IT-95-10/1-PT
D 88 - D 78
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88
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UNITED
NATIONS

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-95-10/1-PT

Date: 22 November 2002

Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 22 November 2002

THE PROSECUTOR

v.

RANKO ČEŠIĆ

DECISION ON DEFENCE PRELIMINARY MOTION CONCERNING JURISDICTION AND THE FORM OF THE INDICTMENT AND ON PROSECUTION'S MOTION FOR LEAVE TO AMEND THE INDICTMENT

The Office of the Prosecutor:
Mr. Mark B. Harmon

Defence Counsel:
Mr. Vojislav Nedić

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1. Introduction

1. Trial Chamber I (the "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 (the "Tribunal") is seized of a motion filed pursuant to Rule 72 of the Rules of Procedure and Evidence of the Tribunal (the "Rules") by the defence for the accused, Ranko Češić (the "Defence") on 18 July 2002 (the "Motion"). The Motion raises challenges to both the form of the indictment and jurisdiction.

2. On 30 July 2002, the Prosecution filed the "Prosecution's Response to Defence Preliminary Motion" (the "Response"). The same day, the Prosecution filed the "Motion to Amend Indictment" whereby it seeks leave pursuant to Rule 50 (A) (i) (c) to amend the Indictment against the accused Ranko Češić (the "Accused") "in order to respond to several of the concerns raised by Češić, and in order to clarify the nature of the Prosecution's case against him".[1] On 11 August 2002, the Defence filed the "Response of the Defence to the Prosecution's Response to the Defence Preliminary Motion and to the Prosecution's Motion to Amend the Indictment" (the "Reply").

2. Challenge on the form of the Indictment

3. On 21 July 1995, the original indictment against Goran Jelisić and Ranko Češić (the "Accused") was confirmed. On 20 October 1998, the Prosecution filed a second amended Indictment (the "Indictment") against Goran Jelisić and the Accused.

4. The Indictment is comprised of forty-four counts, twelve of which concern the Accused and charge him with violations of the laws or customs of war (six counts) and crimes against humanity (six counts), pursuant to Articles 3 and 5 of the Statute of the Tribunal (the "Statute"). It is alleged that all acts or omissions charged in the Indictment occurred between May 1992 and June 1992, during which time the Accused incurred responsibility under Article 7(1) of the Statute for the crimes charged.[2] It is further alleged that during May and June 1992, the Accused, acting

[1] Motion to Amend Indictment, p 1.
[2] The Indictment, para 11.

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individually or in concert with others, participated in the crimes alleged in the Indictment in a position of authority in the Luka camp under the apparent authority of the Brčko police.[3]

5. The Defence alleges generally that the Indictment is defective. It particularly alleges that the Indictment is not correct in respect of the position of authority of the Accused, and consequently in relation to the head of responsibility attached to the Accused. The Defence also alleges that the Indictment is not specific enough in respect of the alleged co-perpetrators and victims of the Accused and that therefore there is a doubt cast on the nature of the plea entered by the Accused.

6. The Prosecution has found merits to some complaints by the Defence and has applied for leave to amend the Indictment to indicate the extent of its proposed application.[4] The Trial Chamber will respond to both the Motion and the Prosecution's "Motion to Amend Indictment" hereby.

a. The Law

7. Article 18(4) of the Statute provides *inter alia*, 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". Rule 47(C) 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". The Appeals Chamber has stated that "[t]he Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21(2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence".[5] Further, it stated that,

> [i]n the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of

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[3] The Indictment, para 8.

[4] *See Supra* para 2 of this decision.

[5] *The Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgement"), para 88. Article 21(2) of the Statute provides: "In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute" (Article 22 of the Statute concerns the protection of victims and witnesses). Article 21(4) of the Statute provides: "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;[....]"

