



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-05-87-PT
Date: 19 August 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: 19 August 2005

PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
VLASTIMIR ĐORĐEVIĆ
SRETEN LUKIĆ

**DECISION ON PROSECUTION'S REQUEST FOR CERTIFICATION FOR APPEAL OF
DECISION ON VLADIMIR LAZAREVIĆ'S AND SRETEN LUKIĆ'S PRELIMINARY
MOTIONS ON FORM OF THE INDICTMENT**

The Office of the Prosecutor

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Counsel for the Accused

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Mr. Toma Fila and Mr. Vladimir Petrović for Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Dragoljub Ojdanić
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 (“International Tribunal”),

BEING SEISED of the “Prosecution’s Request for Certification for Interlocutory Appeal of the Decisions on Vladimir Lazarević’s and Sreten Lukić’s Preliminary Motions on Form of the Indictment”, filed by the Office of the Prosecutor on 15 July 2005 (“Request”), pursuant to Rule 72(B)(ii) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), seeking certification from the Trial Chamber for interlocutory appeal of its “Decision on Vladimir Lazarević’s Preliminary Motion on Form of Indictment” and “Decision on Sreten Lukić’s Preliminary Motion on Form of Indictment”, both issued 8 July 2005 (respectively “Decision on Lazarević’s Preliminary Motion” and “Decision on Lukić’s Preliminary Motion”), in which the Trial Chamber, *inter alia*, ordered the Prosecution to:

- (i) Specify the state of mind required for each of the forms of responsibility alleged pursuant to Article 7 (1) of the Statute, including participation in the various forms of Joint Criminal Enterprise (JCE) alleged, and how these material facts are to be established (“Order (i)”),¹
- (ii) Identify specific aspects of the conduct of the accused, from which the knowledge and failure to act required to establish his superior responsibility with regard to the crimes charged may be inferred (“Order (ii)”),² and
- (iii) Specify the forces of the FRY and Serbia that were allegedly involved in each of the enumerated incidents of murder (“Order (iii)”).³

NOTING the Prosecution’s submission in relation to Orders (i) and (ii) that the information sought by the Trial Chamber has been brought to the Defence’s attention through pre-trial discovery, will be highlighted in the pre-trial brief and will be presented as evidence at trial;⁴

NOTING that the Request argues that the three above orders “exceed what is required to be pled in an indictment under the jurisprudence of the Tribunal”⁵ and amount to an error of law,⁶ in that both decisions on the form of the Indictment improperly order the Prosecution to plead in the Indictment:

¹ Decision on Lazarević’s Preliminary Motion, p. 21 and Decision on Lukić’s Preliminary Motion, p. 6.

² Decision on Lazarević’s Preliminary Motion, p. 22 and Decision on Lukić’s Preliminary Motion, p. 5.

³ Decision on Lazarević’s Preliminary Motion, p. 22 and Decision on Lukić’s Preliminary Motion, p. 6.

⁴ Request, para. 15.

⁵ Request, para. 8.

⁶ Request, para. 12.

(a) *cumulatively*, rather than *in the alternative*, the two ways by which the relevant state of mind required for each of the various forms of responsibility alleged pursuant to Article 7 (1) of the Statute may be pleaded according to the jurisprudence of the Tribunal;⁷

(b) *how these material facts are to be established*, as well as identifying *specific aspects of the conduct of the accused* from which knowledge and failure to act required to establish the accused superior responsibility may be *inferred*, which in the Prosecution's view constitute *evidence* which need to be pleaded in an indictment;⁸

(c) which forces of the FRY and Serbia were allegedly involved in *each of the incidents of murder*, which "exceeds what is required to be pled in relation to the acts of those persons for whom the accused is alleged to be responsible"⁹ and "fails to contextualise the allegations within the context of the indictment taken as a whole and in light of the Prosecution's theory of the case [participation in a JCE]";¹⁰

CONSIDERING that Rule 72(B) (ii) requires two criteria be satisfied before a Trial Chamber may certify a decision for interlocutory appeal: (1) that the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* (2) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings,

CONSIDERING that even when an important point of law is raised, such as in Prosecution's points (a) and (b) above, the effect of Rule 72(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied,¹¹

CONSIDERING that Order (iii) was not intended to require more specification in the Indictment as to which "forces of the FRY and Serbia" involved in the various incidents of murder than the orders to

- (a) 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

⁷ Request, para. 10.

⁸ Request, paras. 11 and 12.

⁹ Request, para. 13.

