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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-05-87/1-PT

Date: 3 April 2008

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Tsvetlana Kamenova
Judge Frederik Harhoff, Pre-Trial Judge

Registrar: **Mr. Hans Holthuis**

Decision of: **3 April 2008**

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

DECISION ON FORM OF INDICTMENT

The Office of the Prosecutor:

Mr Thomas Hannis
Mr Chester Stamp

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

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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 "Vladimir Đorđević's Preliminary Motion Alleging Defects in the Form of the Indictment," filed on 19 October 2007 ("Motion"), and hereby renders its decision thereon.

I. Brief procedural history of Indictment

1. The Accused Vlastimir Đorđević ("Đorđević") was a co-Accused with six other persons who are now being tried jointly in the case of *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T. Because Đorđević was not in custody at the commencement of the *Milutinović et al.* trial, he was severed from the Indictment to be tried separately at a later date. For this reason, the procedural history of the Indictment in the *Đorđević* case is necessarily intertwined with the Indictment in the *Milutinović et al.* case. This Trial Chamber will therefore consider the decisions that have already been made in relation to the *Đorđević* Indictment in the *Milutinović et al.* case. Although this Chamber is cognisant of the fact that it is not bound by the decisions on the form of the Indictment in *Milutinović et al.*, because many of the arguments raised by Đorđević are identical to those already raised by his former co-Accused on the very same Indictment, this Chamber will consider the previous decisions as persuasive authority.

2. On 8 July 2005, the Trial Chamber issued a decision granting the Prosecution's motion to join the *Milutinović et al.* case together with the *Pavković et al.* case and ordered the Prosecution to submit a consolidated Indictment.[1] The same day, the Trial Chamber granted parts of the motions filed by Lazarević and Lukić, in which they alleged defects in the form of the Indictment.[2] In the *Lazarević* Decision and the *Lukić* Decision of 8 July 2005, the Trial Chamber found that the pre-existing Indictment was defective in a number of ways and ordered the Prosecution to cure those defects in the consolidated Indictment. It is noteworthy that the Prosecution was not only ordered to amend the parts of the Indictment related to Lazarević and Lukić, but was also invited "to undertake a general review of the Indictment in relation to all co-accused," considering that the

[1] *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, and *Prosecutor v. Pavković et al.*, Case No. IT-03-70-PT, Decision on Prosecution Motion for Joinder, 8 July 2005.

[2] *Prosecutor v. Pavković et al.*, Case No. IT-03-70-PT, Decision on Vladimir Lazarević's Preliminary Motion on Form of Indictment, 8 July 2005 ("*Lazarević* Decision of 8 July 2005"); Decision on Sreten Lukić's Preliminary Motion on Form of the Indictment, 8 July 2005 ("*Lukić* Decision of 8 July 2005").

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defects identified in the context of the objections raised by Lazarević and Lukić also affected the Indictment in relation to the co-Accused.[3]

3. The Prosecution submitted the consolidated Indictment on 16 August 2005 ("Proposed Indictment").[4] Milutinović, Pavković, Šainović, Lazarević, and Lukić filed motions alleging defects in the form of the Proposed Indictment on October 2005. On 22 March 2006, the Trial Chamber issued a decision granting parts of these motions and ordered the Prosecution to cure the defects and submit another Indictment.[5]

4. The Prosecution submitted the Second Amended Joinder Indictment on 5 April 2006. On 24 April 2006, the Trial Chamber received more challenges to the Second Amended Joinder Indictment from Milutinović, Šainović, and Lazarević. On 11 May 2006, the Trial Chamber issued a decision granting parts of these motions and ordered the Prosecution to submit the final version of the Indictment.[6] The Prosecution filed the Third Amended Joinder Indictment on 6 July 2006. It serves as the current operative indictment in the *Milutinović et al.* and *Đorđević* cases, although they are technically two separate Indictments.

5. The Trial Chamber will now turn to the applicable law to be applied to the Motion.

II. Applicable law

6. The form of an indictment is governed by Articles 18 and 21 of the Statute and Rule 47(C) of the Rules.[7] Pursuant to Article 18(4) of the Statute, the indictment must set out "a concise statement of the facts and the crime or crimes with which the accused is charged," an obligation that must be interpreted in the light of the terms of Article 21 of the Statute, which provide that, in the determination of charges against him or her, the accused shall be entitled to a fair hearing and, more specifically, to be informed of the nature and cause of the charges against him or her and to have adequate time and facilities for the preparation of his or her defence. Likewise, Rule 47(C) of the Rules provides that the indictment must set out not only the name and particulars of the suspect, but also "a concise statement of the facts of the case and of the crime with which the suspect is charged."

