



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: IT-00-41-PT

Date: 15 March 2002

Original: English

IN THE TRIAL CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Amin El Mahdi
Judge Alphons Orié

Registrar: Mr. Hans Holthuis

Decision of: 15 March 2002

THE PROSECUTOR

v.

PAŠKO LJUBIČIĆ

**DECISION ON THE DEFENCE MOTION ON
THE FORM OF THE INDICTMENT**

The Office of the Prosecutor:
Mr. Mark Harmon

Defence Counsel:
Mr. Tomislav Jonjić

TRIAL CHAMBER I (the “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 (the “Tribunal”);

BEING SEISED OF the “Defence Motion on the Form of the Indictment Pursuant to Rule 72” filed on 16 January 2001 (the “Motion”) by the accused Paško Ljubičić (the “Accused”);

NOTING the “Prosecution Response to Defence Motion on the Form of the Indictment,” filed on 30 January 2002 (the “Prosecution Response”);

NOTING the “Defence Request for Leave to Reply to the Prosecution Response to Defence Motion on the Form of the Indictment,” filed 1 February 2002;

NOTING the “Order Granting Leave to the Defense to File a Reply to the Prosecution Response to the Defence Motion on the Form of the Indictment,” filed 6 February 2002, in which the Trial Chamber granted leave to the Accused to file a reply by 7 February 2002 and to the Prosecution to file a response, if any, to the reply within seven days of the filing of such reply;

NOTING the “Reply to the Prosecution Response to Defence Motion on the Form of the Indictment,” filed 5 February 2002 (the “Reply”);

CONSIDERING that in the Motion the Accused objects to the form of the indictment on the grounds that: 1) the supporting material in reality does not support the indictment, in other words, the Indictment does not result from the supporting material; 2) the indictment is vague; 3) neither the indictment nor the supporting material establish a causal nexus between the conduct of the accused and the alleged subsequent harmful effects; 4) the indictment charges the Accused “with cumulative responsibility for the transactions”;

CONSIDERING that, in so arguing, the Accused submits that the indictment should be dismissed or, alternatively, that the Prosecution should be ordered to amend the indictment in order to make it more specific;

CONSIDERING that in response to the arguments raised by the Accused, the Prosecution submits that: 1) having been confirmed by a reviewing Judge, the Trial Chamber has no power to review the confirmation of the indictment; 2) the indictment is sufficiently specific; 3) the indictment pleads the material facts, including a connection between the accused and the crimes alleged with the required degree of specificity; 4) the arguments concerning cumulative charging should be dismissed as being at variance with Appeals Chamber jurisprudence which reveals that cumulative charging on the basis of the same set of facts is generally permissible;

CONSIDERING that, in particular with regard to the Accused's third argument set out above, the Prosecution submits *inter alia* that: it is not the function of the indictment to establish the link between an accused and the crimes alleged, the facts are to be pleaded while the evidence is adduced at trial; that in any event, the indictment, in respect of each count, specifies a causal nexus between the actions of the Accused and the crimes alleged; further detail regarding the connection of the accused to the crimes committed will be provided in the Prosecution's pre-trial brief and witnesses summaries to be submitted pursuant to Rule 65ter of the Rules of Procedure and Evidence of the Tribunal (the "Rules");

CONSIDERING that in the Reply the Accused submits *inter alia*, that: he does not agree with the Prosecution on the issue of his rank; although the Prosecution states that the commanding position of the Accused relieves it from the duty to include in the indictment details of identity of perpetrators or victims and precise times when crimes took place, the latest jurisprudence requires that relevant details must be provided more precisely regardless of the fact that an accused is a commander; the indictment in a number of counts does not identify a single perpetrator, a single victim or a single place where a crime took place;

CONSIDERING that Article 18(4) of the Statute of the Tribunal (the "Statute") provides that "the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute" and that Rule 47(C) of the Rules provides that "[t]he 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";

CONSIDERING that the obligation on the Prosecution to provide a concise statement of the facts and crime(s) with which an accused is charged is based on the right of an accused set out in Article 21(4)(a) of the Statute "to be informed promptly and in detail in a language which he

understands of the nature and cause of the charge against him” and the right of an accused set out in Article 21(4)(b) of the Statute “to have adequate time and facilities for the preparation of his defence”;

