



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-03-70-PT
Date: 8 July 2005
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Decision of: 8 July 2005

PROSECUTOR

v.

NEBOJŠA PAVKOVIĆ,
VLADIMIR LAZAREVIĆ,
VLASTIMIR ĐORĐEVIĆ
SRETEN LUKIĆ

**DECISION ON SRETEN LUKIĆ'S PRELIMINARY
MOTION ON FORM OF INDICTMENT**

The Office of the Prosecutor:

Mr. Thomas Hannis
Ms. Christina Moeller
Ms. Carolyn Edgerton

Counsel for the Accused:

Mr. John Ackerman and Mr. Aleksander Aleksić for Mr. Nebojša Pavković
Mr. Mihaljo Bakrač for Mr. Vladimir Lazarević
Mr. Theodore Scudder for Mr. Sreten Lukić

THIS 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 (“the International Tribunal”);

BEING SEISED of a “Defendant, Sreten Lukić’s Preliminary Motion Pursuant to Rule 72, Objecting to Defects in the Form of the Indictment” (“Motion”), filed by Sreten Lukić (“Accused”) on 6 June 2005, by which he challenges the form of the Indictment, and “Prosecution Response to Sreten Lukić’s Preliminary Motion Objecting to the Form of the Indictment” (“Response”) filed by the Prosecution on 21 June 2005,

NOTING that on 2 October 2003, Judge O-Gon Kwon confirmed the Indictment against the Accused and three co-accused Nebojša Pavković, Vladimir Lazarević and Vlastimir Đorđević, and that the Accused was transferred to the Tribunal on 4 April 2005,

NOTING that the initial and further initial appearance of the Accused took place before Judge Iain Bonyon on 6 April and on 4 May 2005 respectively, at which he entered a plea of “not guilty” to all counts in the Indictment,¹ and that, on 20 April 2005 pursuant to Rule 66 (A) (i), the Prosecution disclosed to the Accused English and BCS copies of the supporting material which accompanied the Indictment at confirmation,

NOTING that the Accused is charged with various crimes allegedly committed in Kosovo between 1 January 1999 and 20 June 1999 against Kosovo Albanians by forces of the FRY and Serbia, and is specifically charged under Article 7 (1) and 7 (3) of the Tribunal Statute, as follows:

- (a) count 1: deportation as a crime against humanity (Article 5 (d) of the Statute);
- (b) count 2: other inhumane acts as a crime against humanity (forcible transfer) (Article 5 (i) of the Statute);
- (c) count 3 and 4: murder as a crime against humanity (Article 5 (a) of the Statute) and as a violation of the laws and customs of war (Article 3 of the Statute) and recognized by Article 3 (1) (a) of the Geneva Conventions;
- (d) count 5: persecutions on political, racial and religious grounds as a crime against humanity (Article 5 (h) of the Statute).

¹ Further Initial Appearance, T. 42, 4 May 2005

NOTING that in the Motion the Defence generally challenges the lack of specificity of the Indictment and its vagueness,² incorporates the objections made by the co-defendant Lazarević as to the form of the Indictment,³ and in addition raises new objections which will be dealt with in turn,

NOTING that the Defence requests the Trial Chamber to order that the Indictment be struck out and dismissed, and that the Prosecution be ordered to plead with particularity and detail the allegations against each of the accused, clearly differentiating between acts for which responsibility is alleged under Article 7(1) of the Statute, and those for which responsibility is alleged under Article 7(3) of the Statute,⁴

NOTING the Prosecution Response that, read as a whole, the Indictment conforms to the general pleading requirements as set out in the Statute of the Tribunal, the Rules and the applicable Tribunal jurisprudence, and, therefore, that the Motion should be dismissed,⁵

CONSIDERING the Trial Chamber's Decision on Lazarević's Preliminary Motion on the Form of the Indictment, filed on 8 July 2005 ("First Decision on the Form of the Indictment"), in which it sets out general pleading principles which, in the Chamber's view, are applicable to the present case,⁶

1. Objections related to the superior responsibility of the Accused

CONSIDERING that although the Motion refers to the failure "to adequately specify the forces alleged to be subordinates under [the Accused's] effective control",⁷ an aspect of the Indictment also challenged by the co-defendant Lazarević, the arguments raised in support of this objection go further and challenge the failure to identify in the Indictment the basis for the allegation that the Accused, a member of the MUP :

- 1) had *de jure* and *de facto* authority over military-territorial units, civil defence and other armed groups, not falling under the structure of the MUP;⁸ and
- 2) "retained authority over MUP units after these units were subordinated to the army commanders",⁹

² Motion, paras. 4 and 12.

