



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-95-11-PT
Date: 13 December
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: 13 December 2002

PROSECUTOR

v.

Milan Martić

**DECISION ON THE PROSECUTION'S MOTION
TO REQUEST LEAVE TO FILE A
CORRECTED AMENDED INDICTMENT**

The Office of the Prosecutor:

Hildegard Uertz-Retzlaff

Counsel for the Accused:

Strahinja Kastratović

1. Procedural history

1. On 25 July 1995, the initial indictment against the Accused Milan Martić (“the Accused”) was confirmed by Judge Claude Jorda. On 26 August 2002, the Prosecution filed the “Motion to Request Leave to File an Amended Indictment” (“the first Prosecution’s Motion”). On the same day, the “Prosecution’s Material in Support of the Amended Indictment” (“the Prosecution’s Material”) was filed confidentially. On 2 September 2002, the Prosecution filed a “Motion to Request Leave to File a Corrected Amended Indictment” (“the second Prosecution’s Motion”). On 16 September 2002, the Defence filed its “Proposal”, requesting that the Trial Chamber (“the Chamber”) grant to the Defence an additional time of six weeks to prepare their response to the Prosecution’s first Motion. In the course of the Status Conference, held before the Pre-Trial Judge on 23 September 2002, the Defence was orally granted thirty (30) days to respond to the first and the second Prosecution’s Motion, from the day of the Status Conference.¹ On 11 October 2002, the Defence filed its “Preliminary Objection” in relation to the Prosecution’s first and second Motions. On 18 October 2002, the Prosecution filed the “Prosecution’s Response to “Preliminary Objection” of Milan Martić to Prosecution’s Motion For Leave to Amend Indictment” (“the Prosecution’s Reply”). On 18 November 2002, finally, the Prosecution filed its “Addendum of Supporting Materials in Support of Amended Indictment” consisting of eleven witness statements which were inadvertently left out of the Prosecution’s Material.

2. The Initial Indictment

2. The initial indictment charged the Accused with serious violations of the laws and customs of war pursuant to Article 3 of the Statute (“the Statute”) of the International Criminal Tribunal for the former Yugoslavia (“the Tribunal”) for an unlawful attack against the civilian population and individual civilians in Zagreb in 1995, the so-called “Zagreb bombing”. The original indictment contained four counts and alleged alternative individual criminal responsibility of the Accused either under Article 7 (1) or under Article 7 (3) of the Statute.

3. The Prosecution’s First and Second Motion and the Corrected Amended Indictment

3. The Prosecution submits that it continued its investigations into crimes committed by the Accused and such committed under his command since the initial indictment was filed in 1995. According to the Prosecution, the new evidence that has emerged since then justified the incorporation of crimes allegedly committed by the Accused and his subordinates from the Croatia and Bosnia indictments in the case *Pros. v. Slobodan Milošević* (IT-02-54-T).

¹ *Transcript*, p. 67

4. The Corrected Amended Indictment charges the Accused with nineteen counts. In detail, he is charged with murder, torture, cruel treatment, wanton destruction of villages, or devastation not justified by military necessity, destruction or wilful damage done to institutions dedicated to education or religion, plunder of public or private property and attacks on civilians as violations of the laws or customs of war pursuant to Article 3 of the Statute. Further, he is charged with persecution, extermination, murder, inhumane acts, imprisonment and deportation as crimes against humanity pursuant to Article 5 of the Statute.

5. Regarding the individual responsibility of the Accused, the Corrected Amended Indictment alleges that he is responsible under Article 7 (1) of the Statute, by, inter alia, participating in a joint criminal enterprise to forcibly remove a majority of the Croat, Muslim and other non-Serb population from parts of the territory of the Republic of Croatia and of the Republic of Bosnia and Herzegovina "in order to make them part of a new Serb-dominated state" (paragraphs 3 and 4 of the Corrected Amended Indictment). Paragraphs 7 a. - h. of the Corrected Amended Indictment set out the modalities of the alleged participation of the Accused in the joint criminal enterprise in a detailed way. According to paragraph 8 of the Corrected Amended Indictment, the Accused is also charged under Article 7 (1) with "having planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, execution, and commission of the crimes".

