



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-99-37-PT  
Date: 27 March 2003  
Original: English

**IN THE TRIAL CHAMBER**

**Before:** Judge Richard May, Presiding  
Judge Patrick Robinson  
Judge O-Gon Kwon

**Registrar:** Mr. Hans Holthuis

**Decision of:** 27 March 2003

**PROSECUTOR**

v.

**MILAN MILUTINOVIĆ  
DRAGOLJUB OJDANIĆ  
NIKOLA ŠAINOVIĆ**

**DECISION ON DEFENCE PRELIMINARY MOTION FILED BY THE DEFENCE FOR  
NIKOLA ŠAINOVIĆ**

**The Office of the Prosecutor**

**Mr. Geoffrey Nice  
Ms. Cristina Romano  
Mr. Milbert Shin**

**Counsel for the Accused**

**Mr. John Livingston, for Milan Milutinović  
Mr. Tomislav Višnjić and Mr. Peter Robinson, for Dragoljub Ojdanić  
Mr. Toma Fila and Mr. Vladimir Petrović, for Nikola Šainović**

**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 (“International Tribunal”),

**BEING SEISED OF** a “Defence Preliminary Motion” filed on 2 August 2002 (“Motion”) by the Defence for Nikola Šainović (“Accused”), alleging numerous defects in the form of the indictment against the Accused<sup>1</sup> and consequently seeking an order to amend the indictment,

**NOTING** the “Prosecution’s Response to Nikola Šainović’s Defence Preliminary Motion” filed on 15 August 2002 (“Response”) by the Office of the Prosecution (“Prosecution”), seeking the dismissal of the Motion,

**NOTING** the “Defence Notice” filed on 8 October 2002 by the Defence, notifying the Trial Chamber that the Defence considered its original Motion equally relevant to the Third Amended Indictment dated 19 July 2002 (“Indictment”), which the Trial Chamber granted the Prosecution leave to amend on 5 September 2002,<sup>2</sup>

**NOTING** that the Indictment<sup>3</sup> concerns events that occurred in Kosovo between 1 January and 20 June 1999 and provides that during the relevant times, the Accused held various positions in the governments of Serbia and the Federal Republic of Yugoslavia (“FRY”),<sup>4</sup> including the positions of Deputy Prime Minister of the FRY and representative of Slobodan Milošević (“Milošević”), then President of the FRY, for Kosovo,<sup>5</sup>

**NOTING** that the Indictment charges the Accused, along with Milan Milutinović (“Milutinović”), Dragoljub Ojdanić (“Ojdanić”), with individual criminal responsibility under Article 7, paragraph 1, of the Statute of the International Tribunal (“Statute”),

**NOTING** that the alleged responsibility of the Accused under Article 7, paragraph 1, of the Statute is based on the knowing and wilful participation by the Accused, using *de jure* and *de facto* powers available to him, in a joint criminal enterprise whose purpose was, *inter alia*, the expulsion of a

<sup>1</sup> *Prosecutor v. Slobodan Milošević et al*, Second Amended Indictment, Case No. IT-99-37-PT, 16 Nov. 2001.

<sup>2</sup> Substituted Decision on Motion to Amend Indictment, Case No. IT-99-37-PT, 5 Sept. 2002. The amendment was a consequence of one of the accused, Slobodan Milošević, being tried separately and another accused, Vlatko Stojilković, having died.

<sup>3</sup> *Prosecutor v. Milan Milutinović, Nikola Šainović & Dragoljub Ojdanić*, Third Amended Indictment, Case No. IT-99-37-PT, 19 July 2002.

<sup>4</sup> Although the FRY has officially changed its name to State Union of Serbia and Montenegro beginning on 4 Feb. 2003, the Trial Chamber shall continue to use the acronym FRY for purposes of this Decision.

<sup>5</sup> Indictment, paras 8-11.

