



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-T
Date: 14 June 2007
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 14 June 2007

PROSECUTOR

v.

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

PUBLIC

**DECISION ON DEFENCE APPLICATION FOR CERTIFICATION OF
INTERLOCUTORY APPEAL OF RULE 98 *BIS* DECISION**

Office of the Prosecutor

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Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić 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 (“Tribunal”) is seised of “General Ojdanić’s Application for Certification to Appeal: Participation in Joint Criminal Enterprise by Omission”, filed on 24 May 2007 (“Application”), and hereby renders its decision thereon.

Background

1. On 18 May 2007, the Trial Chamber rendered its decision on the Accused’s motions for judgement of acquittal (“Decision”), in which the Trial Chamber recognised that liability for commission through participation in a joint criminal enterprise (“JCE”) can be established by omission.¹ On 24 May 2007, Ojdanić filed his Application in which he seeks certification of an interlocutory appeal of that portion of the Decision referring to participation in the JCE by omission as a mode of liability, namely the following ruling:

In the present case, where the evidence points to a legal duty and failure to act on the part of one or some of the Accused, this may be considered sufficient evidence of participation in a joint criminal enterprise for liability under Article 7(1), if, by such omission, a significant contribution to the JCE is made.

2. Pavković,² Milutinović,³ and Lukić⁴ joined the Application on 25, 28, and 31 May 2007, respectively. On 5 June 2007, the Trial Chamber received the “Prosecution’s Response to General Ojdanić’s Application for Certification to Appeal: Participation in Joint Criminal Enterprise by Omission” (“Response”), in which the Prosecution opposes the Application and requests the Trial Chamber to deny certification of the Decision.⁵

Legal standard for certification

3. Rule 73(B) requires that two criteria be satisfied before a Trial Chamber may certify a decision for interlocutory appeal: (a) the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* (b) an immediate resolution of the issue

¹ T. 12776–12777 (18 May 2007).

² Public Joinder in General Ojdanić’s Application for Certification to Appeal Participation in Joint Criminal Enterprise by Omission, 25 May 2007.

³ Mr. Milutinović’s Motion to Join General Ojdanić’s Application for Certification to Appeal: Participation in Joint Criminal Enterprise by Omission, 28 May 2007.

⁴ Sreten Lukić’s Notice of Joinder in Ojdanić Request for Certification of Appeal: Participation in Joint Criminal Enterprise by Omission, 31 May 2007.

⁵ Response, paras. 4, 16.

by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.⁶

4. Furthermore, this Trial Chamber has previously held that “even when an important point of law is raised ..., the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied.”⁷ A request for certification is therefore “not concerned with whether a decision was correctly reasoned or not. That is a matter for appeal, be it an interlocutory appeal or one after final Judgement has been rendered. Rule 73(B) concerns the fulfilment of two criteria, after which the Trial Chamber may decide to certify an interlocutory appeal.”⁸

Submissions

5. With respect to the disputed portion of the Decision, Ojdanić raises the following questions: (a) whether, under Article 7(1) of the Statute, an accused can be held responsible for participation in a JCE by omission; (b) whether there is a basis for participation in a JCE by omission in customary international law; and (c) whether the application of participation in a JCE by omission to Ojdanić violates his fair trial rights since it was not pleaded in the Indictment nor included in the pre-trial brief.⁹

6. Ojdanić argues that the Prosecution has failed to inform the Accused that it sought to rely upon participation in a JCE by omission as a mode of liability and that the lack of notice of the charges against the Accused is a matter that affects the fairness of trial.¹⁰ The Prosecution responds that the Accused have been properly notified that the Indictment includes the charge of their participation in a JCE by omission. For example, paragraphs 41(i), 42(i) and (j) of the Indictment refer to Ojdanić’s contribution to the JCE through his failure to act.¹¹ For this reason, there is no issue at stake that would significantly affect the fair and expeditious conduct of the proceedings.¹²

⁶ *Prosecutor v. Milutinović et. al.*, Case No. IT-05-87-PT, Decision on Prosecution’s Request for Certification for Appeal of Decision on Vladimir Lazarević and Sreten Lukić’s Preliminary Motions on Form of the Indictment, 19 August 2005, p. 3; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005 (“*Milošević Decision*”), para. 2; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of “Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment”, 12 January 2005 (“*Halilović Decision*”), p. 1.

⁷ *Halilović Decision*, p. 1.

⁸ *Milošević Decision*, para. 4.

⁹ Application, para. 2.

¹⁰ Application, paras. 7–11.

