



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-00-41-PT
Date: 13 December 2002
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr. Hans Holthuis

Decision of: 13 December 2002

PROSECUTOR

v.

PAŠKO LJUBIČIĆ

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

The Office of the Prosecutor:

**Mr. Mark Harmon
Ms. Magda Karagiannakis**

Counsel for the Accused:

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”) is seized of a Motion brought on 22nd October 2002 by the Defence on the Form of the Amended Indictment of 8 April 2002 (“the Motion”). The Motion calls for the Chamber’s dismissal of the amended indictment – or ordering the Prosecution to correct and clarify it.

1. Procedural background

1. The procedural background of the Indictment requires special attention when considering this Motion. The Prosecution’s indictment was originally submitted under seal on 26th September 2000 and confirmed by a Judge on the following day (“the first indictment”); it then included 11 counts on crimes against humanity and violations of the laws and customs of war. A year later, on 30th October 2001, it was unsealed, shortly after which the Accused voluntarily turned himself in on 21st November 2001. He subsequently appeared initially before the Tribunal on 30th November 2001.

2. *The Chamber’s first decision.* – On 16th January 2002, the Defence submitted a preliminary motion against the form of the indictment, contending that the supporting material did not support the indictment; that the indictment was too vague; that no nexus was shown between the Accused’s conduct and the atrocities; and finally that the indictment charged the Accused cumulatively with different crimes on the basis of the same set of facts. – The Prosecution replied on 30th January 2002 that the Trial Chamber had no power to reconfirm the indictment; that the indictment, anyway, was sufficiently specific and did plead the material facts linking the Accused to the crimes charged; and finally that cumulative charging was in line with the Tribunal’s jurisprudence. – In its decision of 15th March 2002 (“the Chamber’s first decision”), the Chamber *ordered, inter alia*, the Prosecution to clarify the Accused’s participation in the attacks on Ahmići and Očenići, and to provide details of the Accused’s alleged participation and responsibility in the planning of the attack on Očenići and of the places, facts and dates or periods of each count, and to detail the information on the victims of several of the alleged crimes.

3. *The Chamber’s second decision.* – Reacting upon the Chamber’s first decision of 15th March 2002, the Prosecution filed an amended indictment on 8th April 2002 (“the amended indictment”) in which it had included a number of the details required in the Chamber’s first

decision and had raised the number of counts from 11 to 15 to specify the circumstances of the attack against Očenići.¹ The Defence objected on 30th April 2002 against the introduction of these new counts and held that the Prosecution, to the detriment of the Accused and in violation of Rule 50(A)(i)(c) of the Rules of Procedure and Evidence (“the Rules”), had failed to obtain leave of the Chamber to amend the indictment in excess of the Chamber’s first decision of 15th March 2002. The Prosecution responded on 8th May 2002 that the four new counts were merely introduced in compliance with the Chamber’s first decision and that they were not substantially “new” as they were founded on the same facts as referred to in the first indictment, in addition to which the details required by the Chamber had also been provided. – In its decision of 7th June 2002 (“the Chamber’s second decision”) the Chamber ordered the Prosecution *either* to gather counts 3-10 of the amended indictment into a single section and to strike the allegations of using detainees as human shields and to lay mines from counts 14-15, *or* alternatively to file a request for leave to amend the indictment in respect of those matters. The substantive disposition of the decision stated that the Chamber:

“**ORDERS** that the Prosecution amend the indictment in the terms set out in this order and should file a second amended indictment within fourteen days of the date of this order;”

In directing the Prosecution to “amend the indictment *in the terms set out in this order*”, the Chamber’s second decision clearly referred to the two alternate options set out in the preceding premises: the Prosecution should *either* just follow the Chamber’s suggestion (to gather counts 3-10 and delete allegations in counts 14-15) in which case no further authorization to amend would be required, *or* seek leave to amend the indictment should the Prosecution wish to pursue any other avenue.

4. *The Chamber’s third decision.* – In response to the Chamber’s second decision the Prosecution filed a motion on 13th June 2002 in which it chose the second alternative, *viz.* to file a request for leave to amend the first indictment so as to have it stand in just the form it had been given in the amended indictment of 8th April 2002. Arguing that the amended indictment did not include substantively new charges against the Accused or carry any prejudice to him, the Prosecution deserted the Chamber’s suggestion to gather counts 3-10 into one single section and to withdraw the allegations of human shields and mine-laying and chose instead to seek the Chamber’s approval of the amended indictment as it stood – with no further changes. In its objection of 25th June 2002 to the Prosecution’s motion, the Defence claimed that the amended indictment had already been rejected once by the Chamber and that the Prosecution

could thus not raise the same issue again. According to the Defence, the Prosecution would be allowed to circumvent the Chamber's earlier decision if the Prosecution's motion were to be accepted, and the motion should therefore be dismissed. – In its decision of 2nd August 2002 (“the Chamber's third decision”), ultimately, the Chamber granted the Prosecution's motion under Rule 50 of the Rules and accepted the amended indictment as the final indictment against the Accused and hence ordered a further appearance of the Accused to enable him to enter a plea on the new charges. The second initial appearance then took place on 26th September 2002 during which the Accused pleaded not guilty to the four new counts of the amended indictment.