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the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.[6]

8. The Trial Chamber agrees that "there is a floor below which the level of information must not fall if the indictment is to be valid as to its form".[7] However, as stated, there is a distinction between material facts upon which the Prosecution relies and the evidence by which those material facts will be proven: material facts supporting each charge must be pleaded, but not the evidence by which such material facts are to be proven.[8] "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 accused."[9] In particular, "whether or not a fact is material depends upon the proximity of the accused person to the events for which that person is alleged to be criminally responsible."[10] Legal prerequisites, which apply to offences charged, are material facts and must also be pleaded.[11]

9. This Trial Chamber emphasises that although pre-trial discovery is an essential part of the disclosure process and may assist the defence in a better understanding of the details of the crimes with which an accused is charged, an indictment must first meet the requisite standards of specificity and precision, as prescribed in the Statute and Rules.[12]

[6] *The Kupreškić* Appeal Judgement, para 88 (footnote omitted).
[7] *The Prosecutor v. Miroslav Kvočka et al.,* Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 ("*Kvočka* Decision"), para 14. This Trial Chamber considered that "[a]lthough Article 18, paragraph 4, of the Statute and Sub-rule 47(C) of the Rules do not appear to set a high threshold as to the level of information required in an indictment, a concise statement of the facts of the case and of the crime with which the suspect is charged being all that is needed, there is a minimum level of information that must be provided by the indictment; there is a floor below which the level of information must not fall if the indictment is to be valid as to its form." It stated that this was still an accurate description even when considering the distinction drawn between material facts and evidence, in *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 ("First *Krnojelac* Decision"), para 12.
[8] *The Prosecutor v. Rahim Ademi,* Case No. IT-01-46-PT, Decision on the Defence Motion on the Form of the Indictment, 12 November 2001 ("First *Ademi* Decision"), p. 4 (and accompanying references). Also, *Prosecutor v. Stanislav Galić*, Case No, IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 November 2002 ("*Galić* Decision"), para 15.
[9] *The Kupreškić* Appeal Judgement, para 89.
[10] *Galić* Decision, para 15, referring to *The Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001 ("First *Talić* Decision"), para 18 and the *Kupreškić* Appeal Judgement, paras 88 – 90.
[11] *The Prosecutor v. Enver Hadžihasanović et al.,* Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001 ("*Hadžihasanović* Decision"), para 10; *The Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39 & 40-PT, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 20002 (the "Second *Krajišnik* Decision"), para 9.
[12] *See* also, *The Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, 23 February 2001, paras 11-13.

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b. The defects in the form of the Indictment alleged by the Defence

The Position of Authority of the Accused

10. The Defence submits that paragraph 8 of the Indictment fails to specify the position held by the Accused in the Luka camp. It seeks an order whereby the Prosecution be ordered to identify "the position, i.e. the authority of Ranko Češić, and in what precise time period" the Accused held such a position as the Defence argues that the Accused was not a member of the Brćko police at one time during the stated period.[13]

11. The Prosecution responds on the one hand that "the position held by the accused at Luka camp is irrelevant to the charges against him"[14] as he is not charged under Article 7(3) of the Statute. On the other hand, it submits that "disputes as to issues of fact are matters for trial, and are not appropriately dealt with by way of a pre-trial motion alleging defects in the form of the Indictment".[15] Nevertheless, the Prosecution admits that there is a contradiction in the Indictment, which states that the Accused held a position of authority. The Prosecution proposes therefore to strike from paragraph 8 of the Indictment the words "and held a position of authority at Luka camp"[16] as well as the words "ordered" and "instigated" from counts 26-27, 28-29, 34-35 and 42-43.

12. The Trial Chamber accepts the proposed amendments, which properly address the complaint of the Defence.

The head of individual responsibility

13. The Defence complains that paragraph 11 of the Indictment is too general and that, in general, the counts of the Indictment do not define the head of responsibility under which the Accused is charged.[17] The Defence purports to rely on the First *Krnojelać* Decision[18] and on the *Kupreškić* Appeal Judgement[19] to request that the Prosecution identifies and describes the acts charged in counts 26-27, 28-29, 34-35 and 42-43.[20]

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[13] The Motion, p 2.
[14] The Response, 4.(b), p 2.
[15] The Response, para 11.
[16] The Response, para 10.
[17] Paragraphs 11, 27, 28, 31 and 35. The Motion, p 2.
[18] The Defence submits that the Trial Chamber in the First *Krnojelać* Decision stated that: "It is not sufficient that the accused is made aware of the case to be established upon one of the alternative base pleaded. What must be clearly identified by the Prosecution as the responsibility of the accused are particular acts of which the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility", the Motion, p 3.
[19] The Motion, p 3.
[20] The Motion, pp 2-3.

