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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-96-21-AR72.5

Date: 6 December 1996

Original: English and French

BEFORE A BENCH OF THE APPEALS CHAMBER

Before: **Judge Antonio Cassese, Presiding**
Judge Haopei Li
Judge Jules Deschênes

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **6 December 1996**

PROSECUTOR

v.

ZEJNIL DELALIĆ
ZDRAVKO MUCIĆ also known as "PAVO"
HAZIM DELIĆ
ESAD LANDŽO

DECISION ON APPLICATION FOR LEAVE TO APPEAL BY HAZIM DELIĆ (DEFECTS IN THE FORM OF THE INDICTMENT)

The Office of the Prosecutor

Mr. Eric Ostberg
Ms. Teresa McHenry

Counsel for the Accused

Mr. Salih Karabdić for Hazim Delić

I

APPLICATION FOR LEAVE TO APPEAL

1. In an Application filed with the Registry on 22 November 1996, the accused Hazim Delić seeks leave to appeal from the "Decision on Motion by the Accused Hazim Delić based on Defects in the Form of the Indictment" ("*Decision*"), rendered by Trial Chamber II on 15 November 1996 in the case of *the Prosecutor v. Zejnil Delalić, Zdravko Mucić, also known as "Pavo", Hazim Delić and Esad Landžo* (IT-96-21-T). In the *Decision*, the Chamber denied the accused's motion based on Defects in the Form of the Indictment.

2. The application for leave to appeal is made pursuant to Rule 72(B) of the Rules, which reads:

> (B) The Trial Chamber shall dispose of preliminary motions in *limine litis* and without interlocutory appeal, save
>
> (i) in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as of right;
>
> (ii) in other cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon serious cause being shown, within seven days following the impugned decision.

3. The accused advances a number of arguments in support of his Application, which may, for convenience, be summarised as follows:

(a) That the Indictment has not established the Tribunal's jurisdiction in this case;
(b) That the Indictment is incomplete and/or violates the principle *nullum crimen sine lege;*
(c) That the Indictment is vague;

(d) That the Indictment fails to separate distinct charges and therefore subjects the accused to the danger of "double jeopardy" and/or falls foul of the principle *non bis in idem*;

(e) That the Indictment alleges facts which are false.

(a) That the Indictment has not established the Tribunal's jurisdiction in this case;

4. This argument raises a preliminary question which goes to the very issue of whether a Bench of the Appeals Chamber, consisting of three Judges, or the full Appeals Chamber consisting of five Judges, should hear the Application. The preliminary question is whether this is an interlocutory appeal based on lack of jurisdiction, where appeal lies as of right under Rule 72(B)(i), or whether it is not, in which case an appeal can only be brought if leave has first been obtained by a Bench of three Judges of the Appeals Chamber, upon serious cause being shown, under Rule 72(B)(ii).

5. In his Application, the accused argues that his objections to the form of the Indictment "mean that the jurisdiction of the Tribunal is not established, and they should be treated as objection for a lack of jurisdiction" (*Application, p.1, para. 1).* Accordingly, in his prayer, the Applicant proposes to the Appeal Chamber "to treat its Appeal as an appeal on right to appeal", i.e. as of right, "or alternatively ... to grant a leave to appeal". *Id. P.2.*

6. The accused's reason for arguing that his objections to the form of the Indictment are objections based on lack of jurisdiction is based on the fact that the Indictment does not refer to the norms of international humanitarian law which the accused is alleged to have violated, but only to the pertinent Articles of the Tribunal's Statute. The accused argues that the Indictment, on the contrary, needs to refer to the norms of international humanitarian law and not simply to the Articles of the Statute, because the Statute is not a criminal code which legislates offences, but it simply authorises the Tribunal to prosecute what are already offences under international humanitarian law.

7. Thus the Applicant's first argument is that the Tribunal has not established its jurisdiction in this case.

(b) That the Indictment is incomplete and /or violates the principle *nullum crimen sine lege*;

8. The lack of any reference to the norms of international humanitarian law which are alleged to have been violated by the accused is also cited as an objection to the form of the Indictment on the grounds of incompleteness. The Applicant argues that it is difficult to defend against the Indictment when it does not mention the norms relied on; in particular, he argues that in these circumstances the principle *nullum crimen sine lege* is violated and his right to a fair trial is jeopardised.