6. The Corrected Amended Indictment also charges the Accused with individual criminal responsibility for criminal acts of his subordinates while holding various positions of superior authority pursuant to Article 7 (3) of the Statute. It is alleged that the Accused was first Chief of the Serb Police in Knin, then Secretary for Internal Affairs for the SAO Krajina, later Minister of Defence of the SAO Krajina and Minister of Internal Affairs for the SAO Krajina and later of the RSK and that, while holding these positions, he had superior authority over the police forces of the SAO Krajina, including the ethnically Serb "Martić's Police" that he allegedly established himself. The Prosecution pleads that the Accused is therefore criminally responsible for the participation of members of the Martić's Police in the crimes charged in the indictment.

7. The Corrected Amended Indictment further alleges that the Accused was appointed Deputy Commander of the TO of the SAO Krajina on 8 August 1991 and that, in this position, he exercised *de facto and de jure* control over the TO of the SAO Krajina/RSK. Finally, it is pleaded that the Accused was elected President of the RSK on 25 January 1994. He allegedly held this position until August 1995 and it is claimed that it enabled the Accused to further exercise *de jure and de facto* control over the TO of the SAO Krajina/RSK and the SVK. Consequently, the Corrected Amended Indictment charges the Accused with individual criminal responsibility under Article 7 (3) of the

Statute for the participation of members of the TO of the SAO Krajina RSK and SVK in the crimes charged in the indictment.

8. The Prosecution submits that the original indictment against the Accused is incorporated in full in Counts 16 to 20 in the Corrected Amended Indictment. The Prosecution submits that only a few typographical changes have been made in this regard and that the identity of the dead and wounded have been included in an Annex to the Corrected Amended Indictment.

9. The Corrected Amended Indictment further contains two Annexes, listing victims, divided by incident and location, who, as the Prosecution submits, are presently known to them. Annex I refers to paragraphs 26 and 28 to 36 of the Corrected Amended Indictment. Annex II relates to the Zagreb shelling and refers to paragraphs 51 to 53 of the Corrected Amended Indictment.

10. The Prosecution requests leave to amend the indictment to include the additional charges against the Accused regarding (a) his participation in a joint criminal enterprise, (b) crimes allegedly committed on the territory of the SAO Krajina, in Croatia and certain territories in Bosnia and Herzegovina between August 1991 and December 1995, (c) the adding of charges under Article 5 of the Statute with respect to the shelling of Zagreb on 2 and 3 May 1995 and (d) corrections of typographical errors with regard to the shelling of Zagreb. The Prosecution requests leave that the Corrected Amended Indictment attached to the Prosecution's second Motion replace the initial indictment with respect to all charges against the Accused.

4. The Objections of the Defence

11. On 11 October 2002, the Defence filed its "Preliminary Objection" ("the Defence Objections"). Herein, the Defence announced their compliance with the Chamber's oral order to respond to the Prosecution's Motion within 30 days from the day of the Status Conference. The Defence Objections were filed "while acting as instructed". However, the Defence did abstain from filing any additional Objections before the expiration of the filing time on 23 October 2002. In the absence of any such further filing, the Chamber will therefore regard the Defence Objections as its main objections to the merits of the Prosecution's Motion.