¹¹ With regard to the contribution of other Accused to the JCE through their failure to act, see the following paragraphs of the Indictment: paragraphs 35(f), 36(h) and (j) refer to Milutinović; paragraphs 51(g), 52 (j) and (k) refer to

7. The Defence contends that, in the absence of evidence supporting a finding that Ojdanić actively contributed to the JCE, the outcome of his trial may well hinge upon a finding of liability based upon participation in the JCE by omission. According to the Defence, the issues at hand, namely whether an omission can serve as a basis for a JCE, would therefore affect the outcome of the trial.¹³ The Prosecution responds that the Defence is raising an evidentiary issue relating to appreciation of the evidence that is to be addressed by the Trial Chamber at the end of the trial.¹⁴

8. The Defence contends that leaving the matter to be resolved in any later appeal creates the risk of unnecessarily complicating and delaying the proceedings, which could be avoided by having the matter resolved at this stage.¹⁵ Immediate resolution by the Appeals Chamber will therefore avoid unnecessary complications, distractions, and waste of resources when the Defence seeks to meet those charges in its case and when the Trial Chamber deliberates upon the final Judgement.¹⁶

9. The Defence also argues that the question of whether an omission is sufficient to establish a form of liability—particularly the basic and extended forms of JCE—is not firmly settled in the jurisprudence of the Tribunal.¹⁷ Furthermore, the Appeals Chamber has never been called upon to determine whether customary international law permitted a conviction based upon participation in a JCE by omission. According to the Defence, the issue whether participation in a JCE by omission existed in customary international law at the time of Ojdanić's involvement in the alleged offences is substantial enough that an immediate resolution by the Appeals Chamber will materially advance these proceedings.¹⁸

10. The Prosecution responds that the Appeals Chamber has affirmed that an omission may lead to criminal liability under Article 7(1) of the Statute where there is a legal duty to act.¹⁹ With regard to participation in JCE by omission, the Prosecution refers to the *Kvočka* Appeals Chamber decision, which holds that the contribution can be made by omission.²⁰ The Prosecution further argues that participation in a JCE is a form of liability under customary international law and that

Pavković; paragraphs 66(f), 67(j) and (k) refer to Lukić; paragraphs 46(h), 47(h) and (i) refer to Šainović; paragraphs 56(f), 57(j) and (k) refer to Lazarević.

¹² Response, para. 8.

¹³ Application, para. 12.

¹⁴ Response, para. 9.

¹⁵ Application, para. 14.

¹⁶ Application, paras. 15–16.

¹⁷ Application, paras. 17–19.

¹⁸ Application, para. 23.

¹⁹ Response, para. 10.

²⁰ The Prosecution opposes the Defence argument that this decision is limited to JCE II cases and contends that the Appeals Chamber referred to this issue in the context of its general discussion of the *actus reus* of JCE as a form of liability. Response, para. 11.

such participation has so far been equated with a form of “commission” under Article 7(1) of the Statute. According to the Prosecution, in recognising the customary international law basis of JCE as a form of liability, the Appeals Chamber has not distinguished between participation in a JCE made through a positive act and an omission to act.²¹

11. The Defence also asserts that neither the Indictment nor the pre-trial brief mentions Ojdanić’s participation by omission.²² If the Prosecution included the theory of participation in the JCE by omission in the Indictment or pre-trial brief, the Defence would have challenged the motion; to deny certification would therefore penalise the Defence for the Prosecution’s pleading failures.²³ The Prosecution responds that it pleaded this mode of liability with sufficient specificity to give the Accused notice of the charges against him. The Prosecution concludes that the Defence failed to demonstrate how a review by the Appeals Chamber on this issue at this stage of the proceedings, after the conclusion of the Rule 98 *bis* phase, will materially advance the proceedings.²⁴

12. Finally, the Defence argues that an immediate resolution of the issues presented in the Application would also materially advance *other* proceedings at Tribunal.²⁵ According to the Defence, the expansion of JCE to those who participated by omission is another serious and dangerous step in the jurisprudence of international criminal law.²⁶

Discussion

13. At the outset, the Trial Chamber notes that a number of arguments put forward by the parties in their submissions go to the substance of the Decision. As discussed above, “even when an important point of law is raised . . . , the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied.”²⁷ The Trial Chamber has carefully considered all the arguments advanced by the parties that are relevant to a determination of the Application under Rule 73(B).

14. In the Indictment, the Prosecution refers to the Accused’s “participation” in the JCE. For example, the Indictment alleges that Ojdanić, “acting individually and/or in concert with other members of the joint criminal enterprise, *participated in the joint criminal enterprise in, among*

²¹ Response, para. 12.

²² Application, paras. 24–27.

²³ Application, para. 28.

