

IT-96-23/2-PT

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20 FEBRUARY 2003

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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 the
Former Yugoslavia since 1991

Case No.: IT-96-23/2-PT

Date: 28 February 2003

Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 28 February 2003

PROSECUTOR

v.

RADOVAN STANKOVIĆ

**DECISION ON THE PROSECUTOR'S MOTION SEEKING LEAVE TO
AMEND THE AMENDED INDICTMENT**

Office of the Prosecutor

Mr Jan Wubben

Counsel for the Accused

Mr Milenko Radović

1. Procedural history

1. On 15 November 2002 this Trial Chamber (“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”) issued its “Decision on the Defence Preliminary Motion on the Form of the Indictment” which partially granted the Defence’s motion and accordingly ordered the Prosecution to amend the indictment and to file the amended indictment within 21 days of the date of the decision.¹

2. The Chamber is now seized by the “Prosecutor’s Motion Seeking Leave to Amend the Amended Indictment”, filed on 20 November 2002 (“the Motion”). Attached to the motion is the (proposed) “Second Amended Indictment”, which, in addition to incorporating the amendments to the Amended Indictment ordered by the Chamber, proposes numerous other changes, including four additional counts.

3. In response to this Motion the Defence filed its “Preliminary Motion on the Form of the Second Amended Indictment” on 10 December 2002 (“the Response”).

4. The Prosecution maintains that due to an administrative error by its Trial Support Section, counsel assigned to the case did not receive the Defence’s Response until 31 January 2003. The Prosecution subsequently filed the “Prosecution Reply to the Defence Preliminary Motion on the Form of the Second Amended Indictment” on 4 February 2003 (“the Reply”), in which it requested, as a preliminary matter, leave to file a reply in variation of the time-limits pursuant to Rule 127(A)(i) of the Rules.

2. The Prosecution’s Motion

5. The Prosecution submits that the additional substantive amendments it proposes are the result of investigations concerning Radovan Stanković undertaken subsequent to the confirmation of the Amended Indictment in October 1999, or are based on findings of the Trial and Appeals Chambers in the *Kunarac et al.* and *Krnojelac* cases. Their effect is to particularize the indictment further. The balance of the amendments are linguistic improvements or simplifications of form, making the indictment clearer. References to

¹ See para. 15 of that decision.

Mr Stanković's co-accused have been deleted from the proposed Second Amended Indictment and the paragraphs (and counts) have been renumbered throughout.²

6. The proposed four new counts relate exclusively to the alleged rape and enslavement of "D.B." in the period from the end of September 1992 to 3 November 1992. They mirror the four original counts against Mr Stanković (namely, enslavement and rape as crimes against humanity, and rape and outrages upon personal dignity as violations of the laws or customs of war), which now cover an earlier though overlapping period (early August 1992 to the end of October 1992) and concern numerous alleged victims, including D.B. As justification for increasing the counts, the Prosecution states they are "based on testimony from the *Kunarac* trial and additional investigative work undertaken since the Amended Indictment was confirmed".³

3. The Defence's Response

7. The Defence raises the following objections to the Motion:

(a) There was undue delay between the time when the Amended Indictment was confirmed (October 1999) and the current request to amend the indictment; similarly, there was undue delay between the rendering of the *Kunarac et al.* Trial and Appeals Chambers judgements (in February 2001 and June 2002, respectively), on which the Prosecution draws for its proposed amendments, and the filing of the Motion to amend;⁴

(b) The Motion does not contribute to speeding up the proceedings in the case, for if the Motion were granted it would cause the Accused to seek more time to prepare his defence;⁵

(c) It is not possible to charge the Accused for the same acts of rape pursuant to both Article 3 and Article 5 of the Tribunal's Statute; nor is it possible to charge rape and outrages upon personal dignity for the same acts;⁶

² Paras. 2 and 3 of the Motion.

³ Id., para. 2.

⁴ Para. 2 of the Response.

