



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-00-39 & 40-PT

Date: 4 March 2002

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Decision of: 4 March 2002

PROSECUTOR

v.

**MOMČILO KRAJIŠNIK
&
BILJANA PLAVŠIĆ**

**DECISION ON PROSECUTION'S MOTION FOR LEAVE TO
AMEND THE CONSOLIDATED INDICTMENT**

Office of the Prosecutor:

Mr. Mark Harmon
Mr. Alan Tieger

Counsel for the Accused:

Mr. Deyan Brashich and Mr. Nikola P. Kostich, for Momčilo Krajišnik
Mr. Robert J. Pavich, Mr. Eugene O'Sullivan and Mr. Peter Murphy, for Biljana
Plavšić

I. BACKGROUND

1. On 1 February 2002, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution’s Motion for Leave to Amend the Consolidated Indictment” (“Motion”), in which it seeks leave to amend the Consolidated Indictment in the form attached to its Motion.
2. The proposed Amended Indictment contains the following general differences from the current Consolidated Indictment:
 - (a) Count 6 in the current Consolidated Indictment dealing with offences under Article 2 of the Statute of the Tribunal (“Statute”) has been left out, thus removing from contention the issue of internationality of the armed conflict in Bosnia during the period with which the Indictment is concerned;
 - (b) The proposed Amended Indictment has reduced the number of municipalities in which it seeks to link crimes to the accused from 41 to 37 municipalities;
 - (c) The individual criminal responsibility of the accused has been pleaded more clearly, indicating that they “committed” offences under Article 7(1) of the Statute as participants in a joint criminal enterprise; separating allegations under Articles 7(1) and 7(3), and giving a more detailed exposition of the Prosecution’s allegations concerning genocide and the persecutory acts with which they are charged;
 - (d) A number of schedules have been attached to the proposed Amended Indictment detailing the dates and locations of killings not related to detention facilities (Schedule A); the dates and locations of killings related to detention facilities (Schedule B); the names and locations of the detention facilities (Schedule C); and, the locations of cultural monuments and sacred sites that were damaged and destroyed (Schedule D). These schedules provide greater particularisation of some acts alleged, add some incidents not pleaded in the current Consolidated Indictment and remove some incidents pleaded in the current Consolidated Indictment. The schedules provide greater clarity in the structure of the Indictment.

3. On 14 February 2002, the Defence for Biljana Plavšić filed its “Response of Biljana Plavšić to Motion of Prosecutor to Amend Consolidated Indictment” (“Plavšić Response”), in which it argues that the proposed Amended Indictment is defective, lacks sufficient particularisation of material facts and is in violation of the applicable provisions of the Statute and Rules of Procedure and Evidence of the Tribunal (“Rules”). In particular, paragraphs 2, 8, 15-17, 18-19, 24 and 27 of the proposed Amend Indictment are objected to as lacking the particulars of charges against Plavšić such that she would be in a position to prepare her defence. The Plavšić Defence submits that the prosecution should be required to re-plead the mentioned paragraphs, failing which the Indictment against her should be dismissed.

4. On 15 February 2002, the Defence for Momčilo Krajišnik filed its “Opposition to Motion for Leave to Amend Indictment and Motion Directing Repleading of Proposed Amended Indictment with Full Specificity or in the Alternative Leave to File Motion for a Bill of Particulars” (“Krajišnik Response”), in which it argues that the proposed Amended Indictment is defective and seeks an Order that (a) the prosecution be required to further amend the Indictment or, (b) alternatively that the Krajišnik Defence be granted leave to file a motion for further and better particulars. In particular, paragraphs 1, 3, 4, 6, 8, 11, 12, 15-17, 18-19, 24 and 27 of the proposed Amend Indictment are objected to as lacking the degree of specificity required by the Statute and Rules of the Tribunal.

5. On 18 February 2002, the Prosecution sought leave to file a Reply to the Defence Responses to the Motion, which was granted by the Trial Chamber in its Order of 20 February 2002.¹ The Prosecution filed its “Prosecution’s Reply to Defence Responses on Amended Indictment Application” on 21 February 2002 (“Reply”). That Reply addressed the arguments of the Defence in their Responses and provides some additional legal argument in support of the Motion.

