. 55–59. See in particular: “[Judge Prost]: [...] what I want to discuss with you and make sure you understand is that in making the election to defend yourself, you're telling me and you're telling the Trial Chamber that you do not wish to be represented by counsel, that you do not need the legal services of Mr. Mrkić or any other lawyer, that you wish to act as your own counsel. You're saying that you wish to take on the burden yourself of preparing and presenting your case, the responsibility for filing written submissions in accordance with the Rules and practice directions, the responsibility to present your oral submissions yourself, to examine and cross-examine witnesses at the trial phase, to make oral and written arguments. All of these would be your responsibility. There is certainly some possibilities of assistance in some respects, but the responsibility for all of these matters, Mr. Tolimir, in a self-representation situation rests with you, and I want you to be fully aware and understand that. [...]” “[Mr. Tolimir]: [...] I'd like to say [...] that I am fully conscious of my responsibilities, and I will perform those responsibilities myself. I have the right to a legal adviser who will advise me on procedural issues, and I will meet all the other responsibilities I have myself.” *Ibid.*, T. 56–57.

⁷³ See *supra*, para. 2.

⁷⁴ See also, Status conference, 14 September 2007, T. 56, referring to *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007, para. 41.

⁷⁵ See *supra*, paras. 2–3.

⁷⁶ See *supra*, para. 4.

⁷⁷ See *supra*, para. 27.

⁷⁸ See *supra*, para. 33.

38. Finally, with regard to the claims related to the translation of certain parts of the Indictment, this is not an issue to be dealt with in motions challenging the jurisdiction or the form of an indictment, and the Trial Chamber will therefore address this matter separately with the parties.

V. DISPOSITION

For these reasons, pursuant to Rules 72 and 126 *bis* of the Rules, the Trial Chamber hereby

- (1) **GRANTS** the Accused and the Prosecution leave to exceed the word-limit in the Second Preliminary Motion and in the Response, respectively;
- (2) **GRANTS** the Accused leave to file the Reply; and
- (3) **DENIES** the Second Preliminary Motion.

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



Carmel Agius
Presiding

Dated this first day of October 2008
At The Hague
The Netherlands

[Seal of the Tribunal]