⁵ Id., para. 3.

⁶ Id., paras. 19 and 21.

(d) Paragraph 4.1 of the proposed Second Amended Indictment, being the basis for Count 1 (enslavement), makes reference to alleged victim D.B., who is also referred to in paragraph 5.1, forming the basis of Count 5 (enslavement); the Defence objects that the Accused cannot be found twice guilty for the same act;⁷

(e) The Accused does not accept that he is connected with any of the events established in the *Kunarac et al.* case; moreover, the Prosecution's allegation that certain proposed amendments are derived from findings in that case is not borne out when the Prosecution's citations are checked;⁸

(f) Various other factual allegations introduced with the proposed amendments are, according to the Defence, inaccurate or false;⁹

(g) The Defence finally reiterates objections raised in its "Preliminary Motion on the Form of the Indictment" (filed on 24 September 2002 and decided by this Chamber on 15 November 2002), and also raises new objections (see, for example, subparagraph (c), above).¹⁰

4. The Prosecution's Reply

8. The Prosecution first requests the Chamber's leave to admit the Reply pursuant to Rule 127 of the Rules for the reasons referred to in paragraph 4, above.

9. The Prosecution proceeds to reject the Defence's argument that there was undue delay in bringing forth the Motion to amend. The real issue, according to the Prosecution, is the amount of time the Defence will have to prepare. A date for trial has yet to be set in this case, so there is no reason to think that the Defence's preparations would be prejudiced by insufficient time.¹¹

10. The Prosecution answers the Defence's objections as to D.B. by explaining that the Prosecution's position is that D.B. was enslaved at two different locations, at different periods of time, and in different circumstances. The first period of alleged enslavement was from early August 1992 to late September 1992, when D.B. was kept at Karaman's

⁷ Id., para. 20.

⁸ Id., para. 5.

⁹ Id., paras. 4, 7, 13, 14, 15, 16, and 18.

¹⁰ Id., para. 12 (for the first category) and paras. 10, 11, and 17 (for the second category).

¹¹ Paras. 4 and 5 of the Reply.

house. The Accused is alleged to have then relocated D.B. to a first and then to a second apartment, where he kept the victim until about 3 November 1992. The Prosecution contends that these events amount to two different acts of enslavement.¹²

11. Nevertheless, the Prosecution submits that were the Chamber to accept the arguments of the Defence on this point, the Prosecution would change the proposed Second Amended Indictment in such a way as to remove D.B. from the cluster of paragraphs underlying Counts 1 to 4, placing the totality of allegations concerning crimes committed against her in the paragraphs forming the basis of Counts 5 to 8. An attachment to the Reply incorporates this proposed change.¹³

5. Discussion

12. As a preliminary matter, with regard to the Prosecution's request to file a Reply pursuant to Rule 127(A)(i) of the Rules, it seems to the Chamber that the Prosecution counsel assigned to this case could have been more diligent in seeking to establish whether the Defence had filed a response to what is, self-evidently, an important Motion. The Chamber is nevertheless inclined to grant the requested leave to submit a Reply in view of the explanations given by the Prosecution. Taking into account the particular circumstances of this case, the Chamber finds that not admitting the Reply would delay the proceedings and would not be in the interests of justice.

13. Rule 50 of the Rules provides for the amendment of an indictment. According to subparagraph (A)(i)(c) of this rule, 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. Pursuant to subparagraph (B), a further appearance of the Accused before the Chamber must be held if the amended indictment includes new charges and the accused has already appeared before the Chamber in accordance with Rule 62. Subparagraph (C) of Rule 50 provides that the Accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of any such new charges and that the date for trial may be postponed to ensure adequate time for the preparation of the defence.

¹² Id., para. 9 (sic).

¹³ Id., para. 10.