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14. The Prosecution responds that the purpose of paragraph 11 of the Indictment is "to inform the accused, in broad terms, of the nature of the criminal responsibility alleged against him. The material facts setting out the accused's participation in each of the crimes charged are contained in each count".[21]

15. Based on the Indictment as it now stands, the complaint of the Defence has merit. Counts 26-27, 28-29, 34-35, and 42-43 lack specificity. The Trial Chamber notes however that the proposed removal of the words "instigating" and "ordering" of counts 26-27, 28-29, 34-35 and 42-43 mentioned above properly addresses the complaint raised by the Defence.[22] Similarly, paragraph 11 in which the Indictment purports to set out the Accused's conduct is general in nature and insufficiently defines the responsibility pleaded. The Prosecution is accordingly directed to better define which alternatives under Article 7 (1) of the Statute it pleads.

The lack of specification in respect of the identities of victims and co-perpetrators

16. The Defence submits that several counts of the Indictment do not disclose the identities of the alleged victims and co-perpetrators of the Accused.

Counts 2-3

17. According to the Defence, paragraph 15 of the Indictment which describes the acts supporting the charges contained in counts 2-3 of the Indictment is not "clear enough, since the Prosecution has not provided the names of the victims".[23] The Prosecution does not respond to this complaint.

18. Paragraph 15 of the Indictment states that:

> On about 5 May 1992, Ranko Češić went to the Brčko Partizan Sports Hall where Muslim civilians were being confined, and took the Muslim detainees Sakib Bećirević (a/k/a Kibe) and four other men named "Pepa", "Sale" and the two sons of a man called Avdo outside the hall. Ranko Češić lined up and shot and killed the five detainees with bursts of gunfire. [...].

The Trial Chamber is satisfied that this paragraph sufficiently describes the charges contained in counts 2-3 of the Indictment. Accordingly, the Defence's complaint in respect of paragraph 15 of the Indictment is rejected.

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[21] The Response, para 13.
[22] The Prosecution uses the word "initiating" in paragraph 11 of the Indictment, which seems to be an alternative word for "instigating".
[23] The Motion, p 3.

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Counts 28-29

19. In respect of counts 28-29 of the Indictment, it is similarly submitted that paragraph 28 of the Indictment "does not provide the names of the alleged victims (only the Muslim detainees A and B)".[24]

20. The Prosecution emphasises that because the detainees A and B were victims of sexual assault and in order to protect their identity, it had not disclosed their names in the Indictment. However, it provides now the names of the "Muslim detainees A and B" in a confidential annex attached to the Response.[25]

21. The Trial Chamber is satisfied that the complaint by the Defence is properly addressed.

Counts 34-35

22. In respect of counts 34-35 of the Indictment, the Defence submits that paragraph 31 of the Indictment "does not provide the name of "another person" with whom the accused Ranko Češić allegedly beat a detainee".[26]

23. The Prosecution notes that the name of this "another person" was supplied to the Accused at page 75 of the supporting material and proposes to amend the Indictment in order to name the co-perpetrator as Slobodan Popkostić.[27]

24. The Trial Chamber is satisfied that the amendment proposed by the Prosecution properly addresses the complaint raised by the Defence.

Counts 42-43

25. In respect of counts 42-43, the Defence finally submits that the following paragraph 35 of the Indictment is not clear enough.

> Between about 1 June and 6 June 1992, Ranko Češić took four detainees, whose identities are unknown, from the office building at Luka camp to the paved road in front of the main hangar building and, with the assistance of two guards, shot and killed at least two of the detainees. [...].

[24] The Motion, p 4.
[25] The Response, para 19.
[26] The Motion, p 4.
[27] The Response, para 20.