¹ “Prosecution’s Request for Leave to Reply to Defence Responses to Prosecution’s Motion for Leave to Amend the Consolidated Indictment”, 18 February 2002 and “Order Granting Prosecution’s Request to Reply to Defence Responses on Amended Indictment Application”, 20 February 2002.

6. On 25 February 2002, the Krajišnik Defence filed a Request for an oral hearing on the Motion and suggests that this argument take place at the time of the scheduled Status Conference on 8 March 2002.

II. THE LAW

7. The Motion of the Prosecution is made pursuant to Rule 50 (A)(i)(c) of the Rules, which provides that the Prosecution “may amend an indictment...after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties”.
8. With respect to the pleading requirements for indictments before the Tribunal, Articles 18.4, 21.2 and 21.4 (a) of the Statute are applicable. Rule 47 (C) of the Rules sets out the requirements the Prosecution is under with respect to pleading in the indictment, and reads as follows:

The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.
9. What the Prosecution is required to set out in an Indictment are the material facts upon which the charges against the accused are based. The Prosecution is not required to provide any evidence or a summary of evidence it intends to rely upon to prove its case at trial.² The pleadings in an indictment will therefore be sufficiently particular when the material facts of the Prosecution case are concisely set out with sufficient detail to inform an accused clearly of the nature and cause of the charges against him, such that he is in a position to prepare a defence.³ The legal prerequisites which apply to the offences charged are material facts and must also be pleaded by the Prosecution.⁴
10. The Prosecution will, at the time of filing its pre-trial brief, be required to provide “a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the

² *Prosecutor v. Kupreškić and Others*, Appeal Judgement, 23 October 2001 (“*Kupreškić* Appeal Judgement”), para. 88; *Prosecutor v. Krajišnik*, “Decision Concerning Preliminary Motion on the Form of the Indictment”, 1 August 2000 (“*Krajišnik* Decision of 1 August 2000”), footnote 27.

³ See *Kupreškić* Appeal Judgement, para. 88.

⁴ *Prosecutor v. Hadžihazanović and Others*, “Decision on Form of Indictment”, 7 December 2001 (“*Hadžihazanović* Decision”), para. 10.

accused”.⁵ The Prosecution cannot, however, cure a defective indictment through its supporting material or its pre-trial brief.⁶

11. This case concerns allegations against civilians in senior positions of political power who are said to be liable as commanders as well as participants in a joint criminal enterprise with others. With respect to a case based upon superior responsibility, the Trial Chamber notes that it dealt with this issue in its previous considered decision on the form of the current Consolidated Indictment. Since then, a number of decisions have been issued by Trial Chambers and by the Appeals Chamber which support the general propositions set out in that previous decision. One material fact the Prosecution is obliged to plead is the nature of the superior-subordinate relationship between the accused and others whose acts he is alleged to be responsible for.⁷ It must be pleaded that the accused knew or had reason to know that the crimes were about to be or had been committed by those others,⁸ and the related conduct of those others for whom he is alleged to be responsible.⁹ The facts relevant to the acts of those subordinates will usually be stated with less precision.¹⁰ The reason for this is that the detail of those acts (by whom and against whom they are committed) is often unknown and, at any rate, the acts themselves often cannot be greatly in issue.¹¹ The Prosecution must also plead that the accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.¹²

⁵ Rule 65 *ter* (E) of the Rules.

⁶ *Prosecutor v Brdanin & Talić*, Case IT-99-36-PT, “Decision on Objections by Radoslav Brdanin to the Form of the Amended Indictment”, 23 February 2001 (“Second *Brdanin & Talić* Decision”), paras. 11-13.

⁷ *Krajišnik* Decision of 1 August 2000, par 9; *Prosecutor v Krnojelac*, “Decision on Preliminary Motion on Form of Amended Indictment”, 11 Feb 2000 (“*Krnojelac* Decision”), para. 9.

⁸ *Krajišnik* Decision of 1 August 2000, par 9; *Prosecutor v Brdanin & Talić*, “Decision on Objections by Momir Talić to the Form of the Amended Indictment”, 20 Feb 2001 (“First *Brdanin & Talić* Decision”), par 19;

⁹ *Prosecutor v Krnojelac*, “Decision on Preliminary Motion on Form of Amended Indictment”, 11 Feb 2000 (“*Krnojelac* Decision”), para. 38.

¹⁰ First *Brdanin & Talić* Decision, para. 19.