14. The Chamber has considered the Defence's objections to the Motion relating to the question of D.B. (see 7(d), above) and is not persuaded by the Prosecution's argument that the Accused should be charged with two discrete counts of enslavement for his alleged treatment of D.B. over the period August to November 1992 simply because he allegedly moved her from one residence to another in September 1992. However, the Prosecution's Reply adequately addresses the Defence's objections on this point. The proposed amendments shown in the attachment to the Reply (namely, the creation of one set of counts for D.B. and another set for the other victims) clarify that the alleged enslavement of D.B. occurred at locations other than Karaman's house and extended over a slightly longer period of time than was the case for the others. It is quite proper, in the Chamber's opinion, that these alleged acts of enslavement of D.B. are separated out from allegations underlying Count 1 and charged in another count.

15. The other Defence objections lack merit. In relation to the objections summarized above at paragraphs 7(a) and 7(b), the Chamber recalls its 13 December 2002 "Decision on the Prosecution's Motion to Request Leave to File a Corrected Amended Indictment" in the *Martić* case, wherein it stated that Rule 50 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 limitation on such discretion. The Chamber reiterates its endorsement of the test set out in the *Brdanin & Talić* case:

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.¹⁴

16. Taking into account that a trial date for the Accused has not yet been scheduled, the Chamber is satisfied that the Accused will not be prejudiced unfairly by the proposed

amendments. He will have ample opportunity to prepare a defence with regard to the new charges. The Chamber is therefore satisfied that granting leave to amend the Amended Indictment will not cause any injustice to the Accused.

17. With regard to the objection summarized at paragraph 7(c), above, the Appeals Chamber has consistently rejected this argument, stating that:

“Cumulative charging 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. The Trial Chamber is better poised, after the parties’ presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.”¹⁵

The Chamber thus dismisses this objection.

18. The remaining objections of the Defence concern factual issues (see 7(e)-(g), above), which are proper matters for resolution at trial and not at this preliminary stage, or issues already decided by the Chamber. They are dismissed.

19. The Defence has not explicitly challenged the sufficiency of the material submitted by the Prosecution in support of its Motion. The Chamber observes that subrules (i) and (ii) of Rule 50(A) do not require that an indictment to which amendment is sought after the case has been assigned to a Trial Chamber be confirmed. Rule 50, in other words, does not impose an obligation on a Trial 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 Tribunal’s Statute and Rule 47(E) of the Rules.¹⁶ However, in view of the increase in the number of counts brought against the Accused in the present instance, the Chamber considered it appropriate to carefully screen the supporting material adduced in support of the proposed amendments to ensure the Accused’s protection. The Chamber has found sufficient basis for the amendments.

¹⁴ *Prosecutor v. Radoslav Brđanin & Momir Talić*, “Decision on Filing of Replies”, 7 June 2001, para 3.

¹⁵ *Prosecutor v. Delalic et al.*, Judgement on Appeal, 20 February 2001, para. 400.

¹⁶ See the aforementioned decision in the *Martić* case, para. 33.

FOR THE FOREGOING REASONS, THE CHAMBER:

PURSUANT TO Rule 50 of the Rules,

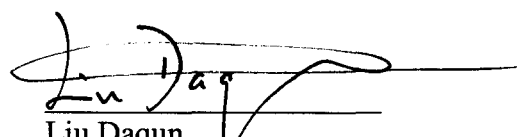
GRANTS the Motion;

ORDERS the Prosecution to file the proposed indictment *attached to its Reply of 4 February 2003* within seven (7) days of this decision – this indictment will be known as the “Second Amended Indictment”;

REQUESTS the Registrar to arrange for a further appearance of the Accused, to be held as soon as practicable after the filing of the Second Amended Indictment, to enable the Accused to enter a plea on the new charges;

REMINDS the Accused that he is entitled to a further period of thirty (30) days from the date of the filing of the Second Amended Indictment in which to file preliminary motions pursuant to Rule 72 in respect of the new charges.

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



Liu Daqun
Presiding

Dated this 28th day of February 2003
At The Hague
The Netherlands

[Seal of the Tribunal]