12. The Defence raises four objections. First, it challenges the Prosecution's submission that the proposed amended indictment is based on *new evidence* that appeared after the initial indictment had been filed. The Defence submits that the amended indictment is not based on any new evidence but rather on the very same evidence that already existed at the time the first indictment was confirmed in 1995.² The same objection is raised against the inclusion of charges under Article 5 of the

² *The Defence Objections*, p. 2

Statute with regard to the bombardment of Zagreb, the exclusive issue in the initial indictment. In the opinion of the Defence, no new evidence was discovered since 1995 and the Prosecution was aware of all related evidence at the time.³

13. Secondly, the Defence submits that it is inadmissible to tie the responsibility of the Accused to the one of the accused Slobodan Milošević since Article 7 of the Statute adopts the principle of *individual criminal responsibility* and this principle would, otherwise, be violated.⁴

14. The third Defence objection concerns the allegation of the Prosecution that the attack on Zagreb was *not "militarily justified"*. According to the Defence, the question whether the attack was militarily justified or not remains to be proven in the main proceedings and can, therefore, not be presupposed in the suggested amended indictment.⁵

15. Finally, the Defence submits that granting leave to amend the original indictment would incur a violation of the *principle of specialty*. It is submitted that the Accused surrendered to the Tribunal in the knowledge that he would be tried for the criminal offences charged in the original indictment. The Defence submits that the rule of specialty, according to which a person who has been extradited for certain charges cannot be prosecuted for any other criminal offences committed before his extradition, also applies for the Accused.⁶

5. The Prosecution's Response

16. In its response, the Prosecution disputed the Defence's allegation that its Motion does not rely on new evidence, pointing out that at least 70 documents and witness statements of the supporting material were obtained by the Prosecution after the date of the initial indictment.⁷ With regard to the addition of charges under Article 5 for the so-called "Zagreb bombing", the Prosecution submitted that Chambers in the Tribunal have repeatedly approved the addition of new charges based on facts contained in the original indictment and that the test to be applied is whether the amendment will unfairly prejudice the accused.⁸ Regarding the Defence's objection that the Prosecution has improperly alleged that the attack on Zagreb was not militarily justified, the Prosecution responded that the latter is an element of the charge under Article 3 of the Statute and that, therefore, the allegation was both proper and required.⁹ Finally, the Prosecution submitted that the principle of specialty, as claimed by the Defence, is not applicable in the case of the Accused for two reasons: first, the Accused has not been extradited but surrendered voluntarily to the Tribunal; sec-

³ *ibid*

⁴ *ibid*

⁵ *The Defence Objections, p. 3*

⁶ *ibid*

⁷ *The Prosecution's Reponse, p. 2*

⁸ *The Prosecution's Response, p. 3*

only, the rule of specialty is a right that belongs to an extraditing State and not to the individual concerned.¹⁰

6. The applicable law

17. Article 21 of the Statute of the Tribunal incorporates the minimum rights of the accused. In paragraphs (2) and (4) it is provided that “(i)n the determination of the charges against him, the accused shall be entitled to a fair and public hearing” and that “(i)n the determination of any charge against the accused”, he shall be entitled “to be informed promptly and in detail in a language he understands of the nature and cause of the charge against him” and “have adequate time and facilities for the preparation of his defence”. Article 18 (4) of the Statute provides that, upon a determination that a *prima facie* case exists, “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”. Accordingly, Rule 47 (C) of the Rules of Procedure and Evidence of the Tribunal (“the Rules”) requires that 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”.

18. The Appeals Chamber has held 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”. 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. Consequently, an indictment is pleaded with sufficient particularity if “it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence”.¹¹ An important 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.¹² In particular, “[w]hether 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.*”¹³ Legal prerequisites which apply to offences charged are material facts and must be pleaded.¹⁴

⁹ *ibid*

¹⁰ *The Prosecution’s Reponse*, p. 4

¹¹ *Pros. v. Zoran Kupreškić et. al.*, Appeal Judgment, Case No. IT-95-16-A, 23 October 2001, para. 88

¹² *Pros. v. Zoran Kupreškić et. al.*, Appeal Judgment, Case No. IT-95-16-A, 23 October 2001, para. 89.

¹³ *Prosecutor v. Radoslav Brdanin and Momir Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, Case No. IT-99-36-PT, 20 February 2001 (“First Talić Decision”), para. 18 and the *Kupreškić* Appeal Judgement, paras. 88 – 90.