¹¹ *Krajišnik* Decision of 1 August 2000, para. 9; *Prosecutor v Kvočka*, “Decision on Defence Preliminary Motions on the Form of the Indictment”, 12 Apr 1999 (“*Kvočka* Decision”), para. 17; *Krnojelac* Decision, para. 18(A).

¹² *Krajišnik* Decision of 1 August 2000, para. 9; First *Brdanin & Talić* Decision, para. 19.

12. Both the Krajišnik and Plavšić Defence rely upon the *Kupreškić* Appeal Judgement in support of their arguments that the proposed Amendment Indictment is defective. The Appeals Chamber in its Judgement stated that the materiality of a particular fact cannot be decided in abstract, but depended upon the nature of the Prosecution case.¹³ The Appeals Chamber went on to state:

Obviously, there may be instances where the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'.¹⁴

13. Finally, the Trial Chamber notes that the material facts which must be pleaded with respect to an allegation that the accused participated in a joint criminal enterprise are as follows: the purpose and period of the enterprise; the identity of the participants in the enterprise, and the nature of the participation of the accused in that enterprise.¹⁵

¹³ *Kupreškić* Appeal Judgement, para. 89.

¹⁴ *Ibid.*

¹⁵ *Krnjelac* Decision.

III. DISCUSSION OF THE APPLICATION

14. The Trial Chamber will deal with the relevant objections of the two accused, paragraph by paragraph.
15. The Krajišnik Defence argues that in paragraph 1, the Prosecution fails to specify the dates between which Krajišnik is alleged to have been a member of the National Security Council of the Bosnian Serb Republic. It is further argued that the proposed Amended Indictment does not allege acts that the accused in his capacity (in the SDS or in the governing bodies such as the National Security Council, the Expanded Presidency and the Assembly of the Republica Srpska) did or participated in which constituted violations of the law. It is submitted that any amendment of the Indictment must specify the acts and dates with which the accused is charged.
16. Whilst it is noted that the period in which the accused is alleged to have been a member of the National Security Council of the Bosnian Serb Republic is not completely clear from the drafting in paragraph 1, to the extent this matter constitutes a material fact, the Chamber is of the view that this could be dealt with by a simple official clarification by the Prosecution. The rest of the information sought by the Krajišnik Defence with respect to paragraph 1 deals with specific conduct of the accused and constitutes a request for evidence. The Prosecution is not obliged to plead these matters in more particularity than it has already done.
17. The Plavšić Defence raises the same concern with respect to the dates between which Plavšić is alleged to have been President of the Council for Protection of the Constitutional Order of the Presidency of Bosnia and Herzegovina and a member of the National Security Council of the Bosnian Serb Republic. Again, the Trial Chamber is of the view that to the extent this matter constitutes a material fact, this could be dealt with by a simple official clarification by the Prosecution.
18. Paragraphs 3 to 9 of the proposed Amended Indictment deal with the participation of the accused in a joint criminal enterprise. The Krajišnik Defence argues that the term "enterprise" is not described, defined or explained and that there is no

reference to any affirmative acts or statements made by the accused that would cause him to become a member of a joint criminal enterprise. It is further alleged that the proposed Amended Indictment does not mention the commencement date of the enterprise and does not reveal the identity of the other members (apart from a reference to thousands of individuals in paragraph 7). The Krajišnik Defence goes on to argue that the proposed Amended Indictment does not refer to any particular agreements made by Krajišnik with other members of the enterprise in order to fulfil the common goals. The Prosecution, in its Reply, argues that it has particularised the elements, participation and timing of the joint criminal enterprise alleged.

19. The Krajišnik Defence goes on to argue that in paragraph 5, the proposed Amended Indictment does not specify the acts (statements, written communications etc.) which would support this allegation. With respect to paragraph 7, the Krajišnik Defence argues that all the named entities that allegedly participated in the joint criminal enterprise, are and were legitimate political and governmental organs created through a democratic political process. In order to show how these legitimate office holders²⁷ and entities became participants in a joint criminal enterprise the Indictment must, it is said, specify which legislative actions, statements, acts and omissions transformed the legitimate activities of the individuals and entities into illegal ones and when the agreement to commit illegal acts took place. The Indictment must also specify when and how Krajišnik became a participant or aider or abettor in the enterprise.
20. With respect to paragraph 8, both accused take issue with the manner in which they are alleged to have participated in the joint criminal enterprise. It is argued that instead of identifying the facts on which the charges are based, the paragraph merely states in a generalised language (i.e., “directing, instigating, promoting...”) the alleged legal nature of their involvement. Once again, it is argued that the proposed Amended Indictment does not specify what acts the accused are alleged to have committed in the joint criminal enterprise.
21. The Trial Chamber recalls that what is required to be pleaded by the Prosecution with respect to an allegation that an accused participated in a joint criminal enterprise is the purpose and period²⁸ of the enterprise; the identity of the participants in the enterprise, and the nature of the participation of the accused in