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It is argued that paragraph 35 does not provide the identities of the alleged victims and the guards, nor does it specify who, among the two guards and the Accused, committed the fatal shooting nor does it specify under which grounds it is said that the Accused killed at least two detainees.[28]

26. The Prosecution responds that the Indictment makes clear that the names of the four detainees are not known to the Prosecution. However, the Defence replies that the Prosecution should at least provide information in relation to the "gender, age, places of permanent or temporary residence or any circumstances which would point to the alleged victims identity".[29] In respect of the identities of the two guards, the Prosecution notes that the Accused had been supplied with them at page 71 of the supporting material and proposes to amend the Indictment to identify the two guards as Čajević and Pudić. In relation to which of the three co-perpetrators administered the fatal shooting, it is submitted that the evidence available to the Prosecution does not reveal this information. However, the Prosecution's contention is that "this point is a matter for trial, and that the material facts in paragraph 35 have been pleaded with a degree of specificity which is sufficient for the Accused to prepare his defence in relation to this incident".[30]

27. The Trial Chamber acknowledges that the Prosecution has provided specification in respect of the material acts pleaded in counts 42-43 to the best of its ability. The absence of knowledge of the identities of victims is a common occurrence during armed conflict. Evidence adduced at trial should allow the Defence to test the Prosecution's witnesses in respect of the incident described in paragraph 35 of the Indictment as well as, if any, the exact role of the Accused in this alleged incident. The Trial Chamber finds that, at this stage of the proceedings, the Accused is able to prepare his defence in relation to this incident. Accordingly, the objection raised by the Defence in respect of the lack of specification in counts 42-43 is partly rejected.

The acceptance of the Accused's plea

28. The Defence submits that in general, because of the lack of specificity in respect of the identities of the victims and co-perpetrators, the Accused "is not able to place his plea".[31]

29. It is unclear to the Trial Chamber whether the Defence objects to the validity of the non-guilty plea entered by the Accused because his plea was not properly informed or whether the Accused wishes to re-enter a different plea in view of the additional specifications provided by the Prosecution. The Trial Chamber will proceed under the understanding that the Defence requires

[28] The Motion, p 4.
[29] The Reply, pp 2-3.
[30] The Response, paras 22-23.
[31] The Motion, pp 3-4.

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guidance as to the meaning of a plea entered on charges contained in an indictment, whose form is subsequently amended.

30. The purpose of entering a plea is for an accused to inform judges whether he acknowledges the *charges*[32] held against him and thus forfeits his entitlement to a trial, or whether he denies those charges and accordingly is prepared to test the Prosecution case through cross-examination of witnesses and to present his own case. In case an indictment is amended to include a new charge brought against an accused, the Prosecution must disclose the supporting material related to this new charge and the accused must enter a plea in relation to this new charge.[33] Conversely, specifications brought to the material facts pleaded to support the already existing charges held against an accused, do not require that the accused re-enter a plea. However, and although there is no new charge as such to require that new supporting material be disclosed, a Trial Chamber may find that the addition of material facts pleaded in support of a charge or the reorganisation of the counts in an indictment is such that a further appearance is necessary to assist the accused in the preparation of its defence.[34]

31. In the present case, the Accused entered a non-guilty plea on the charges contained in the Indictment as it now stands. Specifications are to be brought to the material facts supporting those charges.[35] Although, a higher degree of specificity of the material facts assists in a better preparation of the defence, the Trial Chamber does not find that the addition of those specifications is such that a further appearance is necessary. The specifications proposed by the Defence concerning the identities of victims and co-perpetrators were already contained in the supported material disclosed to the Defence. Also, striking the words "instigating" and "ordering" from the relevant counts of the Indictment discharges, to some extent, the Accused. These specifications clarify the Indictment, but the Defence is not now in a substantially different position to prepare its Defence. The Trial Chamber is satisfied that the Accused's plea is valid as it presently stands. Nevertheless, the Accused may be willing to reconsider his plea in view of the specifications

[32] Emphasis added.

[33] Rule 50 (B) is clear that a further appearance to place a plea is held in case "the amended indictment includes new charges".

