



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-96-23/2-PT  
Date: 11 October 2006  
Original: English

**IN TRIAL CHAMBER I**

**Before:** Judge Alphons Orie, Presiding  
Judge Christine Van Den Wyngaert  
Judge Bakone Justice Moloto

**Registrar:** Mr. Hans Holthuis

**Decision of:** 11 October 2006

**PROSECUTOR**

v.

**DRAGAN ZELENović**

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**DECISION ON DEFENCE PRELIMINARY MOTION**

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**The Office of the Prosecutor:**

Ms. Hildegard Uertz-Retzlaff

**Counsel for the Accused:**

Mr. Zoran Jovanović

## I. BACKGROUND

1. Trial Chamber I (“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 (“Tribunal”) is seized of the “Defence Preliminary Motion” (“Motion”) filed on 14 September 2006 by counsel for Dragan Zelenović (“Defense” and “Accused”, respectively) which alleges defects in the form of the amended indictment. On 22 September 2006, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution’s Response to Defence Preliminary Motion” (“Response”).

2. The Accused was transferred from Bosnia and Herzegovina to the seat of the Tribunal on 13 June 2006. The initial appearance of the Accused occurred on 13 June 2006 and a further hearing was held on 13 July 2006.

3. On 9 August 2006, the Trial Chamber issued the “Decision on Defence Motion for a Stay of Proceedings or for Extension of Time” and ordered that the term for submission of preliminary motions in this case, pursuant to Rule 72 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), be extended by up to 30 days from the date of the assignment of a permanent Defence Counsel and by no later than 22 September 2006. On 16 August 2006, the Registrar issued a decision assigning counsel to the Accused.

4. The Accused was initially indicted together with Gojko Janković, Radovan Stanković, Dragoljub Kunarac, Radomir Kovač, Zoran Vuković, Dragan Gagović and Janko Janjić. The original indictment was confirmed on 26 June 1996.<sup>1</sup> An amended indictment against Gojko Janković, Radovan Stanković, Zoran Vuković, Janko Janjić and the Accused was signed on 5 October 1999.<sup>2</sup> The operative indictment against the Accused is a redacted version of the amended indictment against Gojko Janković, Radovan Stanković and the Accused filed on 20 April 2001 (“Indictment”).

5. The Accused is charged with crimes relating to the military take-over of the municipality of Foča in Bosnia and Herzegovina by Serb forces in the spring of 1992. The Accused is charged with four counts of rape as a crime against humanity<sup>3</sup> and three counts of torture as a crime against humanity<sup>4</sup> under Article 5 of the Statute of the Tribunal (“Statute”), as well as four counts of rape as a violation of the laws or customs of war<sup>5</sup> and three counts of torture as a violation of the laws or

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<sup>1</sup> IT-96-23, Initial Indictment, 26 June 1996.

<sup>2</sup> IT-96-23/2-PT, Amended Indictment, 5 October 1999.

<sup>3</sup> Indictment, Counts 6, 14, 42, 49.

<sup>4</sup> Indictment, Counts 5, 13, 41.

<sup>5</sup> Indictment, Counts 8, 16, 44, 50.

customs of war<sup>6</sup> under Article 3 of the Statute. The Indictment alleges that the Accused is individually criminally responsible for these crimes under Article 7(1) of the Statute.<sup>7</sup>

## II. CHALLENGES TO THE FORM OF THE INDICTMENT

6. The Defence submits that the form of the Indictment is defective due to the Prosecution's failure to plead the material facts that underpin the charges in the Indictment. The Defence argues that the Indictment is "not sufficiently particular to inform the Accused clearly of the nature of the charges against him."<sup>8</sup> Specifically, the Defence claims a lack of specificity in relation to: (A) the Accused's position in the military, the type of military formations to which he belonged, and the type of control, if any, he exercised over members of these formations, (B) the nature of the charges against the Accused, particularly whether he is charged with sexual assaults against two specific witnesses, (C) the particulars of other soldiers involved in the incidents charged and (D) the particulars of the victims of the incidents charged. The Defence contends that as a result of these defects, the Accused is not clearly informed of the nature of the charges against him, thus "seriously bringing into question the right of the Accused to prepare his defence in a timely and adequate manner," as provided by Article 21(4) of the Statute.<sup>9</sup> The Defence requests that the Trial Chamber order the Prosecution to remove the formal defects of the Indictment.