(c) That the Indictment is vague

9. The accused avers, in addition, that the Indictment is not "a concise statement of facts and of the crime or crimes with which the accused is charged under the Statute" as required by Article 18(4) of the Statute. In particular, the accused complains that many charges contain mutually exclusive, alternative formulations of guilt, e.g. "knew" versus "had reason to know", "were about to commit" versus "committed", and "failed to prevent" versus "failed to punish". The accused considers that each charge should contain only one such formulation.

(d) That the Indictment fails to separate distinct charges and therefore subjects the accused to the danger of "double jeopardy" and/or falls foul of the principle *non bis in idem*;

10. The accused submits that the Indictment fails to separate distinct charges; in particular, it fails to separate charges for crimes individually committed from those committed by dint of being a superior. In other words, the accused is charged for certain offences both as a direct participant and as a superior, e.g. Paragraphs 35 (Counts 46 and 47), 36 (count 48) and 37 (count 49).

11. Thus the accused complains in his Application of a danger of "double jeopardy", i.e. of being punished twice for the same offence, in respect of his alleged position as direct participant and as a superior or commander.

12. The accused also complains of "double jeopardy" in respect of the cumulative presentation of the offences charged in the Indictment.

(e) That the Indictment alleges facts which are false.

13. The accused also complains that the Indictment offers no facts concerning Delić's position as Deputy Commander, nor does it demonstrate how a Deputy Commander can be responsible as a commander.

14. The accused also alleges wrongful characterisation of the conflict in Bosnia and Herzegovina.

II

PROSECUTION RESPONSE

15. The Prosecutor filed her reply to the Application on 28 November 1996. In the "Prosecution Response to Delić's Application for Leave to Appeal the Decision of the Trial Chamber denying Motion on the Form of the Indictment" (*"Prosecution Response"),* the Prosecutor argues that the Accused has failed to demonstrate a grave error in the Decision of the Trial Chamber which would justify granting leave to appeal. The Prosecutor argues that:

> .... the Defence does not even attempt to demonstrate where the Trial Chamber erred in its consideration of the challenge to the form of the indictment. Rather, the accused merely restates his initial arguments, all of which were fully responded to in the Prosecutor's initial response to the motion, and all of which were fully considered and correctly rejected in the Trial Chamber's decision of 15 November 1996". *Prosecution Response, p.3.*

III

SCOPE OF RULE 72(B)(ii)

16. Rule 72(B)(ii) was first applied in the "Decision on Application for Leave to Appeal (Separate Trials)" of this Bench on 14 October 1996 regarding the accused Zejnil Delalić. As this Bench noted, a three-fold test of cumulative conditions is to be applied whenever an application for leave to appeal under Rule 72(B)(ii) is concerned:

(1) Does the application relate to one of the issues covered by Rule 73 (A)(ii),(iii),(iv), (v).?

(2) Is the application frivolous, vexatious, manifestly ill-founded, an abuse of the process of court or so vague and imprecise as to be unsusceptible of any serious consideration?

(3) Does the application show a serious cause, namely does it either show a grave error in the decision which would cause substantial prejudice to the accused or is detrimental to the interests of justice or raise issues which are not only of general importance but are also directly relevant to the future development of trial proceedings, in that the decision by the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber?

IV

DISCUSSION

17. Applying the first of these tests, it is apparent that the Application of Hazim Delić relates to defects in the form of the Indictment which is one of the issues covered by Rule 73 (A), namely Rule 73(A)(ii), and is therefore within the interlocutory jurisdiction of Appeals Chamber.

18. Turning to the second test, the Bench does not consider that the Application is frivolous, vexatious, manifestly ill-founded, an abuse of the process of court nor so vague and imprecise as to be unsusceptible of any serious consideration.

19. The Bench therefore turns to the third test: Does the application show a serious cause, namely does it either show a grave error in the decision which would cause substantial prejudice to the accused or is detrimental to the interests of justice or raise issues which are not only of general importance but are also directly relevant to the future development of trial proceedings, in that the decision by the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber?

20. The Applicant has raised five arguments in his Application, outlined here in section I, which will be analysed in turn.

(a) That the Tribunal has not established its jurisdiction in this case;

21. The first question which must be answered is whether this is an interlocutory appeal based on lack of jurisdiction, where appeal lies as of right under Rule 72(B)(i), or an appeal which can only be brought if leave has first been obtained from a Bench of three Judges of the Appeals Chamber, upon serious cause being shown, under Rule 72(B)(ii).