2. The Motion

5. On 22nd October 2002, the Defence filed a preliminary motion on the form of the amended indictment and this motion is hence the object of the present decision. In the Motion, the Defence argues that the amended indictment suffers from significant defects in form by virtue of the fact that: (a) it was accompanied by a serious violation of the Rules and (b) that it is still too vague, for which reasons it obstructs the Accused's right to a fair trial. As a consequence, the amended indictment should be dismissed or, in the alternative, be made more specific through an order to the Prosecution.

6. What the Defence alleges in its first contention is that the Chamber, in handing down its third decision, invalidated its second decision without any legal basis in the Rules and thereby allowed the Prosecution to disregard a clear order to gather counts 3-10 into one single section and to remove the allegations contained in counts 14-15. In its second contention, the Defence claims that the amended indictment still does not specify in a sufficiently clear manner whether the Accused is charged with planning, instigating, commanding or executing the alleged crimes *alternatively* or *cumulatively*, whereby the Accused is deprived of his right to be properly informed of the nature of the charges raised against him.

3. The Prosecution's Response and the Defence's Reply

7. In its response of 29th October 2002 to the Defence Motion, the Prosecution submits (a) that the Defence raises objections against issues *beyond* the scope of the “new charges” contained in the amended indictment; (b) that the “new charges” in counts 7-10 are new only *in form* but *not in substance*; (c) that the Chamber has already conceded that counts 7-10 in the amended indictment provide *sufficient notice* to the Accused for him to prepare his case; (d) that the

¹ Originally filed on 5th April 2002 but corrected on the 8th, hence the “amended indictment”, in which four new counts (counts 7-10) had been added.

allegations relating to the use of detainees as human shields and to lay mines occur within the context of charges existing in the original indictment and not within the context of “new charges”; and finally (e) that the amended indictment has been submitted and approved in strict accordance with the Rules and without any infringement on the rights of the Accused.

8. With leave of the Chamber,² the Defence replied on 7th November 2002 that it insisted on the arguments raised in the Motion, and that even if some of these arguments were regarded as being in excess of the new charges, the fundamental defect of the amended indictment – for being brought without previous leave – had still not been remedied.³ With respect to the vagueness of the amended indictment, finally, the Defence accentuated several points of doubt relating to the Accused’s alleged participation in the attack on Očenići.

4. The Chamber’s Legal Assessment

9. Two contentious legal issues appear in the Parties’ submissions: (1) the compatibility between the Chamber’s three decisions, and (2) the degree of specificity and detail of the charges in the amended indictment.

10. As to the first of these issues, the Defence’s complaint appears to be founded on the belief that the Amended Indictment finds no valid base on the Chamber’s third decision. In the Chamber’s view, what the Defence is really seeking in its Motion is a review of this third decision. From the outset, the Chamber draws the attention to the fact that if the Defence considered this decision to be contrary to the Rules and invalid and contradictory with regards to the Chamber’s previous decisions on the form of the Indictment, it should have sought a certification to appeal this decision in due time pursuant to Rule 73(C) of the Rules.

11. However, in the interest of clarifying this issue to the parties, the Trial Chamber finds it appropriate to address the alleged contradiction or conflict between its decisions. In its second decision, the Chamber responded to the Defence Counsel’s critique of the Prosecution’s attempt to incorporate in the indictment the changes ordered by the Chamber in its first decision. It thus gave the Prosecution two options. As *one part* of its order, it instructed particular changes for the Prosecution to implement right away into the proposed amended indictment, i.e., *without* having to apply first for leave to amend it; such leave lies implicit and goes without saying in the Chamber’s order. Should the Prosecution opt *not* to follow this alternative, it would then have to apply for leave to amend the *original* indictment, namely in view of the four new counts that were added to the indictment (counts 7-10).

² See the Pre-Trial Judge’s Order of 1st November 2002 granting the Defence Request to File a Reply.

³ See paragraph 5 of the Defence Reply to Prosecution’s Response to Defence Motion on the Form of the Indictment, filed on 7th November 2002 in support of the Motion.

12. The Prosecution chose the second option and filed, correctly, its motion for leave to amend the indictment, but the only changes it wanted to include in the original indictment were those already suggested in the proposed amended indictment. In the Trial Chamber's opinion, this was a fair and regular move, since the second decision leaves no ground for assuming that the Prosecution could not do so or that the Chamber, by suggesting certain changes, had dismissed the amended indictment.