¹⁴ *Prosecutor v. Enver Hadžihasanović et al.*, Decision on Form of Indictment, Case No. IT-01-47-PT, 7 December 2001, para. 10; *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Decision on Prosecution’s Motion for Leave to Amend the Consolidated Indictment, Case No. IT-00-39 & 40-PT, 4 March 2002, para. 9.

19. Rule 50 of the Rules provides for the amendment of an indictment. According to Rule 50 (A) (i) (c) of the Rules, the Prosecutor 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. Pursuant to Rule 50 (B) of the Rules, a further appearance of the accused before the Chamber shall be held if the amended indictment includes new charges and the accused has already appeared before the Chamber in accordance with Rule 62 of the Rules. Rule 50 (C) of the Rules provides that the accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 of the Rules in respect of any such new charges.

7. Discussion

(a) New evidence and the test to be applied for an amendment of the indictment

20. With its first objection, the Defence challenges the Prosecution's submission that the Prosecution's first Motion relies on new evidence. The Chamber notes that the timetable submitted as Attachment A to the Prosecution's Response and the Prosecution's Material does indicate that substantial parts of the supporting material was received after the filing of the first indictment.¹⁵

21. Independently of this finding, the Chamber is of the view that the Defence applied a wrong test for challenging an application for the amendment of an indictment when concentrating on the question whether new evidence "justifies" such amendment or not. Rule 50 of the Rules does not contain any requirement that an indictment can only be amended if new evidence has been discovered after the initial indictment has been filed. Indeed, Rule 50 of the Rules neither provides any parameters as to the exercise of discretion by a Chamber when seized by a Motion to grant leave to amend an indictment nor does it contain any express limits of such discretion. The Trial Chamber endorses the test set out in the case *Pros. v. Radoslav Brđanin & Momir Talić* that has also been applied in other Trial¹⁶ and Appeals Decisions¹⁷ of the Tribunal:

¹⁵ For instance, see the following documents whose document dates are after the date of the original indictment of 24 July 1995 with the Index numbers SM 5, SM 6, SM 7-9, SM 13 and 15, SM 19-27, SM 29, SM 34, SM 41, SM 62, SM 83-87, SM 90 and 91, SM 94, SM 96. According to *Annex A* of the Prosecution's Reply, the Prosecution also received a number of documents who are dated earlier only at a time after the original indictment had been filed.

¹⁶ *Pros. v. Mladen Naletilić aka "Tuta" and Vinko Martinović aka "Štela"*, Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, Case No. IT-98-34-PT, 14 February 2002, p. 4, where it was stated: "Although there are no express limits on the exercise of the discretion contained in Rule 50, when viewing the Statute and Rules as a whole, it is obvious that it must be exercised with regard to the right of the accused to a fair trial. In particular, depending on the circumstances of the case, the right of the accused to an expeditious trial, to be promptly informed of the charges against him or her, and to have adequate time and facilities for the preparation of his or her defence, potentially arise when considering objections to an amended indictment".

¹⁷ *Pros. v. Milan Kovačević*, Appeals Chamber, Decision Stating Reasons For Appeals Chamber's Order of 29 May 1998, Case No. IT-97-24-AR73, 2 July 1998, paras 24, 28, 33 which state that it must be considered "whether any injustice would be cause to the accused" (para 24), that the question is "whether the additional time which the granting of the motion for leave to amend would occasion is reasonable in the light of the right of the accused to a fair and expeditious trial" (para 28), that the "timeliness of the Prosecutor's request for leave to amend the Indictment must thus be

“The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly. The word “unfairly” is used in order to emphasise that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction. To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence. There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case.”¹⁸

