

**UNITED
NATIONS**

IT-01-42-PT
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17 MARCH 2003

2053 AT



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-01-42-PT
Date: 17 March 2003
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 17 March 2003

PROSECUTOR

v.

**PAVLE STRUGAR
MIODRAG JOKIĆ
VLADIMIR KOVAČEVIĆ**

**DECISION ON THE PROSECUTOR'S AMENDED INDICTMENT AND
APPLICATION FOR LEAVE TO AMEND**

Office of the Prosecutor

Ms Susan Somers

Counsel for the Accused

**Mr Goran Rodić
Mr Žarko Nikolić
Mr Vladimir Petrović**

A. Procedural history

1. On 28 June 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 Defence (for Mr Strugar) Preliminary Motion Concerning the Form of the Indictment” (“the June Decision”), which partially granted the Defence’s motion and ordered the Prosecution to file a new indictment showing the changes made pursuant to the June Decision as well as any amendments for which the Prosecution would be seeking leave. It also invited the Defence both for Mr Strugar and for Mr Jokic to make submissions on the new indictment.
2. The changes ordered by the June Decision may be summarized as follows:
 - (a) Allegations made in the “Additional Facts” section of the original indictment and relied upon to plead the Accused’s course of conduct should be incorporated within the body of the Amended Indictment;
 - (b) Clarification of the allegation concerning the date of Croatia’s independence;
 - (c) Clarification of the alleged facts said to pertain to the Accused’s criminal responsibility under Article 7(3) of the Tribunal’s Statute, and greater precision as to which forms of responsibility under Article 7(1) were being pleaded;
 - (d) Clarification of the referent of “others” in the allegation that the Accused acted “individually or in concert with others”;
 - (e) Specification, where possible, of the units under the command of the Accused and their overall structure, as well as of the units which carried out acts alleged in the original indictment;
 - (f) Further information, where possible, regarding the number of persons alleged to have been wounded, and where and when they were wounded;
 - (g) Specification, where possible, of certain buildings and of villages and towns in which property is alleged to have been plundered or in which buildings dedicated to religion are alleged to have been damaged.

3. On 26 July 2002 the Prosecution filed its “Amended Indictment and Application for Leave to Amend”.¹ It is composed of the proposed Amended Indictment (“the Amended Indictment”), which highlights and explains the Prosecution’s implementation of changes ordered in the June Decision, and of an application (“the Application”) seeking leave for further amendments, also incorporated into the Amended Indictment. It is worth highlighting, from amongst the multiple proposed amendments, two major ones: a single count of the original indictment (the only count laid pursuant to Article 2 of the Tribunal’s Statute) is proposed for deletion as “unnecessarily duplicative”; and the remaining counts (now limited to charges under Article 3 of the Statute) have been restructured “to better reflect the different areas of responsibility” of the Accused without, purportedly, adding any new charges.

4. In reply to the Prosecution’s proposed Amended Indictment and Application, the following submissions were filed by the parties:

In respect of Mr Jokić:

- “Preliminary Motion of the Accused Miodrag Jokić Concerning the Form of the Amended Indictment and Response to the Prosecutor’s Leave to Amend”, filed on 12 August 2002;
- “Prosecution’s Response to the Accused Miodrag Jokić’s Preliminary Motion Concerning the Form of the Amended Indictment and Response to the Prosecutor’s Application for Leave to Amend”, filed on 23 August 2002;
- “Response of the Defence of the Accused Miodrag Jokić to the Prosecution’s Response to the Accused Miodrag Jokić’s Preliminary Motion Concerning the Form of the Amended Indictment and Response to the Prosecutor’s Application for Leave to Amend”, filed on 2 September 2002;

In respect of Mr Strugar:

- “Defense Second Preliminary Motion” (“No. 1”); and “Defence Response to the Prosecution Application for Leave to Amend the Indictment” (“No. 2”), both filed on 30 August 2002;

¹ Other filings over this period were a motion by the Prosecution for extension of time (10 July 2002, granted 11 July 2002), a motion by the Defence for Mr Strugar for extension of time (22 July 2002, granted 31 July 2002), and a decision by Judge El Mahdi authorizing the Prosecution to withdraw the charges against Milan Zec (26 July 2002).

- "Prosecution's Response to the Accused Pavle Strugar's Second Preliminary Motion Concerning the Form of the Amended Indictment and Response to the Prosecutor's Application for Leave to Amend the Indictment", filed on 13 September 2002;
- "Defense Reply to the Prosecution's Response to the Accused Pavle Strugar's Second Preliminary Motion Concerning the Form of the Amended Indictment and Response to the Prosecutor's Application for Leave to Amend the Indictment", filed on 20 September 2002.