that enterprise. In paragraph 4, the Prosecution states that the “objective of the joint criminal enterprise was the permanent removal, by force or other means, of Bosnian Muslim, Bosnian Croat or other non-Serb inhabitants from large areas of Bosnia and Herzegovina”. In paragraph 5, it is pleaded that the crimes enumerated in all counts in the Indictment were within the object of the joint criminal enterprise. The particularised crimes set out in paragraphs 15-17 and the Schedules attached to the Indictment are therefore incorporated as particulars of the result of the alleged joint criminal enterprise. In paragraph 6, it is pleaded that the joint criminal enterprise was in existence “at the time of the commission of the underlying criminal acts alleged...and at the time of the participatory acts of each of the accused”. In paragraph 7, the Prosecution pleads that the accused worked in concert with seven named individuals and a number of identifiable political and military groups. In paragraph 8, the Prosecution lists 11 separate ways in which the accused participated in the joint criminal enterprise.

22. The Trial Chamber is satisfied that the Prosecution has discharged its obligation to specify the relevant aspects of the joint criminal enterprise. The legal elements which apply to this form of criminal liability are set out satisfactorily. Many of the articulated objections of the accused amount to demands for information which is properly characterised as evidence. Furthermore, whilst the list of co-perpetrators in the joint criminal enterprise is broad and far reaching, the nature of this case and the role of each accused is such that the Prosecution will necessarily plead the relevant material facts in this manner. The Prosecution will be required in its pre-trial brief, and more fully at trial, to show the evidence which establishes the plan and the role of the accused in it.
23. Paragraphs 10 to 14 of the proposed Amended Indictment deal with the alleged command responsibility of the two accused under Article 7 (3) of the Statute. Paragraph 11 alleges that Krajišnik as a member of the Expanded Presidency had *de jure* control and authority over the Bosnian Serb military forces and the political and governmental organs that were involved with the crimes. The Krajišnik Defence argues that the allegation fails to inform with any specificity the competence, authority and jurisdiction that his position held which would allow him to order or control the various government organs. Paragraph 12 of the Indictment alleges that he held a prominent position in the Bosnian Serb leadership and by virtue of his position and associations he had *de facto* control

and authority over the individuals and organs that participated in the alleged crimes. It is argued that the term “prominent” is a relative and loose concept and that the Indictment must specify acts and statements showing a course of conduct which would form the foundation of *de facto* control. Paragraph 14 of the Indictment alleges that Krajišnik failed to take measures to prevent crimes or to punish the perpetrators. It is argued that the proposed Amended Indictment does not specify which acts or omissions support this allegation and must allege that Krajišnik had the authority to control and discipline any member of the Bosnian Serb government, military force or police department.

24. The Trial Chamber finds that the particulars sought by the Defence are clearly matters for evidence and the Prosecution, having sufficiently pleaded the responsibility of the accused under Article 7 (3), is not required to supply further particulars with respect to this matter in the indictment. The objections of the Defence are therefore dismissed.

25. Paragraphs 15-17 deal with allegations of genocide and complicity in genocide by the accused. The Defence for the two accused argue that the Prosecution has failed to plead any material facts underpinning the allegations. Specifically, it is said that the Prosecution fails to identify the places and the times at which genocide is alleged to have occurred. Moreover, it is argued that the proposed Amended Indictment fails to plead with specificity what acts the accused are alleged to have committed which might amount to the crimes of genocide and complicity in genocide.