Case No. IT-99-37-PT

substantial portion of the Kosovo Albanian population from the territory of Kosovo to ensure continued Serbian control,<sup>6</sup>

**NOTING** that the Indictment alleges all the enumerated crimes to be within the object of the joint criminal enterprise, and that in the alternative, some of the crimes are said to be the natural and foreseeable consequences of the joint criminal enterprise,<sup>7</sup>

**NOTING** that the Indictment also charges the Accused, along with Milutinović and Ojdanić, as a superior, with individual criminal responsibility under Article 7, paragraph 3, of the Statute for the acts or omissions of his subordinates,<sup>8</sup>

**NOTING** that the alleged responsibility of the Accused under Article 7, paragraph 3, of the Statute is based on the exercise of effective control by the Accused over those individuals and institutions related to the alleged offences contained in the Indictment, pursuant to both his authority as Deputy Prime Minister of the FRY and representative of Milošević for Kosovo,<sup>9</sup>

**NOTING** that the Indictment alleges the Accused “is also, or alternatively,” responsible under Article 7, paragraph 3, of the Statute pursuant to his *de facto* authority, for the acts of his subordinates, including but not limited to, members of the VJ and MUP police who committed the crimes charged in the Indictment,<sup>10</sup>

**NOTING** that the Indictment provides further details and features of the crimes – deliberate and widespread or systematic campaign of deportation and forcible transfer, murder, sexual assaults and destruction of property of the Kosovo Albanians - alleged to have been committed under each count by the forces of Serbia and the FRY; the additional facts leading up to the events in Kosovo; and the names, approximate age and sex of the known victims,<sup>11</sup>

---

<sup>6</sup> *Ibid.* paras 16-18. The joint criminal enterprise is alleged to have come into existence no later than October 1998 and the Accused is alleged to have planned, instigated, ordered, committed (as co-perpetrator in the joint criminal enterprise and not as a physical perpetrator of any of the crimes) or otherwise aided and abetted in the planning, preparation or execution of the crimes.

<sup>7</sup> *Ibid.* para. 18. The Indictment contains a total of 5 counts against the Accused. Specifically, the counts falling under the alternative charging of “natural and foreseeable consequences” of the joint criminal enterprise are murder (as a crime against humanity and violations of the laws or customs of war) and persecutions (as a crime against humanity).

<sup>8</sup> *Ibid.* paras 19 and 37-39.

<sup>9</sup> *Ibid.* paras 37-38.

<sup>10</sup> *Ibid.* para. 39.

<sup>11</sup> *Ibid.* paras 53-68, 71-108 and attached Schedules.

**CONSIDERING** that although supporting materials and the pre-trial brief may not be used to cure a defective indictment, any evidence or a summary of evidence the Prosecution intends to rely upon to prove its case at trial need not be pleaded in the indictment,<sup>12</sup>

**CONSIDERING** that an indictment is not defective when, taken as a whole, it makes clear to an accused (1) the nature of the responsibility alleged against him and (2) the material facts, but not the evidence, by which his particular responsibility will be established,<sup>13</sup>

**CONSIDERING** that the materiality of the facts pleaded depends on the proximity of an accused to the events for which he is alleged to be criminally responsible<sup>14</sup> and that the Accused in the case at hand, holding a senior leadership position in the governments of Serbia and the FRY, is not alleged to have personally perpetrated any of the crimes alleged in the Indictment,<sup>15</sup>

**CONSIDERING** that the material facts that must be pleaded in the indictment with respect to allegations of individual responsibility arising from participation in a joint criminal enterprise are (1) the purpose and period of the enterprise; (2) the identity of the participants in the enterprise; and (3) the nature of the participation of the accused in that enterprise,<sup>16</sup> and that the Prosecution has pleaded these material facts in the Indictment against the Accused,

**CONSIDERING** that the precise details requested by Defence, such as the names of all the members of the joint criminal enterprise and the requisite factual allegations for the two alternative bases of joint criminal enterprise liability, are not material facts required to be pleaded in the Indictment but rather are matters of evidence,<sup>17</sup>

**CONSIDERING** that the material facts that must be pleaded in the indictment with respect to allegations of individual responsibility arising from the superior responsibility of the accused are (1) the relationship between

<sup>12</sup> *Prosecutor v. Momčilo Krajišnik & Biljana Plavšić*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, IT-00-39&40-PT, 4 Mar. 2002 ("Krajišnik Decision"), paras 9-10.