## III. GENERAL PLEADING PRINCIPLES

7. The jurisprudence of the Tribunal has established general principles for pleading. Article 18(4) of the Statute provides that an indictment shall contain a concise statement of the facts and the crimes with which the accused is charged. Rule 47(C) of the Rules provides that the indictment shall set forth the names and particulars of the suspect, and a concise statement of facts of the case and of the crimes with which the suspect is charged. In addition, Article 21(2) and Article 21(4)(a) and (b) of the Statute provide, respectively, that the accused is entitled to a fair hearing, has a right to be informed of the nature and causes of the charges against him and is entitled to adequate time and facilities to prepare his defence. These entitlements require that the Prosecution plead the material facts underpinning the charges in the indictment with sufficient particularity to enable the

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<sup>6</sup> Indictment, Counts 7, 15, 43.

<sup>7</sup> Indictment, para. 4.6.

<sup>8</sup> Motion, para. 7.

<sup>9</sup> Motion, para. 7.

accused to clearly understand the charges against him and be able to prepare his defence accordingly.<sup>10</sup>

8. The materiality of a particular fact cannot be decided in the abstract and is dependent on the nature of the Prosecution's case.<sup>11</sup> A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts in the indictment is the nature of the alleged criminal conduct charged. The materiality of facts such as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events.<sup>12</sup>

9. It may be impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes. The nature of such a case would not demand that each and every victim be identified. The Prosecution need not specify every single victim in order to meet its obligation of specifying the material facts of the case in the indictment. Nevertheless, since the identity of victims is information that is valuable to the preparation of the defence's case, if the Prosecution is in a position to name the victims, it should do so.<sup>13</sup> In cases where the Prosecution is unable to identify those directly participating in events by name, it is sufficient for the Prosecution to identify them at least by reference to their "category (or their official position) as a group."<sup>14</sup>

10. Where the accused is alleged to have personally carried out the acts underlying the crimes in question, it is necessary for the Prosecution to set out the identity of the victim, the place and approximate date of the alleged criminal acts and the means by which they were committed.<sup>15</sup> Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, then the Prosecution is required to identify the particular acts or the particular course of conduct on the part of the accused which forms the basis for the charges in question.<sup>16</sup>

<sup>10</sup> *Prosecutor v. Kupreškić et al.*, Case No.: IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić Appeals Judgement*"), para. 88; *Prosecutor v. Blaškić*, Case No.: IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić Appeals Judgement*"), para. 209; *Prosecutor v. Čermak et al.*, Case No.: IT-03-73-PT, Decision on Ivan Čermak's and Mladen Markač's Motion on Form of Indictment, 8 March 2005 ("*Čermak Decision*"), para. 5.

<sup>11</sup> *Kupreškić Appeals Judgement*, para. 89; *Blaškić Appeals Judgement*, para. 210.

<sup>12</sup> *Kupreškić Appeals Judgement*, para. 89; *Blaškić Appeals Judgement*, para. 210; *Čermak Decision*, para. 6.

<sup>13</sup> *Kupreškić Appeals Judgement*, paras 89-90; *Prosecutor v. Martić*, Case No.: IT-95-11-PT, Decision on Preliminary Motion Against the Amended Indictment, 2 June 2003, para. 6.

<sup>14</sup> *Prosecutor v. Krnojelac*, Case No.: IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 46.