²⁴ Response, para. 15.

²⁵ Application, para. 29 (emphasis added).

²⁶ Application, para. 30.

²⁷ *Halilović* Decision, p. 1.

others, the following ways....”²⁸ The Indictment does not explicitly distinguish between the participation by “acts of conduct” or participation by “omission”, but refers only to “participation” in the JCE. Nevertheless, within the framework of the Accused’s participation in the JCE, some paragraphs of the Indictment, referred to by the Prosecution in its Response, do explicitly allege the Accused’s failure to act. For example, the Indictment alleges that Ojdanić “encouraged and gave legitimacy to crimes committed against Kosovo Albanians by failing to investigate crimes or alleged crimes against them, to follow up on such allegations and/or investigations and/or to punish or discipline members of the forces of the FRY and Serbia.”²⁹ The Trial Chamber is thus satisfied that the charges in the Indictment referring to the Accused’s participation in the JCE are sufficient to inform the Accused of the modes of liability by which they are said to be responsible for the underlying offences alleged in the Indictment.

15. With regard to the Defence argument that the issue could affect the outcome of the trial due to the absence of evidence in the Prosecution case that Ojdanić affirmatively did anything to participate in the JCE, the Trial Chamber notes that the Trial Chamber held in its Decision that “it could convict Ojdanić for the crimes alleged in the Indictment via his command responsibility under Article 7(3), as well as pursuant to the modes of liability contained within Article 7(1) of the Statute, including commission through a JCE.”³⁰ Ojdanić, should he decide to mount a defence, will therefore have the opportunity to lead evidence in respect of all forms of liability pursuant to Article 7(1), as well as his superior responsibility pursuant to Article 7(3). Although the elements for a conviction based upon an accused’s participation in a JCE differ from the elements required for a conviction under Article 7(3), the evidence upon which the Trial Chamber could enter a finding of guilty or not guilty on the basis of liability under Article 7(1) or Article 7(3) of the Statute would be substantially similar so as not to render the trial of the Accused unfair.

16. The Trial Chamber therefore finds that the appeal does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Having established that the Defence has not satisfied the first prong of Rule 73(B), the Trial Chamber is not obliged to make an assessment on the basis of the second criterion.³¹ The Chamber will, nonetheless, consider if immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings.

²⁸ Paragraph 41 of the Indictment (emphasis added).

²⁹ Paragraph 41 (i); *see also* paragraphs 42 (i) and (j) of the Indictment.

³⁰ Decision, T. 12799 (18 May 2007).

³¹ *Cf. Prosecutor v. Popović et al.*, Decision on Request for Certification to Appeal Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, 26 June 2006, p. 3.

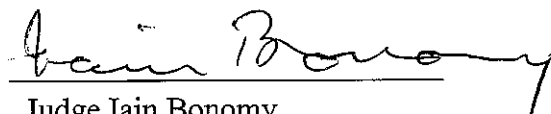
17. The Defence maintains that immediate appellate review of the Decision would avoid unnecessary complications and distractions in the proceedings. The Trial Chamber disagrees with this argument and finds that the Defence would not need to spend additional time and resources to lead evidence to rebut the charges of liability for participation in the JCE by omission. As discussed above, any evidence likely to be led to answer the Prosecution case under Article 7(1), including participation in the JCE by omission, would broadly be that which would answer Article 7(3) responsibility, despite the fact that the elements of the two forms of liability are not the same.

18. It is frequently difficult to categorise conduct or behaviour as entirely positive action or entirely passive failure to act. Both elements may be present in the conduct to be considered. The question whether the evidence demonstrates that an accused “committed” a crime cannot be decided on the basis of a theoretical debate that seeks to determine the relevancy of evidence by classifying it as positive conduct or passive failure to act. The issue of whether the Accused could be held liable for their alleged participation in the JCE by conduct that could be viewed as “omission” is one that is better determined in the context of the specific evidence of this case, both the evidence adduced by the Prosecution and that of the Defence. The Trial Chamber has, in any event, found that there is sufficient evidence of positive action by the Accused to justify refusal of their Rule 98 *bis* applications. The Trial Chamber therefore concludes that the Defence has failed to satisfy it that the resolution of this issue would materially advance these proceedings.

Disposition

19. For all the foregoing reasons, the Trial Chamber finds that the Defence has not sufficiently demonstrated that the two criteria of Rule 73(B) of the Rules of Procedure and Evidence have been satisfied and, pursuant to Rules 54 and 73, hereby DENIES the Application.

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



Judge Iain Bonomy
Presiding

Dated this fourteenth of June 2007
At The Hague
The Netherlands

[Seal of the Tribunal]