26. The Trial Chamber accepts the Prosecution’s argument in its Reply that genocide is a legal characterisation applied to particular acts which are committed with a specific intent. So long as the Prosecution has pleaded the material facts concerning the acts constituting the *actus reus* of the genocide alleged and has pleaded the legal elements constituting the special *mens rea* requirement, it has satisfied the specificity requirements for the purposes of the indictment. In this case, the Prosecution has alleged that the genocidal acts were carried out as part of a manifest pattern of persecutions committed in furtherance of the objective of the joint criminal enterprise in which the accused participated. The acts particularised in paragraphs 15-17 and Schedules A, B and C attached to the proposed Amended

Indictment are incorporated. The Trial Chamber finds that these particulars are sufficient for the purposes of the material facts required to be pleaded in an Indictment. The Prosecution has also sufficiently pleaded the legal elements of the offences charged.

27. Both accused argue that paragraphs 18 to 19 and 24 are defective for the same reason that paragraph 8 is defective (they assert that these paragraphs are simply a repeat of what is pleaded in paragraph 8). In fact, paragraphs 18-23 deal with count 3, persecution. In paragraph 18, the accused are alleged to be liable for the alleged offences as participants in a joint criminal enterprise. In paragraph 19, particulars of the persecutions are set out and Schedules A to D are incorporated. Paragraph 24 sets out counts 4, 5 and 6 (extermination and wilful killing) and incorporates paragraphs 18 to 23.

28. The Trial Chamber has already made its findings with respect to paragraph 8 and the characterisation of the criminal responsibility of the accused under Article 7 (1) of the Statute.

29. It is noted that this Trial Chamber, in ruling on the current Consolidated Indictment, found there to be no lack of precision in the pleading of material facts in that indictment.¹⁶ The Chamber made particular reference to the higher level of responsibility alleged against the accused.¹⁷ It found that the Prosecution had satisfied, for the purposes of an indictment, the requirements for specificity in setting out the means by which the alleged crimes were committed, the persons who committed them, the locations, the victims and the approximate dates of the alleged crimes.¹⁸ The Trial Chamber notes that the proposed Amended Indictment provides greater particularisation of the criminal responsibility of the accused. Furthermore, it drops the Article 2 charges, removing the necessity for the Defence to investigate and prepare its case with respect to the issue of whether or not there was an international armed conflict in Bosnia and Herzegovina during the relevant period. It reduces slightly the breadth of the case against the accused and reformats the indictment to enable greater ease of reference to particular

¹⁶ *Krajišnik* Decision of 1 August 2000, para. 10.

¹⁷ *Ibid.* It is noted that whilst this decision concerned an application made by the accused Krajišnik, the same general proposition applies to the other accused in these proceedings, and the Consolidated Indictment concerned her as well.

categories of crimes alleged. These are initiatives which the Trial Chamber welcomes.

30. Having found that most the objections of the two accused amount to demands for evidence or a level of specificity not required by the Prosecution in an Indictment, the Trial Chamber would like to comment on the application by the Krajišnik Defence that it be granted leave to file a motion for further and better particulars. The Trial Chamber has dealt with several motions by the accused to be provided with further particularisation than was provided by the Prosecution in the Consolidated Indictment.¹⁹ We have noted in the past that the Prosecution will be required, at the time of filing its pre-trial brief pursuant to Rule 65 *ter* (E), to provide a summary of the evidence which it intends to bring regarding the commission of the alleged crimes and the role of the accused. The Trial Chamber will therefore reject the application made by the Krajišnik Defence, however it will consider any such application made after the Prosecution produces its pre-trial brief.

31. Finally, the Trial Chamber will reject the application made by the Krajišnik Defence for an oral hearing. The Chamber is satisfied that the parties have stated their arguments with fullness and is not of the view that an oral hearing will assist it further.

¹⁸ *Ibid.*, paras. 10-11.

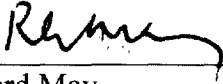
¹⁹ *See*, for example, the “Decision on Motion from Momčilo Krajišnik to Compel the Prosecution to Provide Particulars”, 8 May 2001; “Decision on Motion from Momčilo Krajišnik to Compel the Prosecution to Provide Identity of Subordinates”, 19 July 2001.

IV. DISPOSITION

For the reasons set out above, the Trial Chamber:

1. **GRANTS** the application of the Prosecution in its Motion;
2. **REJECTS** the application of the Krajišnik Defence to be granted leave to file a motion for further and better particulars, but will consider any such application made after the Prosecution files its pre-trial brief; and
3. **REJECTS** the application of the Krajišnik Defence for an oral hearing on the Motion.

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


Richard May
Presiding

Dated this fourth day of March 2002
At The Hague
The Netherlands

[Seal of the Tribunal]