CONSIDERING that the Trial Chamber finds that a clear distinction must be made between the material facts upon which the Prosecution relies and the evidence by which those material facts will eventually be proven; that the material facts supporting each charge must be pleaded in the Indictment, while the evidence by which those facts are to be proven is adduced at trial and not examined at this stage of the proceedings;

CONSIDERING that a decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment, is the nature of the alleged criminal conduct charged to the accused¹; that what must be clearly identified by the Prosecution so far as the individual responsibility of the accused is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility; that the materiality of such details as the identity of the victim, the place and date of the events for which an accused is alleged to be responsible, and the description of the event themselves necessarily depends upon the alleged proximity of that accused to those events²;

CONSIDERING that the Accused argues that the supporting material does not support the indictment, while the Prosecution responds that within the jurisprudence of the Tribunal, a Trial Chamber cannot review the confirmation of an indictment by a reviewing judge;

CONSIDERING that this Trial Chamber concurs with existing mainstream jurisprudence providing that submissions that the supporting materials do not support the charges are not matters to be dealt with at this stage of the proceedings;

¹ Appeal Judgement, *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, 23 October 2001 (the “*Kupreškić Appeals Judgement*”), para. 89.

² Decision on Objections by Momir Talić to the Form of the Amended Indictment, *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, 20 February 2001, para 18, Decision on Preliminary Motion on Form of Amended Indictment, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, 11 February 2000, para. 18. See also Decision Concerning Preliminary Motion on the Form of the Indictment, *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, 1 August 2000, para. 9.

CONSIDERING that the Trial Chamber finds that the layout of the indictment requires further attention in order to ensure easier understanding since it presently necessitates cross-reference between sections; that as a starting point it considers that the indictment should be reorganised so that the last three sections appear at the start before setting out the individual counts; that in reorganising the indictment as such, care should be taken to amend any relevant cross-references and to avoid unnecessary repetition;

CONSIDERING that in paragraph 2.0 of the indictment, it is alleged generally that persecutions were committed in the municipalities of Vitez and Busovača in the Republic of Bosnia and Herzegovina between June 1992 and July 1993, while in some other counts it is alleged that the crimes in question were committed on a specific date or during a more limited time;

CONSIDERING that the Prosecution should specify to the extent possible the dates or periods covered within each count in the indictment, in particular for specifically mentioned acts or conduct;

CONSIDERING that the Accused is charged with individual criminal responsibility under both Article 7(1) and Article 7(3) of the Statute for his involvement in the acts described in the indictment;

CONSIDERING that the Accused seems to argue that the indictment fails to specify who his subordinates are alleged to be;

CONSIDERING that paragraph 1.2 of the indictment provides as follows:

The accused joined the Military Police as commander of the First Company of the Active Battalion of the HVO Military Police ("First Company") stationed in Central Bosnia in June 1992. Thereafter, an HVO Military Police Battalion was established within the Central Bosnia Operative Zone ("CBOZ") which included, *inter alia*, the municipalities of Vitez and Busovaca. In January 1993, the First Company became part of the 4th Military Police Battalion and the accused became the commander of the 4th Military Police Battalion. He remained in this position until 1 July 1993 when he was replaced temporarily by Vlado Santic. Thereafter, the accused became an Assistant Chief of Military Police Administration for the CBOZ and in that capacity was in charge of combining military police activities and tasks of the light assault battalions and the Military Police battalions in the CBOZ. He commanded these entities until November 1993 when the accused left Central Bosnia and became the Deputy Chief of the Military Police Administration in Mostar.