22. Due to its misconception of the applicable test, the Defence did not submit any reasoned arguments of an unfair prejudice being caused to the Accused by the suggested amendment of the indictment. At its own initiative, nevertheless, the Chamber will apply the test set out above to ensure that the principle of a fair and expeditious trial is safeguarded in the present case. In this instance, the Chamber recalls that the Prosecution notified the Accused shortly after his surrender, notably in the course of his initial appearance before the Tribunal on 23 May 2002, of its intention to apply for leave to amend the initial indictment against him.¹⁹ The Prosecution then filed its application for the amendment at an early stage of the Pre-trial proceedings. Taking into account that the Pre-trial proceedings are on-going and that a trial date for the Accused has therefore not yet been scheduled, the Chamber is satisfied that the Accused will not be prejudiced unfairly by the amendment. He will have ample opportunity and time to prepare an adequate defence with regard to the new charges. The Chamber is therefore satisfied that granting leave to amend the initial indictment will not cause any injustice to the Accused as defined above. The objection of the Defence is rejected.

23. Likewise, the objection of the Defence to the addition of charges under Article 5 of the Statute with regard to the alleged “Zagreb bombing” is without merits. The addition of new charges in the absence of new factual material has been accepted in other cases before the Tribunal and the International Tribunal for Rwanda.²⁰ As laid out above²¹, the test to be applied with regard to the amendment of an indictment pursuant to Rule 50 is whether the permission of an amendment will result in any unfair prejudice to the Accused.

measured within the framework of the overall requirement of the fairness of the proceedings” (para 31). See also *Pros. v. Milan Kovačević*, Appeals Chamber, Separate Opinion of Judge Mohamed Shahabuddeen, Case No. IT-97-24-AR73, 2 July 1998, pp. 4 and 5, pointing out that the principle in relation to the amendment of indictments “has to take account of the peculiarities and difficulties of unearthing and assembling material for war crimes prosecution conducted in relation to the territories of the former Yugoslavia and that, therefore, “(t)he resulting need for reasonable judicial flexibility is apparent”.

¹⁸ *Pros. v. Radoslav Brđanin & Momir Talić*, Decision on filing of Replies, Case No. IT-99-36-PT, 7 June 2001, para 3. Footnotes of the original text were omitted for the purpose of this Decision.

¹⁹ See *Transcript*, p. 13. This is not disputed by the Defence, as can be seen from the Defence “Motion to Convene A Status Conference”, dated 15 July 2002 and filed on 19 July 2002, wherein Counsel of the accused confirmed that he and his client were put on notice by the Prosecution of its intention to add new charges to the initial indictment in the course of the accused’s initial appearance.

²⁰ *Pros. v. Mladen Naletilić aka “Tuta” and Vinko Martinović aka “Štela”*, Decision on Vinko Martinović’s Objection to the Amended Indictment and Mladen Naletilić’s Preliminary Motion to the Amended Indictment, Case No. IT-98-34-PT, p. 6 referring also to *Pros. v. Krstić*, Amended Indictment, Case No. IT-98-33-PT, 27 October 1999 and *Pros. v.*

24. In the concrete circumstances of the case, the Chamber is not satisfied that any such prejudice will result from permitting the amendment. The application of the Prosecution for addition of charges under Article 5 was filed early in Pre-trial proceedings. The commencement of the trial has not yet been scheduled. The underlying facts have been known to the Accused for a period of several years during which he had time to prepare his defence with regard to the original charges. The Chamber is fully aware of the Accused's right to be granted sufficient time to prepare an effective defence with regard to the new charges under the heading of Article 5 of the Statute in relation to the Zagreb bombing.

(b) The allegation of a joint criminal enterprise

25. The second Defence objection against the allegation of the Accused's participation in a joint criminal enterprise with other perpetrators appears to be that such pleading violates the principle of individual responsibility and the jurisdiction and general provisions of the Statute of the Tribunal. The Chamber notes that the Prosecution's Response is silent on this objection. The Chamber nevertheless finds this Defence objection to be ill-founded. The Defence correctly argues that the foundation of criminal responsibility, in national as well as in international criminal law, is the principle of personal culpability; i.e. nobody may be held responsible for acts or omissions in which he has not personally engaged or in some other way participated.²²