B. Objections arising from changes ordered by the June Decision

1. Date of independence of Croatia

5. The Defence for Mr Jokić submits that the Prosecution should divide the indictment into two periods, falling either side of 8 October 1991, as this date marks the transition from an internal to an international conflict and is thus relevant to the determination of the applicable legal norms.² The Prosecution responds that there are no issues arising from the classification of the conflict; and that, within the Tribunal's practice, counts 13 to 15 are chargeable in both international and non-international armed conflicts.

6. The Trial Chamber finds that the date of Croatia's independence, the classification of the conflict, and the applicability of norms to the concrete facts of the case are matters to be determined on the merits, in the course of trial. The Trial Chamber therefore dismisses this objection.³

2. Responsibility of the Accused

7. The Defence for Mr Strugar objects that the proposed Amended Indictment does not clarify the nature of the responsibility of the Accused. It submits that the indictment ought to indicate unambiguously that the Accused did not personally commit the acts in question.⁴ The Prosecution responds that the relevant paragraphs of the Amended Indictment are consistent with the jurisprudence of the Tribunal.

² Para. 14 of Mr Jokić's motion of 12 August 2002.

³ See *Prosecutor v. Tihomir Blaskić*, "Decision Rejecting a Motion of the Defence to Dismiss Counts 4, 7, 10, 14, 16 and 18 Based on the Failure to Adequately Plead the Existence of an International Armed Conflict", 4 April 1997, para. 7; and *Prosecutor v. Mladen Naletilic and Vinko Martinović*, "Décision relative à l'opposition de Vinko Martinović à l'acte d'accusation", 15 February 2000, para. 6.

⁴ Paras. 5-13 and 22 of Mr Strugar's motion (No. 1) of 30 August 2002.

8. In the Trial Chamber's opinion, it appears that the Prosecution has still not clearly specified the provisions of Article 7(1) which it pleads. The Prosecution consequently is **ordered** to define more precisely its position on the Accused's alleged participation in the crimes.
9. The Defence for Mr Jokić objects that the Amended Indictment fails to plead sufficient material facts on the alleged relationship between the Accused and "others",⁵ and the Defence for Mr Strugar objects that the Prosecution must clarify what it considers to have been the de jure responsibility of Mr Strugar.⁶ The Prosecution responds that paragraph 8 of the Amended Indictment is precise enough, identifying legal provisions governing the roles and responsibilities of JNA officers, proof of which will be adduced at trial.
10. In the Tribunal's jurisprudence, the fact that an accused is described as a "commander" of a certain structure "is sufficient 'ground' for asserting that he was superior to everyone else and that he was responsible for the functioning [of such a structure] ... The manner in which these material facts are to be proved is a matter of evidence and thus for pre-trial discovery, not pleading."⁷ The material facts presented by the Prosecution in the present case on the commanding position held by the Accused and on the units that were subordinated to them, are, in the Trial Chamber's opinion, sufficient to enable the Accused to prepare their defence. This objection is dismissed.
11. The Defence for Mr Jokić objects that he was not the commander of the ninth VPS until about 10 October 1991, and consequently that he may not be charged for events prior to that date.⁸ The Prosecution responds, and the Trial Chamber agrees, that this is a matter to be determined on the evidence adduced at trial.
12. The Defence for Mr Strugar submits that the Prosecution must plead the names of subordinates and "other" persons in the chain of command, as well as specify the criminal acts which the Accused allegedly knew or had reason to know about, the names of the subordinates who committed those acts, and the measures which the Accused could have taken, but failed to, to prevent their commission.⁹ The Prosecution responds that it complied with the June Decision by adding paragraph 14 to the

⁵ Para. 26 of Mr Jokić's motion of 12 August 2002.

⁶ Para. 23 of Mr Strugar's motion (No. 1) of 30 August 2002.

⁷ *Prosecutor v. Milorad Krnojelac*, "Decision on the Defence Preliminary Motion on the Form of the Indictment", 24 February 1999, para. 19.

⁸ Paras. 7-9 of Mr Jokić's motion of 12 August 2002.

Amended Indictment, that the criminal acts which the Accused knew or had reason to know about are sufficiently specified in the Amended Indictment, while preventive measures that could have been taken need not be specifically pleaded in an indictment.

13. The Trial Chamber finds that the Prosecution has complied with the June Decision to the extent that the Amended Indictment includes a list (albeit not complete, as explained below) of military units that were under the command of the Accused. It also considers that the form of subordination is an evidentiary matter appropriate for proof at trial. This Defence's objection on this point therefore is dismissed.

