



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-96-20-T
Date: 26 April 1996
Original: FRENCH
AND ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Jorda, Presiding
Judge Odio Benito
Judge Riad

Registrar: Mr. Dominique Marro, Deputy Registrar

Decision of: 26 April 1996

PROSECUTOR
v.
DJORDJE DJUKIĆ

DECISION ON PRELIMINARY MOTIONS OF THE ACCUSED

The Office of the Prosecutor:

Mr. Eric Ostberg
Mr. Michael Keegan
Mr. Michael Blaxill

Defence Counsels:

Mr. Milan Vujin
Mr. Toma Fila

THE TRIAL CHAMBER

BEING seized of an indictment against General Djukić confirmed on 29 February 1996 by Judge Karibi-Whyte,

HAVING REGARD to the motions presented by the Defence on 4, 14, and 18 March 1996,

HAVING REGARD to the briefs filed by the Prosecutor on 14 and 25 March 1996 responding to each of the motions,

HAVING REGARD to Rules 72 and 73 of the Rules of Procedure and Evidence (the Rules),

HAVING HEARD the parties during the hearing of 25 March 1996;

CONSIDERING that the Trial Chamber is seized of an indictment against General Djukić which was confirmed on 29 February 1996 by Judge Karibi-Whyte who, on that same day, issued an order of detention for the accused;

CONSIDERING that in its decision of 24 April 1996, the Trial Chamber rejected the motion from the Prosecutor that the indictment be withdrawn because of the medical condition of General Djukić, as well as that of the Defence that the indictment be withdrawn because of an alleged lack of sufficient evidence produced by the Prosecutor at this stage of the proceedings;

CONSIDERING that, by that same decision, the Trial Chamber did, however, accept the motion from the Defence for provisional release of the accused solely for humanitarian reasons, justified by the extreme gravity of his medical condition;

CONSIDERING that the Trial Chamber must therefore rule on all the preliminary motions presented by the Defence pursuant to Sub-rule 73 (A) (i), (ii), and (iii) of 4, 14 and 18 March 1996 and the briefs from the Prosecutor dated 14 and 25 March 1996.

On the objection based on the lack of jurisdiction (Sub-rule 73 (A) (I) of the Rules) and the subsequent request for deferral

1. The Defence emphasises that, pursuant to Sub-rule 9 (iii) of the Rules, before issuing an indictment against General Djukić, the Prosecutor must present a proposal to a Trial Chamber for deferral by the judicial authorities of the Republic of Bosnia and Herzegovina which are currently conducting investigations in respect of General Djukić. According to the Defence, the fact that there has been no such request for deferral renders the decision reviewing the indictment invalid. For this reason, the Trial Chamber is said not to have jurisdiction to conduct the trial against General Djukić.

2. In response, the Prosecutor alleges that a request for deferral is not a pre-condition to issuing an indictment and that the reviewing of the indictment against General Djukić is therefore valid.

3. No challenge is raised as to whether the judicial authorities of the Republic of Bosnia and Herzegovina are seized of investigations into General Djukić and as to whether he is still covered by a detention order from the High Court of Sarajevo. The investigations conducted by the national judicial authorities began prior to the transfer of the accused to the Tribunal and before his indictment by that same body. Nothing in the Statute or the Rules of the Tribunal supports the conclusion that the absence of deferral proceedings before the decision to review an indictment would render such a decision invalid. The Trial Chamber therefore considers that it is properly seized of the matter and that, consequently, conducting the trial against General Djukić falls within its jurisdiction.

4. A response to the subsequent request of the Defence for the Trial Chamber to request for deferral by the national courts based on Rule 13 of the Rules must, however, be given. The Defence alleges that "it is not possible to accept two on-going proceedings at the same time for the same case". Nevertheless, according to the Prosecutor who bases his arguments on the terms of Article 9 (2) of the Statute, the request for deferral may be presented at any stage of the proceedings, and the Tribunal

may, therefore, simultaneously and in parallel with a national court, continue its prosecution based on the principle of concurrent jurisdiction of the International Tribunal and the national courts.

5. The principle of concurrent jurisdiction is recognised by Article 9 of the Statute of the Tribunal. According to the Report of the Secretary-General containing the draft Statute approved by Security Council resolution 827 (1993), the expression of the principle of the concurrent jurisdiction of the International Tribunal and the national courts sought to reflect the intention of the Security Council not to exclude the jurisdiction of national courts in respect of crimes also falling within the jurisdiction of the Tribunal. According to the Report: “national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures” (doc S/25704, paragraph 64).

6. This principle is limited, however, by the principle of *non bis in idem*, recognised by Article 10 of the Statute and Rule 13 of the Rules. According to Rule 13:

“When the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the Tribunal, a Trial Chamber shall, following *mutatis mutandis* the procedure provided in Rule 10, issue a reasoned order requesting that court permanently to discontinue its proceedings”.

It appears that, even before the sentence is rendered, the mere fact of two trials being held simultaneously for the same crimes against the same accused is likely to prejudice the rights of that accused as stated in Article 14 of the International Covenant on Civil and Political Rights and reiterated in Article 21 of the Statute of this Tribunal, particularly in paragraph 4 (b) of that Article according to which the accused has the right “to have adequate time and facilities for the preparation of his defence...”