CONSIDERING that paragraphs 7.0 – 7.2 of the indictment purport to set out the Accused's individual criminal responsibility, with paragraph 7.0 providing that from January 1993, the Accused "was the highest-ranking member of all HVO Military Police units in the CBOZ. In this

capacity, he exercised both formal and *de facto* authority over members of the First Company and, later, the 4th Military Police Battalion”;

CONSIDERING that it would assist the Accused and contribute to the expediency of the proceedings that the Trial Chamber and the Accused be provided with appropriate details (by way of confidential schedule, if necessary) as to the structure of the units involved and the subordinates allegedly under the Accused’s authority;

CONSIDERING that the Accused requests that the indictment should “be concretised so that the accused does not have any doubts whether he is charged, according to certain counts, with planning, instigating, commanding or executing (alternatively) or all these acts (cumulatively)”;

CONSIDERING that a review of the indictment as it now stands reveals lack of clarity and specificity with regard to the alleged responsibility of the Accused in certain instances and that although particular findings of vagueness will be specifically addressed below, the Trial Chamber finds that the Prosecution is under an obligation to specify, in a consistent manner throughout the indictment, the form of participation alleged with regard to each allegation made; in particular, how responsibility is alleged to have been incurred when the Accused is charged under both Article 7(1) and 7(3) of the Statute and when the Accused is charged under only one or other of the latter provisions; that the Prosecution should specify, when it is alleged that the Accused “participated” in a crime, how he so participated;

CONSIDERING that the Accused argues that the fact that he has been cumulatively charged with offences in the indictment is unfair and that either the indictment should be dismissed or, if not, that the Prosecution should be ordered to elect among the counts charged;

CONSIDERING that it is settled jurisprudence within the Tribunal that cumulative charging on the basis of the same set of facts is generally permissible;

CONSIDERING that, in relation to count 1 (persecution), the Accused claims *inter alia*, that “the notion of persecution [in the indictment] is not defined in the sense of criminal law in a way to protect the principle of legality” and that the indictment does not explain the participation of the Accused in carrying out wide-spread and systematic attacks on towns and villages inhabited by Muslims;

CONSIDERING that the indictment cites the applicable provisions of the Statute which support the alleged criminal responsibility of the Accused for the acts mentioned within count 1 and that it identifies different acts underlying the crime of persecution; that the general contention that the principle of legality in relation to the crime of persecution has been violated should thus be rejected;

CONSIDERING that it appears necessary to request more specifics in relation to an underlying crime or a form of participation of the Accused in a crime;

CONSIDERING that in paragraph 2.1 of the indictment, it is alleged that persecutions were perpetrated by the widespread or systematic attack on towns and villages, including attacks on the towns and villages of Busovača, Vitez, Ahmići, Nadioći, Pirići, Santići, Donja Večeriska, Lončari, Očenići and Gaciče;

CONSIDERING that no particulars have been provided anywhere in the indictment regarding the alleged attacks on Gaciče and Donja Večeriska referred to in paragraph 2.1 of the indictment; that although reference is made to the municipality of Vitez in some paragraphs of the indictment, no particulars are given regarding an attack in the town of Vitez; that with regard to the town of Busovača and the village of Lončari referred to in, *inter alia*, paragraphs 2.1 and 5.0 – 5.1 (counts 7 – 9, destruction and plunder) no specifics have been given regarding the allegation of an attack in this town and village respectively;

CONSIDERING that either further specifics should be provided as to the allegation of an attack on these towns and villages, including specification of the Accused's alleged responsibility, or reference to them should be removed from paragraph 2.1 of the indictment;

CONSIDERING that, with regard to Schedule A referred to in paragraph 2.2 of the indictment, it is suggested that the list refers to persons both killed and seriously injured while in paragraph 4.0 a) of the indictment (counts 3 – 6) it is suggested that the list is confined to persons killed and that in such circumstances the class of victim referred to in Schedule A should be clarified and appropriate amendments made to the relevant paragraphs of the indictment;

CONSIDERING that, with regard to paragraph 2.6 of the indictment, further specifics should be given in relation to the allegations of forcible transfer of civilians, in particular, details of the Accused's alleged responsibility, numbers, locations and relevant dates or time periods;

CONSIDERING that the Accused argues that count 2 does not clarify, in relation to the attacks on the villages of Ahmići, Nadioći, Pirići and Šantići, "who, when and where issued the order the accused communicated (conveyed) to his (unidentified!) subordinates" and that this same defect exists in relation to the event in the village of Ahmići (paragraph 3.1), to the event in the village of Očenići (paragraph 3.2), and to counts 3 – 6 and 7 – 9 of the indictment;

CONSIDERING that the Trial Chamber considers that absence of further details as to who gave orders to the Accused and when and where these orders were given does not impair the Accused in his preparation for trial at this stage of the proceedings;