14. The Defence both for Mr Strugar and for Mr Jokić object that the Prosecution should plead material facts relating to the engagement and operation of the units under the command of the Accused in the acts charged in the Amended Indictment.¹⁰ In the case of Mr Jokić, it is argued that the general statement "including forces under the command of Miodrag Jokić" is not sufficient to connect the Accused with all charges pleaded against his co-accused,¹¹ and that the Prosecution does not specify whether the "shelling" was effected by a unit or units under his command.¹² It is also submitted that the Prosecution should have pleaded material facts regarding the term "operational control", and the units under such control, in order to enable the Accused to recognize which units under his command are alleged to have committed the acts referred to in the Amended Indictment.¹³ On behalf of Mr Strugar it is argued that the air units referred to in paragraph 16 of the Amended Indictment are not included in the schedule on the overall military structure, and that the Prosecution should identify the paramilitary, police, and special police units that were under the Accused's command.¹⁴

15. The Prosecution responds generally that by these objections the Defence raises evidentiary issues that should be left to be determined at trial, and that the June Decision expressly stated that the Prosecution was not required to specify the units responsible for each incident.

16. While the Trial Chamber agrees that the Prosecution does not have to identify in the indictment each and every unit taking part in the incidents, the schedule on the overall

⁹ Paras. 14-17 of Mr Strugar's motion (No. 1) of 30 August 2002.

¹⁰ Para. 32 of Mr Jokić's motion of 12 August 2002; and paras. 28-29 of Mr Strugar's motion (No. 1) of 30 August 2002.

¹¹ Para. 28 of Mr Jokić's motion of 12 August 2002.

¹² Para. 36 of Mr Jokić's motion of 12 August 2002.

¹³ Para. 33 of Mr Jokić's motion of 12 August 2002.

¹⁴ Paras. 21, 24, and 26 of Mr Strugar's motion (No. 1) of 30 August 2002.

military structure is not sufficiently precise, as it does not include all the categories of units which according to the Amended Indictment are said to have been commanded by the Accused, and particularly the air, paramilitary, police, and special police units referred to in paragraph 16. It is also noted that none of these units are mentioned in paragraphs 4 to 8 of the Amended Indictment, where the Accused's individual criminal responsibility is set out. The Prosecution is therefore **ordered** to make Schedule III more precise, in light of the information available to it.

3. Alleged incidents

17. *Wounded persons.* The Defence for Mr Strugar objects that the Amended Indictment provides no information on the place where seven persons are alleged to have been wounded.¹⁵ The Prosecution replies that it has complied with the directions of the Trial Chamber on this point.

18. There is no doubt that the Prosecution is not required to supply, as part of the Amended Indictment, every detail of the facts pleaded. As long as the *material* facts underlying the charges are present, the Accused in this case will have been given adequate notice of the case against them to prepare their defence.¹⁶ The Defence has misapprehended, on this point, the scope of the directions given by the Trial Chamber in its June Decision, which was that the Prosecution should provide details *where possible*. The objection therefore is dismissed.

19. *Buildings destroyed.* The Defence for Mr Jokić submits that the Prosecution is required to state the precise dates on which the hotels hosting refugees were damaged;¹⁷ and the Defence for Mr Strugar interprets the June Decision as directing the Prosecution to list, where possible, the objects fired upon or damaged, which however the Amended Indictment fails to do; moreover, the Amended Indictment improperly extends the dates of the attacks on hotels without providing supporting facts.¹⁸ The Prosecution responds that it has complied with the June Decision on this point.

¹⁵ Para. 25 of Mr Strugar's motion (No. 1) of 30 August 2002.

¹⁶ See, for example, *Prosecutor v. Tihomir Blaskić*, "Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges)", 4 April 1997, para. 37; *Prosecutor v. Enver Hadžihasanović et al.*, "Decision on Form of Indictment", 7 December 2001, para. 43; *Prosecutor v. Rahīm Ademi*, "Decision on the Second Defence Motion on the Form of the Indictment", 21 January 2002, p. 4.

¹⁷ Paras. 38 and 45 of Mr Jokić's motion of 12 August 2002.

¹⁸ Paras. 18-19 of Mr Strugar's motion No. 1 and para. 15 of motion No. 2 of 30 August 2002.

20. The Trial Chamber finds that the extension of the dates does not prejudice the Accused, since no new facts are alleged, and the details provided by the Prosecution, namely the temporal framework, the names of the hotels, and the areas in which they were located, are adequate to inform the Accused of the charges against them. The objection therefore is dismissed.

21. *Plundered property.* The Defence for Mr Jokić objects that more specificity is required regarding the dates on which property was allegedly plundered, and the Defence for Mr Strugar submits that the Amended Indictment should particularize the property allegedly destroyed or pillaged, as well as the dates and alleged perpetrators of those acts.¹⁹ The Prosecution submits that the Amended Indictment is sufficiently specific as to these incidents, and further details are evidence to be adduced at trial.