7. In respect of the jurisdiction of various organs of this Tribunal as regards deferral, the Trial Chamber notes that Rule 13 of the Rules, on which the Defence has based the competence of the Trial Chamber to request deferral, is not applicable. The Prosecutor has correctly emphasised that, pursuant to Rule 9 of the Rules, he has the power to assess the suitability and timing for submitting to the Trial Chamber a proposal for deferral.

8. The Trial Chamber considers that the Prosecutor must, however, take care not to place the Defence in a position which, in the future, might prejudice the rights of General Djukić, as recognised in Article 21 of the Statute.

9. Basing itself on these comments, the Trial Chamber rejects the motion for deferral made by the Defence.

On the objection based on defects in the form of the indictment (Sub-rule 73 (A) (ii) of the Rules)

10. Basing itself on Sub-rule 73 (A) (ii) of the Rules, the Defence develops two sets of arguments respectively on the incomplete nature and lack of precision of certain allegations in the indictment.

11. First, the Defence asserts that the general nature of the indictment would permit anyone to be brought before the Tribunal and not only those persons whose individual responsibility might be established in accordance with Article 7 of the Statute of the Tribunal. *Inter alia*, the Defence emphasises that the information contained in paragraph 7 of the indictment referring to a “widespread and systematic” attack against a civilian population points to random acts. The indictment is alleged to be imprecise and ambiguous because it makes general allegations about the shelling of civilian targets in Sarajevo from May 1992 to about December 1995 without, however, specifically stating the day, time, identity of those responsible for the shelling, and the targets under consideration. The Defence Counsels conclude therefore that the indictment does not permit to ensure adequate preparation of their client’s defence and that it is null and void. Consequently, it requests that the

indictment be made more concrete and more precise, specifically in respect of acts ascribed to General Djukić.

12. Second, the Defence claims that the indictment contains inexact information in respect, specifically, of the functions and title of the accused. Among other things, it claims that the accused is not to be a member of the Yugoslav army, does not hold the rank of Colonel-General in the Bosnian Serb army and is not “the deputy commander responsible for logistics for Ratko Mladić”. Last, the Defence adds that the planning, preparation and execution of the Bosnian Serb military operations in the Republic of Bosnia and Herzegovina do not fall within the competence of the accused. It concludes that those activities do not establish any fault on the part of General Djukić. In order to establish such a link, the indictment should have specified the nature of the decisions taken by General Djukić or those in which he is said to have participated as regards the criminal acts ascribed to him.

13. The Prosecutor asserts that he has met the provisions of the Statute and the Rules as regards the contents of the indictment, specifically by presenting the acts which identify the accused and which are sufficient to describe the alleged crimes, as required by Sub-rule 47 (B) of the Rules. The Prosecutor adds that the specific points raised by the Defence are semantic in nature or are mere details which have no influence on the validity of the indictment.

14. Last, the Prosecutor generally contends that the information being challenged relates to questions to be decided at trial on the merits. It is only at that stage that he will have to prove this information. The Prosecutor concludes by adding that new evidence will be submitted as part of the process of disclosure and that amendments may be made to the indictment.

15. The Statute provides that any person against whom an indictment has been issued has the right to be informed promptly and in detail of the nature and cause of the charge against him (paragraph 4 (A) of Article 21). It places the obligation on the Prosecutor when he issues an indictment to state succinctly the facts and the crime or crimes of which the accused is charged (paragraph 4 of Article 18). Last, the Rules specify that the indictment must indicate the name and particulars of the suspect

together with a concise statement of the facts of the case and the classification of those acts (Sub-rule 47 (B)).

16. The Trial Chamber first takes note of the summary nature of the indictment which very succinctly demonstrates that the accused allegedly committed a crime against humanity and a violation of the laws or customs of war. In respect of the allegedly incorrect information contained in the indictment, the Trial Chamber considers that, at this stage of the proceedings, the indictment meets the relevant provisions of the Statute and the Rules, conditional on its being understood that each of the parties will have to prove its allegations during the trial on the merits. The Trial Chamber therefore rejects the preliminary motion of the Defence based on the incorrect nature of some of the information contained in the indictment.

17. The Trial Chamber next takes note of the imprecise and ambiguous nature of the indictment, specifically in paragraph 7 where it is alleged, with no other precision, that from May 1992 to about December 1995, "Bosnian Serb military forces, on a widespread and systematic basis, deliberately or indiscriminately fired on civilian targets that were of no military significance in order to kill, injure, terrorise and demoralise the civilian population of Sarajevo". Because he is said to have participated in the planning and preparation, or in some other manner aided and abetted the planning and preparation, of those acts and operations, General Djukić is accused of having committed a crime against humanity as provided for in Article 5 (i) (other inhumane acts) of the Statute and of a violation of the laws and customs of war, as provided for in Article 3 of the Statute.