<sup>15</sup> *Kupreškić Appeals Judgement*, para. 89; *Blaškić Appeals Judgement*, para. 213.

<sup>16</sup> *Kupreškić Appeals Judgement*, para. 89; *Blaškić Appeals Judgement*, para. 213; *Čermak Decision*, para. 7.

11. The Prosecution need not plead the evidence by which the material facts are to be proven. Such evidence may be provided by way of pre-trial discovery.<sup>17</sup> However, where material facts are not pleaded with sufficient particularity, the Prosecution cannot cure a defective indictment through supporting material and pre-trial briefs.<sup>18</sup> The Prosecution is expected to inform the accused of the nature and cause of the case, as set out above, before it goes to trial. It is unacceptable for it to omit the material facts in the indictment with the aim of moulding the case against the accused in the course of the trial.<sup>19</sup>

## IV. ARGUMENTS OF THE PARTIES AND DISCUSSION

### A. The Position of the Accused in the Military

#### 1. Submission

12. The Defence claims a lack of specificity with respect to paragraph 2.4 of the Indictment which states that “Dragan Zelenović was one of the sub-commanders of the military police and a paramilitary leader in Foča.”<sup>20</sup> The Defence submits that allegations of the Indictment “do not offer enough information” as to the type of formations of which the Accused was allegedly the sub-commander.<sup>21</sup> The Defence further argues that the Indictment more generally fails to “define the position of the Accused” in the military and whether he exercised any formal or *de facto* control of military and paramilitary formations.<sup>22</sup>

13. The Defence further submits that paragraph 5.2 of the Indictment, which states that the Accused was among the soldiers under the control of Gojko Janković, places the Accused in a “subordinated position,” and thus creates confusion about his earlier-described position as a sub-commander and paramilitary leader.<sup>23</sup>

14. The Prosecution responds by arguing that the facts provided in the Indictment make clear that “the Accused was a member of the military police and a soldier during the events.”<sup>24</sup> The Prosecution notes that the Accused is not charged with criminal responsibility as a superior pursuant to Article 7(3) of the Statute and thus argues that “no more details need to be provided as

<sup>17</sup> *Kupreškić Appeals Judgement*, para. 88; *Blaškić Appeals Judgement*, para. 210.

<sup>18</sup> *Prosecutor v. Deronjić*, Case No.: IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002 (“*Deronjić Decision*”), para. 10.

<sup>19</sup> *Prosecutor v. Mrkšić*, Case No.: IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003 (“*Mrkšić Decision*”), para. 13.

<sup>20</sup> Motion, para. 9.

<sup>21</sup> Motion, para. 9.

<sup>22</sup> Motion, para. 16.

<sup>23</sup> Motion, para. 10.

<sup>24</sup> Response, para. 3.

to the military formations the Accused belonged to and whether he was in any superior position as to other participants in the crimes charged.”<sup>25</sup> The Prosecution further submits that the Indictment must be read in conjunction with the supporting materials provided, which supply further details and additional information to assist the Accused in preparing his defence. The Prosecution notes that these materials establish that the Accused belonged to the so-called “Dragan Nikolić Unit,” which at the beginning of the war belonged to the Serb Territorial Defence in Foča and became part of the Army of Republica Srpska (VRS) in the summer of 1992.<sup>26</sup>

15. The Prosecution further contends that there is no confusion as to the position of the Accused as a sub-commander and his subordination to Gojko Janković.<sup>27</sup> The Prosecution submits that it is in fact typical within a military chain of command that a sub-commander would be subordinated to a superior officer.<sup>28</sup> Furthermore, the Prosecution argues that this detail has been pleaded in the Indictment in relation to Gojko Janković who was charged with criminal responsibility as a superior pursuant to Article 7(3) of the Statute.<sup>29</sup>

## 2. Discussion

16. The Trial Chamber recalls the general principle of pleading that a determination regarding the materiality of specific facts cannot be decided in the abstract<sup>30</sup> and therefore directs its attention to the specific facts of the case. In this case, the Accused is not charged with superior criminal responsibility pursuant to Article 7(3) of the Statute and thus extensive details about the types of military formations to which the Accused belonged and his position in them are not material. In contrast, in cases where the accused is alleged to have personally carried out the acts, the Prosecution is required to plead the identity of the victim, the place and approximate date of the alleged criminal acts and the means by which they were committed.<sup>31</sup> The Trial Chamber therefore rejects the submission of the Defence.