22. Having examined the Application, the Bench is of the view that this is not an appeal from the dismissal of an objection based on lack of jurisdiction. The accused's

Motion before the Trial Chamber, which was entitled "Preliminary Motions of Accused Hazim Delić based on Defects in the Form of the Indictment", did not raise the issue of jurisdiction as an objection. The Trial Chamber's *Decision,* accordingly, did not consider the issue of whether or not it had jurisdiction to entertain the case. It is well settled that, since the Accused's Motion did not raise the issue of jurisdiction before the Trial Chamber, the issue cannot now be raised for the first time before the Appeals Chamber.

23. The Bench therefore considers that the Application is not to be treated as an appeal on jurisdiction which would lie as of right (assuming of course that the Trial Chamber had already pronounced on the matter), but as an appeal for which leave is required.

24. The Bench also notes, secondarily, that the Application to this Bench is headed "Appeal against Decision on Motion based on Defects in the Form of the Indictment", and that it addresses itself primarily to defects in the form of the Indictment. It does not therefore, even *prima facie*, purport to be an appeal based on lack of jurisdiction. This also justifies the Bench in treating the Application as an application for leave to appeal under Rule 72(B)(ii).

(b) That the Indictment is incomplete and/or violates the principle *nullum crimen sine lege;*

25. To the Accused's objection that the Indictment is incomplete and violates the principle of *nullum crimen sine lege*, the Trial Chamber replied:

> The Trial Chamber finds that the allegation that this Indictment violates the principle of *nullum crimen sine lege* does not hold. The Indictment cites the applicable provisions of the Statute which support the alleged criminal responsibility for the acts mentioned in the Indictment. In so doing, the Indictment puts the Defence on notice of the legal classification of the crime and sufficiently enables the accused to prepare his defence.(para. 21)

26. The Accused is no doubt correct when he states that the Tribunal's Statute does not create new offences but rather serves to give the Tribunal jurisdiction over offences which

are already part of customary law. As the Secretary-General comments in his Report on the Tribunal's Statute (S/25704): "... the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence to some but not all States to specific conventions does not arise" (para. 34).

27. This does not, however, have any bearing on whether *the Indictment* should refer for each offence to both the pertinent Article of the Statute and the pertinent norm of international humanitarian law. Provided that it is clear in each count of the Indictment which serious violation of international humanitarian law is being charged, it matters little whether the Indictment refers to, for example, Article 2 of the Statute or to the relevant Articles of the Geneva Conventions of 1949. Indeed the Statute appears to favour the former approach; Article 18(4) mentions "a concise statement of facts and of the crime or crimes with which the accused is charged *under the Statute*". Moreover, the Report of the Secretary-General to the Security Council of 1993 on the Statute of this Tribunal in his exposition of Articles 2,3,4 and 5 of the Statute clearly referred the crimes enumerated in them to their sources of international humanitarian law, for example, the Geneva Conventions of 1949, the Hague Convention (IV) of 1907, the Nuremberg Charter of 1945 and the Genocide Convention of 1948. The Bench takes the view, therefore, that Articles 2,3,4 and 5 of the Statute are shorthand for the corresponding norms of international humanitarian laws, and if there is any dispute as to those norms, that is a matter for trial, not for pre-trial objections to the form of the Indictment.

28. The Accused argues that it is difficult for him to defend against the Indictment when it does not mention the norms relied on. In particular, he says that in these circumstances the principle nullum crimen sine lege is violated and his right to a fair trial is jeopardised. In light of the above comments, the Bench does not consider this concern to be justified.

(c) That the Indictment is vague;

29. The defence further avers that the Indictment is not "a concise statement of facts and of the crime or crimes with which the accused is charged under the Statute" as required by Article 18(4) of the Statute.

30. In particular, the accused complains that many charges contain mutually exclusive alternative formulations of guilt, e.g. "knew" versus "had reason to know", "were about to commit" versus "committed", "failed to prevent" versus "failed to punish".