[34] *See* e.g., *The Prosecutor* v *Naletilić and Martinović*, Case No. IT-98-34-PT, "Decision on Prosecution Motion to Amend Count 5 of the Indictment", 28 November 2000. The Trial Chamber granted leave for the Prosecution to amend Count 5 of the Original Indictment to add a further charge, noting that the definition of "new charge" was not to clearly defined. Accordingly, the Prosecutor filed an amended indictment dated 4 December 2000 and each of the accused entered a plea of "not guilty" to the new charge on 7 December 2000; *see* also T*he Prosecutor v Ljubičić*, Case No IT-00-41-PT, Decision on Motion for Leave to Amend the Indictment, 2 August 2002.

[35] The words "instigating" (or "initiating" in paragraph 11 of the Indictment) and "ordering" are to be strike from the Amended Indictment in those parts and counts related to the Accused. The identities of two victims and three co-perpetrators are now specified.

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brought to the Indictment. Therefore, the Trial Chamber directs the Accused to indicate whether he wishes to enter a different plea as soon as practicable.

Issue raised Proprio motu

32. The Trial Chamber notes that the charges held against the co-accused of Češić have been definitively determined upon.[36] It deems that the Indictment must not contain references to the now convicted Goran Jelisić, unless necessary. The Prosecution is therefore directed to remove any reference relating to the convicted person Goran Jelisić from the Indictment.

3. Challenge on Jurisdiction (objection to legal characterisation)

33. The Defence submits in an unclear manner that although it is aware of the jurisprudence of the Tribunal, the Prosecution should determine more precisely the legal characterisation "of the criminal acts for which the accused Ranko Češić is charged with" because the Accused "may not be indicted subject to both the Article 3 of the ICTY Statute and the Article 3 (1) (a) of the Geneva Convention, since the acts are actually stipulated exclusively in the Article 5 of the ICTY Statute".[37] In its Reply, the Defence emphasises that "the Prosecution's reference to the Article 3 of the Statute, "violations of the laws or customs of war", is too broad and without factual grounds".[38]

34. The Prosecution notes that the Defence appears to confuse Article 3 of the Statute of the Tribunal and Article 3 of the Geneva Conventions of 1949 ("Common Article 3") and submits that the Appeals Chamber has found that Article 3 of the Statute gives the Tribunal jurisdiction over the prohibitions enumerated in Common Article 3.[39] The Prosecution further submits that under the Tribunal's jurisprudence, cumulative charging is generally permissible. The Appeals Chamber in the *Čelebići* Appeal Judgement held that cumulative charging on the basis of the same acts "is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven".[40]

[36] See *The Prosecutor v Goran Jelisić*, Appeal Judgement, Case No IT-95-10-A, 5 July 2001.
[37] The Motion, p 1.
[38] The Reply, p 2.
[39] The Response, footnote 10, quoting *The Prosecutor v Dušan Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case IT-94-1-AR72, 2 October 1995, para 89.
[40] *The Prosecutor v Delalić et al.*, Case No. IT-96-21-A, Čelebići Appeal Judgement, para 400.

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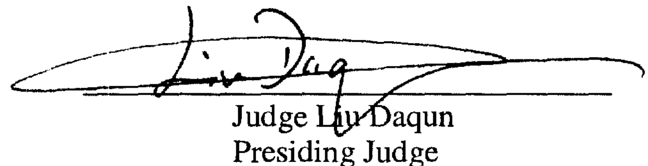
35. The Trial Chamber finds that the position of the Prosecution is in accordance with the established jurisprudence of the Tribunal. The challenge to jurisdiction by the Defence is therefore rejected.

PURSUANT TO Rules 50, 54 and 72 of the Rules,

HEREBY,

1. **REJECTS** the Motion in respect of the challenge to jurisdiction;
2. **GRANTS** the Motion, in part, in respect of the form of the Indictment, to the extent set out in the terms of this decision;
3. **GRANTS** the Prosecution's Motion to Amend the Indictment, in part, to the extent set out in the terms of this decision;
4. **ORDERS** the Prosecution to file a third amended indictment within fourteen days of the filing of this decision;
5. **INVITES** the Accused to indicate whether he wishes to enter a different plea.

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



Judge Liu Daqun
Presiding Judge

Dated this twenty-second day of November 2002
At The Hague,
The Netherlands.

[Seal of the Tribunal]

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