17. Furthermore, the Trial Chamber finds that the Indictment is clear in describing the position of the Accused as a member of the military police and a soldier during the incidents charged and is satisfied that these facts are clear even without reference to the supporting materials provided by the Prosecution. The Trial Chamber also finds no inconsistency in describing the Accused as being both subordinated to Gojko Janković, as in paragraph 5.2 of the Indictment, and being a “sub-commander of the military police and a paramilitary leader in Foča,” as in paragraph 2.4 of the

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<sup>25</sup> Response, para. 3.

<sup>26</sup> Response, para. 4.

<sup>27</sup> Response, para. 5.

<sup>28</sup> Response, para. 5.

<sup>29</sup> Response, para. 5.

<sup>30</sup> *Supra.* fn. 11.

<sup>31</sup> *Supra.* fn. 10.

Indictment. The Trial Chamber thus finds that this pleading adequately enables the Accused to prepare his defence.

## **B. The Nature of the Charges Against the Accused**

### **1. Submission**

18. Paragraph 5.3 of the Indictment, referring to alleged acts of torture and rape at the Buk Bijela settlement, states that “Janko Janjić and Dragan Zelenović and other soldiers acting under the control of the Accused Gojko Janković gang-raped several women during or immediately after the interrogation who they suspected of lying.”<sup>32</sup> The Defence submits that paragraphs 5.4 to 5.7 of the Indictment describe these sexual assaults in greater detail but that, in paragraphs 5.6 and 5.7 of the Indictment, there is no mention of the Accused participating in these acts with relation to witnesses FWS-48 and FWS-74.<sup>33</sup> The Defence submits that this description renders the types of charges against the Accused unclear.<sup>34</sup>

19. The Prosecution responds by arguing that paragraph 5.8 of the Indictment makes it clear that only Gojko Janković is charged with crimes against witnesses FWS-48 and FWS-74, while paragraph 5.9 of the Indictment states clearly that, as concerns the alleged acts of torture and rape at Buk Bijela, the Accused is only charged with crimes against witnesses FWS-75 and FWS-87.<sup>35</sup>

### **2. Discussion**

20. The Trial Chamber notes that each paragraph of the indictment should be read not in isolation from others but rather in the context of the other paragraphs of the indictment.<sup>36</sup> The Trial Chamber finds that, when read with paragraphs 5.8 and 5.9 of the Indictment, paragraphs 5.3 to 5.7 clearly establish which crimes are alleged against the Accused and in relation to which victims. The Trial Chamber thus rejects the submission of the Defence.

## **C. Particulars of Soldiers**

### **1. Submission**

21. The Defence claims that paragraphs 5.4, 6.6 to 6.10, 7.13, 7.15, 7.17 and 7.19 of the Indictment lack specificity relating to the particulars of other soldiers involved in the incidents

<sup>32</sup> Motion, para. 11.

<sup>33</sup> Motion, paras 11-12.

<sup>34</sup> Motion, para. 12.

<sup>35</sup> Response, para. 6.