31. The Trial Chamber, in its *Decision,* did not fully address this issue, which the Accused raised in its Motion before the Trial Chamber in paragraph 5. The Bench considers, however, that this is not a grave error on the Trial Chamber's part. These sets of alternatives, recognised in military manuals and under international humanitarian law, do not render the Indictment fatally vague, although wherever possible the Prosecutor should make clear the precise line of conduct and mental element alleged.

(d) That the Indictment fails to separate distinct charges and therefore subjects the accused to the danger of "double jeopardy" and/or falls foul of the principle *non bis in idem*;

32. The Accused submits that a charge for crimes individually committed must be separated from a charge as a superior, whereas he is charged for certain offences, both as a direct participant and as a superior, for example Paragraphs 35 (Counts 46 and 47), 36 (count 48) and 37 (count 49).

33. The Trial Chamber, in response to this objection, stated:

> "The Trial Chamber finds that the Indictment sufficiently informs the accused of the acts for which he is being charged both as a direct participant and as a superior. Moreover, the Indictment does separate the acts for which the accused is being held responsible as a direct participant and as a superior. The Indictment therefore fulfils its purpose in an adequate manner...." (*para. 18, Decision*).

The Trial Chamber therefore rejected the objection; in the view of this Bench, with reason.

34. It is worth noting, however, that there is one respect in which the Accused's concern is justified with respect to the distinction between being charged as a direct participant and being charged as a superior; namely the failure, in those counts of the indictment which charge command responsibility for the acts of subordinates, to refer to the statutory source for liability for the acts of subordinates, i.e. Article 7(3) of the Tribunal's Statute. While the Bench is of the view that the said sub-Article should be explicitly mentioned whenever it is relied on, nevertheless there is no possibility in this Indictment of the Accused being mistaken as to which Article is being referred to when the "knew or had reason to know" formula is employed.

35. The accused also complains of being charged on multiple occasions throughout the Indictment with two different crimes arising from one act or omission, namely being charged in each case with both a grave breach "and" a violation of the laws or customs of war for the same acts. On this matter, the Trial Chamber endorsed its reasoning on an identical issue in the *Tadić* case:

> "In any event, since this is a matter that will only be relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading". (*Prosecutor v. Tadić,* Decision on Defence Motion on Form of the Indictment at p.10 (No. IT-94-1-T, T.Ch.II, 14 Nov, 1995)

36. The Bench does not consider that the reasoning reveals an error, much less a grave one, justifying the granting of leave to appeal.

(e) That the Indictment alleges facts which are false.

37. The accused complains under this heading that the Indictment offers no facts concerning Delić's position as Deputy Commander, nor does it demonstrate how a Deputy Commander can be responsible as a commander. Also as a factual issue, the Accused avers that the Prosecutor has wrongfully characterised the conflict in Bosnia and Herzegovina.

38. The Bench considers that the Trial Chamber was correct to state that these are factual issues to be determined at trial. It should be noted with respect to the latter issue, that this has not been presented as an objection to the jurisdiction of the Tribunal, i.e. an objection based on the alleged wrongful characterisation of the armed conflict in Bosnia and Herzegovina, and so appeal on this issue does not lie as of right. Rather this being raised as an objection to the form of the indictment, leave to appeal is required, which is refused on the grounds that the objection raises factual issues to be determined at trial.

39. The accused raises two miscellaneous issues which, however, do not allege an error on the part of the Trial Chamber, much less a "serious cause" justifying leave to appeal, namely:

(a) That the ex parte review of the Indictment under Rule 47 offends the principle audi alteram partes.

(b) that there must be a "reasonable suspicion" that the accused has committed the offences alleged.

40. The Bench does not consider that either of these arguments raise a "serious cause" justifying the granting of leave to appeal under Rule 72(B)(ii).

V

DISPOSITION

The Bench of the Appeals Chamber,

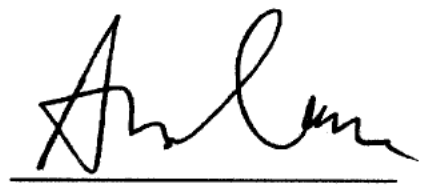
Ruling unanimously,

For the above reasons,

Pursuant to Rule 72(B)(ii) of the Rules of Procedure and Evidence,

REJECTS the application of accused Hazim Delić for leave to appeal the Decision of 15 November 1996 denying his motion based on defects in the form of the Indictment.

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



Antonio Cassese
President

Dated this 6th day of December 1996
At The Hague
The Netherlands

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