³ "Defence Preliminary Motion", (Lazarević), 11 April 2005, and Motion, para. 38.

⁴ Motion, p. 10.

⁵ Response, para. 4.

⁶ First Decision on the Form of the Indictment, paras. 4-8 and 14.

⁷ Motion, p. 4 and paras. 16 to 26.

⁸ Motion, para. 17.

- 3) “had the ability to know of acts committed by groups other than the MUP, or that he had any ability to punish persons who were not members of the MUP”,¹⁰

CONSIDERING that, in a case where superior criminal responsibility pursuant to Article 7 (3) of the Statute is alleged, the material facts which must be pleaded in the indictment with respect to the command position of the Accused are (i) that he is the superior of (ii) subordinates sufficiently identified, (iii) over whom he had effective control, in the sense of a material ability to prevent or punish criminal conduct, and (iv) for whose acts he is alleged to be responsible,¹¹

NOTING that the Prosecution alleges that “[u]nder the FRY Law on Defence, and through joint command and coordination structures and mechanisms, as Commander of the Priština Corps of the VJ 3rd Army, **Colonel General Vladimir LAZAREVIC** also exercised command authority or control over republic police units subordinated to, or operating in co-operation or co-ordination with, the Priština Corps of the VJ 3rd Army as well as military-territorial units, civil defence units and other armed groups”,¹²

CONSIDERING that, unlike the above-mentioned allegation against the accused Lazarević, the Prosecution fails to specify the basis for its allegation against the Accused that his subordinates “included, but were not limited to, members of the MUP, military-territorial units, civil defence units and other armed groups,”¹³

CONSIDERING that material facts relating to the basis for the Prosecution’s above-mentioned allegation must be pleaded in the Indictment to inform the Accused clearly of the nature and cause of the charges against him and enable him to prepare his defence effectively and efficiently,

CONSIDERING further that the Prosecution’s case becomes even more difficult for the Defence to discern in light of paragraphs 10 and 13 of the Indictment which concede that, pursuant to the FRY laws and mechanisms, during the period relevant to the indictment, the army commanders assumed control and command over MUP units, and military-territorial units, civil defence units and other armed groups,¹⁴

⁹ Motion, para. 19.

¹⁰ Motion, para. 17.

¹¹ *Prosecutor v. Blaškić, Case IT-95-14-A, Blaškić Appeal Judgement*, 29 July 2004, para. 228.

¹² Indictment, para. 13 (emphasis added).

¹³ Indictment, paras. 16 and 18.

¹⁴ Motion, para. 18. See also, Response, paras. 9 and 10, according to which the Defence is moving beyond a challenge to the form of the Indictment; that it is proper to assign criminal liability to more than one person for the acts and conduct of certain units which are acting in co-operation with, *inter alia*, members of the MUP and the VJ; and that whether either or both accused (the Accused and Pavković) are liable for the acts and conduct of these units is a question to be answered at trial.

CONSIDERING that the conduct of the Accused, from which the knowledge and failure to act required to establish his superior responsibility may be inferred, constitutes a material fact which must be pleaded in the Indictment,¹⁵ and that this also relates to acts committed by groups other than the MUP,

2. Objections related to the pleading of the JCE

NOTING that the Defence further raises the following objections related to the pleading of the joint criminal enterprise (JCE):

- 1) That, by pleading the JCE in alternatives, the Prosecution has not sufficiently apprised the Accused of the nature of the charges against him and makes it difficult to prepare a defence,¹⁶
- 2) that the concept of JCE was not contained in the criminal laws of the FRY at the time of the acts alleged and thus, the Indictment violates the principle *nullum crimen sine lege*,¹⁷

CONSIDERING, with respect to the alternative pleading of the third form of JCE,¹⁸ that it is for the Prosecution to determine the legal theory which it considers most appropriate to demonstrate the facts it intends to submit to the Trial Chamber for assessment to enable the responsibility of the person charged to be established,

CONSIDERING further that, to that end, the Prosecution may additionally or alternatively rely on one or more legal theories, on condition that it is done clearly, early enough and, in any event, allowing enough time to enable the accused to know what exactly he is accused of and to enable him to prepare his defence accordingly,¹⁹ and that it is preferable for an indictment alleging the accused's responsibility as a participant in a JCE to refer also to the particular form (basic or extended) of JCE envisaged,²⁰

¹⁵ See, First Decision on the Form of the Indictment, para. 37.

¹⁶ Motion, para. 36.