26. The individual criminal responsibility of an accused under Article 7 (1) of the Statute does not exclude responsibility of individuals for actions perpetrated by a collectivity of persons in furtherance of a common criminal design. As the Appeals Chamber of the Tribunal has noted, such restrictive interpretation of Article 7 (1) of the Statute would disregard the role as co-perpetrators of such persons who in some way made it possible for the perpetrator to physically carry out a certain criminal act. The Appeals Chamber found the conclusion warranted that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design. It concluded:

"In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment... With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens*

Niyitegeka, Decision on Prosecutor's Request for Leave to File an Amended Indictment, Case No. ICTR-96-14-I, 21 June 2000.

²¹ See above, para 20 of the Decision.

²² *Pros. v. Duško Tadić*, Appeal Judgment, Case No. IT-95-1-A, 15 July 1999, para 186.

rea are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose...²³

27. Applying the same standard to the present case, the Prosecution’s assertion that the notion of “committing” in the Corrected Amended Indictment includes the Accused’s “participation in a joint criminal enterprise as co-perpetrator” does not constitute a reason to reject the Prosecution’s application for leave to amend the indictment. The objection of the Defence is therefore without merit.

(c) The question of the lawfulness/military necessity of the attack on Zagreb

28. The Chamber also has to reject the third objection of the Defence. As the Defence themselves correctly stated in the Defence Objections, the question “(w)ether the attack was militarily justified or not remains to be proven at the main trial”. For that reason, the Prosecution acted correctly when charging the Accused in the amended indictment in the manner challenged by the Defence. The question whether the attack was militarily justified constitutes a legal element of the alleged crime. Already in the initial indictment, the Accused was charged with an “unlawful” attack against the civilian population and individual civilians under Article 3 of the Statute. Further, Article 3 (b) of the Statute explicitly refers to the “wanton destruction of cities, towns or villages, or devastation *not justified by military necessity*”²⁴ as a violation of the laws or customs of war. The Prosecution, in the amended indictment, therefore translated a legal element of the charged crime into the corresponding factual allegation that may or may not be proven by the Prosecution beyond reasonable doubt in the course of the Prosecution case against the Accused. By doing so, the Prosecution therefore complied with its obligation to “state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven” and to reflect in the indictment “a concise statement of the facts and the crime or crimes with which the Accused is charged”, as required by the Statute and interpreted by the Appeals Chamber.²⁵

(d) The rule of specialty

29. The Defence has invoked the rule of specialty in support of its rejection of the proposed amendment to the Indictment. This argument is without merit. The Defence rightly argues that the rule of specialty applies in the domain of extradition.

30. The rule of specialty protects the extradited person against prosecution for offences for which the extradition has not been sought. It serves to prevent that the requested state would lose

²³ *Pros. v. Duško Tadić*, Appeal Judgment, Case No. IT-95-1-A, 15 July 1999, para 220.

²⁴ Italics were inserted for the purpose of this Decision.

its authority to decide whether it grants extradition under the existing treaty and statute provisions for each and every of the offences for which the extradition is sought. It reflects the equal positions of States in their extradition relations with other States.

31. The relation between the Tribunal, being established under Chapter VII of the Charter of the United Nations, and States is not the same as the relation between equal states.²⁶ States are under an obligation of International Law to co-operate with the Tribunal, which includes a duty to arrest and transfer accused persons upon the request of the Tribunal. States would therefore not be in a position to object to the prosecution of a transferred accused before the Tribunal on other charges falling within the jurisdiction of the Tribunal than those that were brought against him when that person was transferred. Therefore an accused, who was arrested and transferred by a State under Article 29 of the Statute of the Tribunal would not have the possibility to invoke the principle of specialty for any such offence.²⁷ The Tribunal is under no obligation to seek, and never sought, the consent of a state that has arrested and transferred an accused when confirming an indictment that enlarges the scope of the charges brought against the accused.