18. These are serious allegations for which the accused is entitled to receive all necessary information to prepare his defence. In the *Tadić* case, the Tribunal justified its Decision, authorising the Prosecutor to amend his indictment, in these terms: "[t]he indictment says nothing specific about the accused's conduct, about what was the nature and extent of his participation in the several courses of conduct which are alleged over the months in question(...). However, there should nevertheless be some clear identification of particular acts of participation of the accused in such an attack". (*Prosecutor v. Duško Tadić*, IT-94-1-T, Decision on the Defence motion on the form of the indictment, 14 November 1995, paragraph 12). In this case, the Trial Chamber

considers that the indictment against General Djukić does not demonstrate the level of precision as required in the *Tadić* case. In fact, it does not contain any identification of the acts or omissions of General Djukić in the preparation or planning of the acts for which he is charged. It does not provide any indication as to the nature of “the other inhumane acts” he is alleged to have committed. The Trial Chamber therefore invites the Prosecutor to make, pursuant to the provisions of the Statute and the Rules, such modifications as he deems necessary if he intends to maintain the counts appearing in paragraph 7 of the indictment. The Trial Chamber also takes note of the fact that at the hearing of 25 March 1996 the Prosecutor indicated that further evidence will be submitted as part of the process of disclosure as provided for in the Rules and that he reserved the right to amend the indictment.

On the application for the exclusion of evidence obtained from the accused or having belonged to him (Sub-rule 73 (A) (iii) of the Rules)

19. Basing itself on Sub-rule 73 (A) (iii), the Defence requests that some of the evidence obtained from the accused, or belonging to him, be excluded. Specifically, it requests that the scheme of the organizational structure of civilian and military set-up, as well as political organization of a political party, containing information said to be completely erroneous, be excluded. Furthermore, the Defence requests the same for the evaluation of the information on General Djukić in respect of his functions within the army of Republika Srpska and for the information pertaining to Radovan Karadžić and General Ratko Mladić. The table schedule of alleged bombing of civilian targets and civilian population should also be excluded because it is presented with no indications whatsoever as to who has made this table or the evidence on which it is based. Last, the declaration of General Djukić to the Sarajevo police should not be considered as admissible evidence because it was allegedly received in violation of the provisions of the national law of the Republic of Bosnia and Herzegovina.

20. In respect of the organisational scheme, the information on General Djukić, General Mladić and Radovan Karadžić, and the table schedule of civilian targets, the Prosecutor emphasises that the exclusion of that proof does not fall within the scope of application of Sub-rule 73 (A) (iii) of the Rules because it was not obtained from the accused and does not belong to him. Last, as regards the statement of General

Djukić, the Prosecutor asserts that no provisions exist to exclude automatically evidence obtained from the accused. It is the responsibility of the Defence to show the evidence to be prejudicial so as to outweigh probative value or obtained in a way that is inconsistent with the rights of the accused guaranteed by international law. The Prosecutor considers that, in this case, the probative value of the evidence in question is greater than any harm caused to the accused and that nothing in the Defence motion indicates that there is reason to conclude that the statements were not taken in accordance with the Rules.

21. Sub-rule 89 (A) of the Rules provides that the Trial Chamber which is seized of a matter is not bound by national rules of evidence, and Sub-rule 89 (D) permits the exclusion of any evidence whose probative value is substantially outweighed by the need to ensure a fair trial. In addition, Rule 95 of the Rules stipulates that “[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings”.

22. The Trial Chamber notes that any evidence whose admissibility has been challenged has been provided to the accused but not submitted to the Trial Chamber at this stage of the proceedings. Nonetheless, as regards the organisational scheme, the evaluation of information on General Djukić, the information about General Mladić and Radovan Karadžić, as well as the table schedule of the civilian targets, the Trial Chamber considers that this proof was not obtained from the accused or does not belong to him.

23. As regards the statement of General Djukić, the Trial Chamber, in accordance with Sub-rule 89 (D), considers that the Tribunal is in no way bound by the national rules of evidence of the Republic of Bosnia and Herzegovina. It can only take note of the assertion by the Prosecutor, according to which the probative value of this evidence is greater than any damage to the accused. However, the Trial Chamber recalls that the admissibility of that particular evidence during the trial on the merits will, *inter alia*, depend on its respect for the requirements of the proper administration of justice and that an appropriate balance of interests is necessary - public interest and the interest of the accused - and must necessarily be sought in light of the appropriate

provisions of the Statute, the Rules and the applicable norms of international law. Consequently, the Trial Chamber rejects the preliminary motion based on the inadmissibility of the evidence obtained from the accused or belonging to him.

FOR THESE REASONS, THE TRIAL CHAMBER, RULING UNANIMOUSLY,

REJECTS the motion of the Defence in respect of the preliminary motion on the lack of jurisdiction and the subsequent request for deferral;

REJECTS the preliminary motion of the Defence based on the inexact nature of some of the information contained in the indictment;

INVITES the Prosecutor to amend paragraph 7 of the indictment in accordance with the Statute and the Rules;

REJECTS the motion of the Defence based on the inadmissibility of evidence obtained from the accused or belonging to him.

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

Claude Jorda,
Presiding Judge of Trial Chamber I

Dated the twenty-sixth day of April 1996
At The Hague
The Netherlands

(Seal of the Tribunal)