<sup>36</sup> *Mrkšić* Decision, para. 28; *Prosecutor v. Hadžihasanović*, Case No.: IT-01-47-AR72, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 21 February 2003, para. 38; *Krnjelac* Decision, para. 7.

charged.<sup>37</sup> The Defence objects to the use of phrases such as “unidentified soldiers,” “four men” and “groups of soldiers.”<sup>38</sup>

22. The Prosecution responds by arguing that it has repeatedly been found sufficient to identify groups and categories of persons that participated in the crimes charged rather than specific individuals and that therefore “the terms used in the Indictment are sufficient.”<sup>39</sup>

23. The Defence further submits that the failure to provide sufficient particulars of other soldiers involved makes “the relationship of the Accused and unidentified soldiers” unclear, particularly with relation to whether the Accused exercised control over the other soldiers.<sup>40</sup>

24. The Prosecution responds by arguing that, as the Accused is not charged with superior criminal responsibility, “his relationship with the other soldiers is not relevant to the crimes he is charged with.”<sup>41</sup>

## 2. Discussion

25. The Trial Chamber recalls the general principle of pleading that it is sufficient for the Prosecution to identify those participating in events by reference to their category or position as a group<sup>42</sup> and therefore finds that the level of specificity in the Indictment relating to individuals involved in the incidents charged is appropriate. The Trial Chamber further finds that, because the Accused is not charged with superior criminal responsibility pursuant to Article 7(3), additional details about the relationship of the Accused with other soldiers need not be pleaded. The Trial Chamber therefore rejects the submission of the Defence.

### **D. Particulars of Victims**

#### 1. Submission

26. The Defence submits that paragraphs 9.1 and 9.2 of the Indictment allege that the Accused, along with Gojko Janković and Janko Janjić, committed crimes against FWS-75 and FWS-87 and “two other women.”<sup>43</sup> The Defence submits that the Prosecution was able to specify these

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<sup>37</sup> Motion, para. 14.

<sup>38</sup> Motion, para. 13.

<sup>39</sup> Response, para. 7.

<sup>40</sup> Motion, para. 14.

<sup>41</sup> Response, para. 7.

<sup>42</sup> *Supra*. fn. 14.

<sup>43</sup> Motion, para. 15.



individuals and needed to do so in order to offer the Accused the opportunity to adequately prepare his defence.<sup>44</sup>

27. The Prosecution responds by submitting that the Indictment gave sufficient details such that “the Accused cannot have any doubt as to the nature of the charges against him.”<sup>45</sup> Nonetheless, the Prosecution is able to state that the “two other women” referred to in the Indictment were A.S. and A.B., who was about twelve years old at the time. The Prosecution further notes that this information is provided in the supporting materials.<sup>46</sup>

## 2. Discussion

28. While the Prosecution should provide the names of victims when it is in a position to do so,<sup>47</sup> the Trial Chamber finds that, given the context of the event described and the fact that the Indictment names two of the victims with pseudonyms, the absence of these names occasions no adverse effect on the ability of the Accused to understand the charges against him or adequately prepare his defence. Therefore, the Trial Chamber rejects the submission of the Defence.

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<sup>44</sup> Motion, para. 15.

<sup>45</sup> Response, para. 8.

<sup>46</sup> Response, para. 8.

<sup>47</sup> *Supra*. fn. 13.

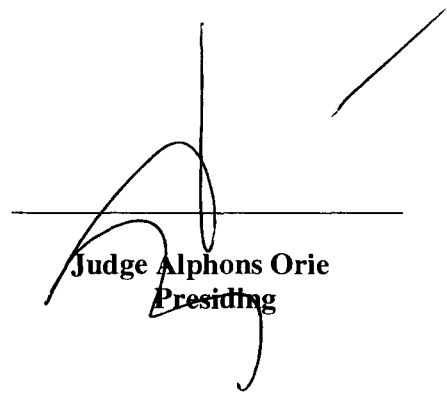
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**V. DISPOSITION**

**FOR THE FOREGOING REASONS** and pursuant to Rule 72 of the Rules, the Trial Chamber hereby **DENIES** the Motion.

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

Dated this eleventh day of October 2006  
At The Hague  
The Netherlands



Judge Alphons Orie  
Presiding

[Seal of the Tribunal]