32. There is also another reason why the reliance upon the principle of specialty is without merit. The Accused has not been extradited to the Tribunal, but has turned himself in. Whereas the rule of specialty may generally apply when the person requested has been extradited as a result of a full extradition procedure, *i.e.* by one State to another State, it is less evident that the Rule would find similar general application in cases where simplified proceedings have been followed on the basis of the *consent* of the person, given prior to his or her extradition.²⁸ Since the rule of specialty does not apply in general when the person has been extradited with his consent as a result of a simplified procedure, in other words, it is even less acceptable that the Rule should apply where the person has not been extradited but has turned himself in. The mere fact that the Accused might have risked being surrendered if he had not given himself up voluntarily does not change this. In sum, no grounds remain to apply the rules governing extradition, regardless of whether the individual surrenders or is transferred to the Tribunal. The Defence objection is thus unfounded.

²⁵ *Pros. v. Zoran Kupreškić et. al.*, Appeal Judgment, Case No. IT-95-16-A, 23 October 2001, para 88; see also above, paras 15 and 16.

²⁶ The Appeals Chamber confirmed that “the fundamental relations between requested and requesting state have no counterpart in the arrangements relating to the International Tribunal”, *Pros. v. Milan Kovačević*, Decision Stating Reasons For Appeals Chamber’s Order of 29 May 1998, Case No. IT-97-24-AR73, 2 July 1998, p. 16.

²⁷ This view was also endorsed in the Appeals Chamber Decision in Prosecutor v. Milan Kovačević, Case No. IT-97-24-AR73, 2 July 1998, p. 16, wherein the Appeals Chamber held with regard to the principle of specialty that “if there exists such a customary international law principle, it is associated with the institution of extradition as between states and does not apply in relation to the operations of the International Tribunal.”

²⁸ See Art. 41.2 of the German Act on International Cooperation in Criminal matters and Art. 9 and 15 of the Convention drawn up on the basis of Article K.3 of the Treaty of the European Union, on simplified Extradition Procedure between the Member States of the European Union of 10 March 1995

(e) The sufficiency of the supporting material

33. The Chamber notes that the Defence has not challenged the sufficiency of the supporting material submitted by the Prosecution to sponsor its Motion. More importantly, however, the Chamber observes that subrules (i) and (ii) of Rule 50(A) of the Rules do not require confirmation of an indictment in which amendment is sought *after* the case has been assigned to a Trial Chamber. Rule 50, in other words, does not impose an obligation on the Chamber to examine the amended indictment by the same standards as those applicable to the initial confirmation of the indictment under Article 19(1) of the Statute and Rule 47(E) of the Rules. However, in view of the considerable extension of the charges and the substantial increase in the number of counts brought against the Accused in the amended indictment, the Chamber considered it appropriate to carefully screen the amended indictment and the supporting material adduced in support thereof to ensure the protection of the Accused against being unjustifiably put at trial for the new charges. The Chamber has found sufficient basis for the new counts charged in the amended indictment and the supporting material to allow the promotion of the amended indictment to trial without any prejudice to the Accused's right to a fair trial.

8. Disposition

FOR THE FOREGOING REASONS,

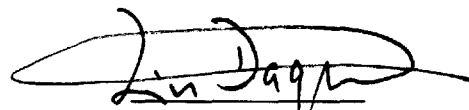
PURSUANT TO RULE 50 (A)(i)(c) of the Rules,

THE CHAMBER DECIDES AS FOLLOWS:

1. Leave is granted to the Prosecution to amend the indictment as proposed in the Corrected Amended Indictment attached to the Prosecution's Second Motion.
2. The Corrected Amended Indictment shall replace the current indictment with respect to all charges against the Accused.
3. The Prosecution is ordered to file the new indictment within thirty days of the filing of this decision.
4. The Defence shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 of the Rules in respect of the new charges.
5. A further appearance of the Accused will be scheduled by the Chamber and be held as soon as practicable to allow the Accused to enter a plea on the new charges.

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

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



Judge Liu Daqun
Presiding Judge

[Seal of the Tribunal]