<sup>13</sup> *Prosecutor v. Milorad Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, 24 Feb. 1999, para. 7.

<sup>14</sup> *Prosecutor v. Strugar, Jokić et al*, Decision on Defence Preliminary Motion Concerning the Form of the Indictment, Case No. IT-01-42-PT, 28 June 2002 ("Strugar Decision"), para. 7, referring to *Prosecutor v. Stanislav Galić*, Decision on Application by Defence for Leave to Appeal, Case No. IT-98-29-AR72, 30 Nov. 2001, ("Galić Decision") and to *Prosecutor v. Kupreškić et al*, Appeal Judgement, Case No. IT-95-16-A, 23 Oct. 2001 ("Kupreškić Appeal Judgement"). For instance, if an accused is alleged to have personally committed the crimes alleged, the material facts such as the identity of the victim, the time and place of the events and the means by which the acts were committed have to be pleaded in detail. Kupreškić Appeal Judgement, para. 89.

<sup>15</sup> As the proximity becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed on the conduct of the accused himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him: Galić Decision, para. 15.

<sup>16</sup> Krajišnik Decision, para. 13, referring to *Prosecutor v. Milorad Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, Case No. IT-97-25-PT, 11 Feb. 2000.

<sup>17</sup> The precise details of the material facts are matters of evidence and therefore for pre-trial discovery: Strugar Decision, para. 18.

Case No. IT-99-37-PT

the accused and those who committed the alleged acts; (2) the conduct of the accused by which he may be found to have known or had reason to know that the acts were about to be done or had been done, by those others; and (3) that the accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them, and that the Prosecution has pleaded these material facts in the Indictment against the Accused,<sup>18</sup>

**CONSIDERING** that the specific details requested by the Defence, such as the time interval over which the Accused “exercised effective control”; what the “effective control” consisted of; over which persons and institutions “effective control” was exercised; what was the main importance of those individuals and institutions; and which were the persons and institutions that committed the alleged acts and were responsible for the alleged crimes,<sup>19</sup> are not material facts required to be pleaded in the Indictment but rather are matters of evidence,

**CONSIDERING** that the Prosecution clarifies an ambiguity in the Indictment, by affirming in the Response that the Accused is only alleged to have had *de facto* authority regarding Article 7, paragraph 3, of the Statute,<sup>20</sup>

**CONSIDERING** that further details of the source of *de facto* authority are not material matters required to be pleaded in the Indictment but rather are matters of evidence,

**CONSIDERING** that while the acts or omissions that form the basis of the liability of the Accused are the participation by the Accused in the joint criminal enterprise under Article 7, paragraph 1, of the Statute and the omission of the Accused to take necessary and reasonable measures to prevent such acts or to punish the perpetrators under Article 7, paragraph 3, of the Statute, specific details of the acts or omissions that support the allegation and of the individualised role of the Accused beyond what are alleged in the Indictment are not matters required to be pleaded in the indictment but rather are matters for evidence,<sup>21</sup>

**CONSIDERING THEREFORE** that the Accused’s right as provided in the Statute, to be informed promptly and in detail of the nature and cause of the charges against him so that he may adequately prepare his defence,<sup>22</sup> has been not been affected by defects in the form of the Indictment,

<sup>18</sup> *Ibid.* para. 17.

<sup>19</sup> Motion, para. 23.

<sup>20</sup> Response, para. 19.

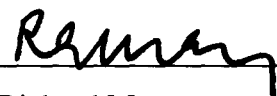
<sup>21</sup> The specific acts or omissions that support the allegations are matters for evidence: Krajišnik Decision, paras 23-24.

<sup>22</sup> Kupreškić Appeal Judgement, paras 4-8.

**PURSUANT TO** Rule 72 of the Rules

**HEREBY DISMISSES THE MOTION.**

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



Richard May  
Presiding

Dated this twenty-seventh day of March 2003  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**