22. The Trial Chamber considers that the information provided by the Prosecution on the names of villages, and on the approximate dates of their occupation by the JNA, is sufficient for the Accused to prepare their defence. This objection is dismissed.

23. *Damage to buildings dedicated to religion.* The Defence for Mr Jokić objects that no facts are pleaded in the Amended Indictment that could connect the Accused with the alleged dates on which damage to buildings dedicated to religion was perpetrated. The Prosecution replies that this is an evidentiary question to be determined at trial. The Trial Chamber agrees with the Prosecution and therefore dismisses the objection.

C. Objections arising from further amendments proposed by the Prosecution

1. Amendment to count 8

24. The Prosecution seeks leave to amend count 8 to give expression to the fact that unlawful attacks on civilian objects are prohibited under international customary and treaty law. The Defence for Mr Strugar objects that this addition amounts to a new charge against the Accused, that it is arbitrary and selective because there is no mention of customary law in counts 3 and 6, and that its only aim is to render pointless the Defence motion regarding jurisdiction pending before the Appeals Chamber at the time of the submissions.²⁰ The Prosecution responds that the proposed amendment does not prejudice the Accused because (i) the case is in the early pre-trial phase, (ii) the charges

¹⁹ Para. 30 of Mr Strugar's motion (No. 1) of 30 August 2002.

²⁰ See paras. 7-11 of the Defence's response of 30 August 2002 to the Prosecution's Application.

always comprised the prohibition against unlawful attack on civilian objects, which is found in both treaty and customary international law, and (iii) the inclusion of the reference to customary law seeks to provide greater clarity on the applicability of the prohibition to non-international conflicts.

25. To this the Defence retorts that the norms found in Article 3 of the Tribunal's Statute do not differentiate between types of conflict, and thus the Prosecution's elaboration is superfluous and unfounded; that since customary law can be applied regardless of the type of conflict, there is no need for the insertion of the words "customary law"; and that if Article 52 of Additional Protocol I can only be applied to international armed conflicts, it cannot be considered a customary rule.²¹

26. The Trial Chamber does not agree with the Defence that the addition of the words in question gives rise to a new charge. It simply expresses in clearer fashion the relevant charges. This objection therefore is dismissed.

2. Amendment to count 9

27. The Prosecution proposes to amend the wording of count 9 to reproduce the wording of Article 3(d) of the Tribunal's Statute and include all types of cultural property. The Defence for Mr Strugar is opposed to the addition of the words "charity, and education, the arts and sciences, historic monuments and works of art and science" on the grounds that this is an impermissible extension of the indictment. It submits alternatively that the Prosecution should state which institutions dedicated to charity, education, arts, and sciences and which historic monuments and works of art and science were intentionally damaged.²²

28. The Trial Chamber finds that the addition of the reference to institutions dedicated to charity, education, the arts and sciences and to historic monuments and works of art and science is merely a clarification, not a new charge, and the proposed amendment is based on conduct pleaded in the original indictment. The Trial Chamber is nevertheless concerned that no material fact has been specifically pleaded by the Prosecution in support of its request. The Amended Indictment does not sufficiently inform the Accused of the facts underlying the proposed new wording of count 9. The Prosecution is therefore **ordered** to specify, where possible, which institutions dedicated to charity,

²¹ Paras. 32-37 of the Defence's reply of 20 September 2002.

²² Para. 20 of Mr Strugar's motion (No. 1) of 30 August 2002.

education, the arts and sciences and which historic monuments and works of art and science are alleged to have been wilfully destroyed or damaged.

D. Application for oral argument

29. As part of its submissions filed on 30 August 2002, the Defence for Mr Strugar has requested an oral hearing, without giving reasons that would justify such a hearing. Therefore, the Trial Chamber dismisses this request and finds it appropriate to decide the issues raised by the parties solely on the basis of their written submissions.

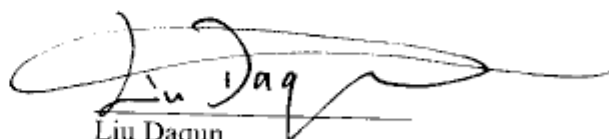
FOR THE FOREGOING REASONS, THE CHAMBER:

PURSUANT TO Rules 50 and 72 of the Tribunal's Rules of Procedure and Evidence;

GRANTS the Prosecution's Application subject to the amendments indicated above;

ORDERS the Prosecution to file the proposed Amended Indictment, which will be known as the *Amended Indictment*, incorporating the three sets of changes ordered by the present Decision; the new indictment is to be filed within fourteen (14) days of the present Decision.

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


Liu Daqun
Presiding

Dated this seventeenth day of March 2003
At The Hague
The Netherlands

[Seal of the Tribunal]