¹⁰ *Ibid.*

¹¹ See, *Prosecutor v. Sefer Halilović*, Case No.: IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of Decision on Prosecution's Motion Seeking Leave to Amend the Indictment, 12 January 2005, relating to Rule 73 (B) setting out the same criteria as Rule 72 (B).

case that only those forces and units were involved in the commission of the crimes charged;¹² and

- (b) clarify to whom the expression “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,¹³ with which the Prosecution does not take issue;

NOTING the Prosecution argument that the Decisions involve “an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”¹⁴ in that, if it were to include the requested information in the Indictment a) it could be required to call additional witnesses to support each allegation;¹⁵ b) it would be prevented from “remaining focused on those allegations which support the Prosecution’s theory of the means by which crimes were committed;”¹⁶ c) there is a risk that the outcome of the trial would be affected, should the Prosecution establish a factual proposition by *evidence* other than that *specifically included* in the Indictment;¹⁷ and d) the scenario of requests to amend the indictment would become not only more frequent but, indeed, necessary;¹⁸

NOTING the Prosecution’s further argument that “an immediate resolution by the Appeals Chamber of the issues raised [...] would materially advance the proceedings”,¹⁹ in that a) if it “were to provide the requested information and detail in the indictment, it would be forced to proceed to trial on an indictment that varies in form from that which is required to be pled in indictment and is thus, arguably defective”,²⁰ and b) any defects to the form of this indictment could not be cured through a further amendment of the indictment following the rendering of the judgment in this case,²¹

¹² Decision on Lazarević’s Preliminary Motion, p. 21.

¹³ Decision on Lazarević’s Preliminary Motion, p. 21. The Trial Chamber noted that “Fwǵhen the Prosecution submits that it has specified the category to which other participants in the JCE belong, it can only be referring to the phrase frequently repeated throughout the Indictment, “forces of the FRY and Serbia” and to the individual forces mentioned in specific paragraphs. However, when specifying the parties to the JCE, the Indictment repeatedly refers to the forces of the FRY and Serbia acting at the direction, with the encouragement, or with the support of the Accused and the eight others named in the Indictment “and others known and unknown”. The phrase “forces of the FRY and Serbia” is thus used throughout the charges to refer to personnel who fall outside the definition of “others known and unknown” (Decision on Lazarević’s Preliminary Motion, para. 23).

¹⁴ Request, para. 14.

¹⁵ Request, para. 14.

¹⁶ Request, para. 14.

¹⁷ Request, para. 18.

¹⁸ Request, para. 18.

¹⁹ Request, para. 22.

²⁰ Request, para. 20.

²¹ Request, para. 20.

CONSIDERING, with regard to the first criterion, that Orders (i) and (ii) do not require the Prosecution to plead in the Indictment the *evidence* by which it intends to establish that the accused possessed the state of mind required for each of the various forms of responsibility alleged pursuant to Article 7 (1) and 7 (3) of the Statute and the failure to act required to establish his superior responsibility with regard to the crimes charged, but rather the *material facts*,²² including the conduct of the accused from which these elements are to be inferred,

CONSIDERING that doing so will assist the Prosecution in focusing on those allegations which support its theory of the means by which crimes were committed, and provide the defence proper notice of these material facts, while having no impact on the need to call additional witnesses to support each allegation, and thus would not adversely affect the fair and expeditious conduct of the proceedings or the outcome of the trial,

CONSIDERING FURTHER that the Prosecution's argument that the scenario of requests to amend the indictment would become not only more frequent but, indeed, necessary, is speculative and that the Trial Chamber is not satisfied, at any rate, that this would adversely affect the expeditious conduct of the proceedings and is of the view that it could only ensure the fairness of the trial,

CONSIDERING, with regard to the second criterion, that, assuming that the Trial Chamber erred in ordering the Prosecution to plead in the Indictment information exceeding the required *material facts*, the Trial Chamber rejects the submissions that the amended indictment would be "*thus, arguably defective*", and that the circumstances of this case would prevent a proper remedy being granted on appeal following judgment in the case,²³ and concludes that the Prosecution's arguments do not support its assertion that immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings;

PURSUANT TO Rule 72(B)(ii) of the Rules,

HEREBY DENIES THE APPLICATION.

²² Decision on Lazarević's Preliminary Motion, para. 5.

²³ Request, para. 20.

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



Patrick Robinson
Presiding

Dated this nineteenth day of August 2005
At The Hague
The Netherlands

[Seal of the Tribunal]