¹⁷ Motion, para. 37.

¹⁸ See in particular *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 (“*Tadić* Appeal Judgement”), paras 195-226, describing the three categories of cases following a review of the relevant case-law, relating primarily to many war crimes cases tried after the Second World War. See also *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeal Judgement, signed 17 September 2003, filed 5 November 2003 (“*Krnojelac* Appeal Judgement”), paras. 83-84.

¹⁹ *Krnojelac* Appeal Judgement, para. 115.

²⁰ *Krnojelac* Appeal Judgement, para. 138.

NOTING that the Accused advances no reason why the Prosecution may not charge in the alternative participation in several forms of JCE, provided that the Indictment clearly pleads the material facts required with regard to each of these forms of liability,

CONSIDERING, with respect to the Defence argument that the Indictment violates the principle *nullum crimen sine lege*, that the Appeals Chamber has rejected a similar objection raised by the accused Ojdanić,²¹

3. Remaining objections

NOTING that all further objections made by the Defence in relation to 1) the generic reference in the Indictment to the perpetrators as “forces of the FRY and Serbia”; 2) the failure to specify the link between the Accused and the particular nature of the responsibility alleged under each individual count; and 3) the failure to allege any proper facts relating to sexual assaults of women and; have already been addressed by the Trial Chamber in its First Decision on the Form of the Indictment, and need not be specifically addressed here,

CONSIDERING that the Trial Chamber adopts the reasoning thereon set out in paragraphs 32, 33, 18, 19, 20 and 48 of its First Decision on the Form of the Indictment,

PURSUANT TO Rule 72, for the foregoing reasons,

HEREBY PARTIALLY GRANTS the Motion and **ORDERS** the Prosecution to amend the Indictment as follows:

- (i) Specify the basis for its allegation that subordinates to the Accused “included, but were not limited to, members of the MUP, military-territorial units, civil defence units and other armed groups;”
- (ii) Identify the specific conduct of the Accused, from which the knowledge and failure to act required to establish his superior responsibility in relation to acts committed by groups other than the MUP may be inferred;

²¹ *Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, paras. 43 and 44, referring to *Prosecutor v Tadić*, Case No IT-94-1-A, Judgement, 15 July 1999, para. 225. where the Appeals Chamber held in particular that “Article 26 of the Criminal Law of the Federal Republic of Yugoslavia, coupled with the extensive state practice noted in *Tadić*, the many domestic jurisdictions which provide for such a form of liability under various names and which forms of liability run parallel to custom, and the egregious nature of the crimes charged would

- (iii) Identify either a) the specific conduct that supports the averment that the accused acted in each or any of the ways whereby individual criminal responsibility may be attributable to him under Article 7 (1) of the Statute; or, b) state that it does not intend to rely upon specific conduct but proposes to invite the Trial Chamber to infer that the Accused acted in one or more of the ways set out in Article 7(1) from the conduct of the forces over whom he exercised authority, his position in the police hierarchy and his relationship to others, in the military, police or political hierarchy;
- (iv) Specify the state of mind required for each of the various forms of responsibility alleged pursuant to Article 7 (1) of the Statute, including participation in the various forms of JCE alleged, and how these material facts are to be established;
- (v) Clarify to whom “others known and unknown” refers and further state the identity of those participants in the JCE whose identities are known. If the identity of participants is not known, then specify the category to which they belonged;
- (vi) Specify the category of persons alleged to have committed the crimes charged by indicating which of the forces and units allegedly subordinated to the Accused were involved in the events in each municipality and specify whether it is the Prosecution’s case that only those forces and units were involved in the commission of the crimes charged;
- (vii) Specify, if the Prosecution is in a position to do so, the military-territorial units, civil defence units and other armed groups over which it alleges that the Accused exercised command authority or control;
- (viii) Specify the forces of the FRY and Serbia that were allegedly involved in each of the enumerated incidents of murder.
- (ix) Specify the state of mind required for the crime of persecution.

have provided notice to anyone that the acts committed by the accused in 1999 would have engaged criminal responsibility on the basis of participation in a joint criminal enterprise.

(b) The amended indictment is to be filed no later than 15 August 2005. A table indicating all the amendments and changes made to the indictment shall be filed by the same time (reorganisation table).

(c) The Defence is to file complaints, if any, resulting from the amendments made in accordance with the above directions within fifteen days of the filing of the amended indictment;

The remainder of the Motion is **DENIED**.

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



Judge Patrick Robinson

Presiding

[Seal of the Tribunal]

Dated this 8th day of July 2005.
At The Hague,
The Netherlands.