CONSIDERING however that although the Prosecution has been ordered generally to clarify the Accused's alleged form of participation, it should in particular clarify with regard to count 2, how it is alleged that the Accused "participated" in the attacks alleged in paragraphs 3.1 and 3.2 of the indictment and provide details as to the Accused's alleged participation in the planning of the attack on the village of Očenići referred to in paragraph 3.2 of the indictment, including when and where the planning took place;

CONSIDERING that, in relation to, *inter alia*, counts 3-6 (wilful killing and causing serious injury), the Accused argues that insufficient details have been provided regarding the identity of the victims, although rough denotations are given for certain villages; that "[n]ational or religious denotation of an actual or an alleged victim ('Bosnian Muslims') is intolerably general"; and that the place of suffering is imprecisely stated;

CONSIDERING that the Appeals Chamber held that where an accused is charged "with having participated as a member of a military force in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in a large number of killings and forced removals ... the Prosecution need not specify every single victim that has been killed or expelled in order to meet its obligation of specifying the material facts of the case in the indictment"; that it further indicated that "[n]evertheless, since the identity of the victim is information that is

valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so³;

CONSIDERING that it has been stated above that Schedule A should be amended to clarify those victims killed and those victims injured;

CONSIDERING that no particulars are contained within paragraphs 4.0 and 4.1 with regard to the Accused's responsibility under counts 3 – 6 in relation to the events at Očenići; that even if the reference in paragraph 4.0, referring to paragraph 3.0, was intended to be understood as including a reference to paragraph 3.2, it is unclear; that therefore the Prosecution must clarify the allegation in respect of Očenići under these counts including the Accused's responsibility;

CONSIDERING that, in relation to counts 7-9, the Accused claims that "the Indictment does not in any way concretise the devastation it refers to; which and whose property was destroyed" and that "it does not identify a single destroyed or plundered institution dedicated to religion or education";

CONSIDERING that the Prosecution has been ordered generally to clarify the Accused's responsibility for the crimes allegedly committed; that in particular it must specify the Accused's responsibility for the crimes alleged in Lončari and Očenići under counts 7 – 9 of the indictment; that otherwise the indictment gives sufficient notice in the paragraphs relevant to counts 7 – 9 of the indictment as to the acts charged, at this stage of the proceedings, for the Defence to prepare its case on these counts;

CONSIDERING that the Accused argues in relation to counts 10 - 11 of the indictment that: no details have been provided regarding the identity of the victims who were "detained, beaten, subjected to physical and psychological abuse and intimidation," and of those who were "forced to dig trenches near the front line, and killed or seriously injured"; no indication is given as to the location where the latter acts occurred; it is not stated which persons allegedly military police members took part in abusing detainees and other violations of international humanitarian law;

CONSIDERING that the Prosecution should provide, where available: details as to the identity and/or approximate number of victims alleged in counts 10 – 11 together with dates and places

³ *Kupreskic Appeals Judgement*, para 90.

of detention (by way of schedule, if appropriate); with regard to paragraphs 6.1 and 6.2 of the indictment, further particulars regarding the allegations made, including incidents and dates;

CONSIDERING that with regard to dispute as to facts including the position of the Accused in the hierarchy of the HVO Military Police and the truthfulness of the allegations contained in the indictment, these are factual questions to be determined at trial;

FOR THE FOREGOING REASONS,

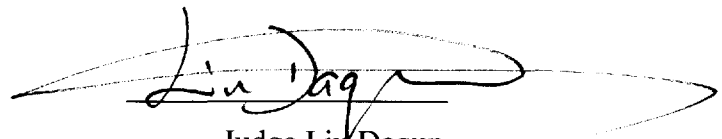
PURSUANT to Articles 18 and 21 of the Statute and Rule 47 (C) of the Rules;

PARTIALLY GRANTS the Motion;

ORDERS that the Prosecution shall amend the indictment in the terms set out in this order and shall file the amended indictment and accompanying schedule(s) within 21 days of the date of this order;

DECIDES that the Accused shall have fourteen days from the date of the Prosecution's filing to submit any further preliminary motion.

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



Judge Liu Daqun,
Presiding Judge

Dated this fifteenth day of March 2002

At The Hague

[Seal of the Tribunal]