13. In the Chamber's view, the Defence is interpreting the second decision incorrectly to mean that it *exclusively* ordered the Prosecution to implement the suggested changes in the proposed amended indictment. As explained above, the Chamber explicitly referred to "the terms set out in this order" and it follows clearly from the premises of the second decision that offering the alternate options of either implementing the Chamber's suggestions or otherwise seeking leave to amend was the *ratio decidendi* of that decision. The Trial Chamber could not decide *a priori* on the Prosecution's possibility to seek leave to amend, that is, before a filing was made by the Prosecution in accordance with Rule 50. When the Prosecution opted to retain the new counts that had been introduced in the amended indictment, it sought leave to amend. Upon reception of the Prosecution's motion of 13 June 2002, the Chamber, in its third decision, after having received and examined the parties' submissions, had a fresh look at the amended indictment and granted the motion to the effect that the amended indictment hence stood as the final arraignment against the Accused. In strict application of Rule 50 (B), the Trial Chamber then held a further appearance in order to enable the Accused to enter a plea on the new counts. In the Chamber's view, there is no room for alleging that the latter decision was defeating the former or to hold that the Accused was prejudiced in the preparation of his case.

14. As to the second contentious issue, the question of *vagueness*, the Motion raises objections against the amended indictment's level of precision on a general basis and certainly beyond what strictly pertains to the new counts on which the Accused is entitled to file a preliminary motion under Rule 50(C).⁴ In this respect, the Chamber finds that it should be clearly understood that the opportunity given by Rule 50 (C) to file a preliminary motion alleging defects in the form of an amended indictment is directed to the parts of the Indictment affected by the amendment.⁵ It considers that the Defence cannot use this opportunity to raise issues that should have been raised when the Defence was given the opportunity to do so. Thus, the Chamber does not see the need to consider the allegations of the defence that do not concern the new charges. However, the Motion and the Reply do refer to the alleged uncer-

⁴ See for instance paragraphs 17 and 18 of the Motion.

⁵ See *Prosecutor v. Krnojelac*, IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para.15.

tainty of the new charges, namely regarding the exact relationship that existed between the 4th Military Police Battalion, the Nikola Šubić Zrinski Brigade and the Accused, and regarding the forces that participated in the alleged attack to the village of Očenići.⁶ The Defence also argues that more detailed is required to explain why the alleged aim of the attack on Očenići was to cleanse and demolish the village. With regard to the latter complaint, the Chamber finds that this is a matter that should be examined at trial. As regards the former complaint, the Trial Chamber notes that paragraph 45 of the Amended Indictment states that the Accused “individually and in concert with members of the 4th Military Police Battalion, who were under his command and control, and members of the Nikola Šubić Zrinski Brigade, committed or otherwise aided and abetted in the execution of the crimes of murder and the wilful infliction of serious injury and great suffering, both physical and mental, to Bosnian Muslim civilians in Očenići.” Paragraph 46, in relation to the above mentioned attack, goes on to say that the Accused “and members of the 4th Military Police Battalion, in co-ordination with the Nikola Šubić Zrinski Brigade, directly participated in this attack.” Paragraph 47 further states that the Accused “knew or had reason to know that members of the 4th Military Police Battalion were about to murder or inflict serious physical and mental injury to civilians in the village of Očenići...” The Amended Indictment also contains an organigram (diagram 1), submitted by the Prosecution in compliance with the Trial Chamber’s Decision of 15 March 2002,⁷ which sets out, *inter alia*, the structure of the 4th Military Police Battalion. The Chamber is thus of the view that these allegations are sufficiently detailed to protect the Accused from judicial surprises during trial and to allow him to prepare his defence without prejudice. It further finds that the information sought by the Defence regarding the precise correlation between the Accused, the 4th Military Police Battalion and the Nikola Šubić Zrinski Brigade, and the exact role played by this brigade in the alleged attack on the village of Očenići is a matter that should be dealt with at trial stage. It therefore dismisses the Defence’s objections.

FOR THE ABOVE REASONS

PURSUANT to Rules 50(C) and 54 of the Rules,

THE CHAMBER HEREBY DENIES the Motion.

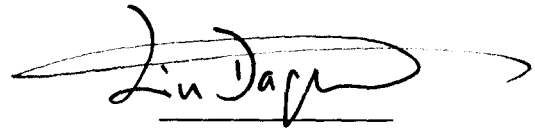
Done in both English and French, the English version being authoritative.

Dated this 13th day of December 2002,

⁶ The Motion, para. 19; the Reply, paras 7-8-9.

⁷ See *Prosecutor v. Paško Ljubičić*, Decision on Defence Motion on the Form of the Indictment, 13 March 2002, p.6.

Dated this 13th day of December 2002,
At The Hague,
The Netherlands

A handwritten signature in black ink, appearing to read 'Liu Daqun', with a long horizontal flourish extending to the right.

Judge Liu Daqun
Presiding Judge

[Seal of the Tribunal]