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[3] *Lazarević* Decision of 8 July 2005.

[4] *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, Prosecution's Notice of Filing Amended Joinder Indictment and Motion to Amend Indictment with Annexes, 16 August 2005.

[5] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment, 22 March 2006 ("22 March 2006 Decision").

[6] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Motion to Amend the Indictment, 11 May 2006 ("11 May 2006 Decision").

[7] *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgment"), para. 88.

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7. This right translates into an obligation on the Prosecution to plead in the indictment the material facts underpinning the charges.[8] The pleadings in an indictment will, therefore, be sufficiently particular when they concisely set out the material facts of the Prosecution case with enough detail to inform an accused clearly of the nature and cause of the charges against him or her, enabling the accused to prepare a defence effectively and efficiently.[9] The Prosecution is not required to plead the evidence by which it intends to prove the material facts.[10] The materiality of a particular fact is dependent upon the nature of the Prosecution case.[11]

8. Should the indictment, as the primary accusatory instrument, fail to plead with sufficient specification the material aspects of the Prosecution case, it suffers from a material defect.[12] In applying that principle to challenges to indictments based on the vagueness of their terms, the ICTY and ICTR Appeals Chambers have recently taken a stricter approach than before to the degree of specification of material facts that should be pleaded in an indictment and have applied that strict approach to the averment of the acts and conduct of the accused upon which the Prosecution rely as indicating his or her criminal responsibility. In *Prosecutor v. Kvočka et al.*, the Appeals Chamber took the view that whether a fact is material depends upon the proximity of the accused person to the events for which that person is alleged to be criminally responsible. "As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him."[13]

9. Where the charge is of individual criminal responsibility under Article 7(1) of the Statute, the material facts to be pleaded will vary according to the particular head of Article 7(1) averred.[14] Where the accused is alleged to have committed the crimes in question by participating in a joint criminal enterprise ("JCE"), the existence of the JCE is a material fact that must be pleaded. In

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[8] *Kupreškić* Appeal Judgment; *Prosecutor v. Hadžihasanović, Alagić, and Kubura*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001 ("*Hadžihasanović* Indictment Decision"), para. 8.

[9] *See Kupreškić* Appeal Judgment, para. 88.

[10] *Ibid.*

[11] *Kupreškić* Appeal Judgement, para. 89.

[12] *Kupreškić* Appeal Judgement, para. 114.

[13] *Prosecutor v. Kvočka, Radić, Žigić, and Prcać*, Case No. IT-98-30/1-A, Appeal Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement"), para. 65, citing *Prosecutor v. Galić*, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 November 2001 ("*Galić* Decision on Leave to Appeal"), para. 15.

[14] *See, e.g., Kupreškić* Appeal Judgment, para. 89 (holding that, in a case where the Prosecution alleges that an accused personally committed the criminal acts, 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); *but see Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("*Brđanin & Talić* 26 June 2001 Decision"), paras. 21–22 (holding that, in a JCE case, different material facts would have to be pleaded).

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addition, the indictment must specify a number of matters which were identified by the Trial Chamber in *Prosecutor v. Krnojelac* in the following terms:

> In order to know the nature of the case he must meet, the accused must be informed by the indictment of:
>
> (a) the nature or purpose of the joint criminal enterprise (or its "essence", as the accused here has suggested),
>
> (b) the time at which or the period over which the enterprise is said to have existed,
>
> (c) the identity of those engaged in the enterprise—so far as their identity is known, but at least by reference to their category as a group, and
>
> (d) the nature of the participation by the accused in that enterprise.
>
> Where any of these matters is to be established by inference, the Prosecution must identify in the indictment the facts and circumstances from which the inference is sought to be drawn.[15]

This Trial Chamber notes in particular that the nature of the participation by the accused in the JCE must be specified and that, where the nature of the participation is to be established by inference, the Prosecution must identify in the indictment the facts and circumstances from which the inference is sought to be drawn.

10. The Appeals Chamber has decided in Brđanin and Talić that there are at least two ways in which *mens rea* can be adequately included in an indictment. [16] Specifically, with respect to the sufficiency of *mens rea* as it pertains to superior responsibility, emphasis is placed on pleading the "particular acts" or the "particular course of conduct" on the part of the accused [17] Because *mens rea* is almost always a matter of inference from facts and circumstances established by the evidence, the emphasis on pleading the facts upon which the Prosecution will rely to establish the requisite *mens rea* signifies the importance attached by the Appeals Chamber to ensuring that the indictment informs the accused clearly of the nature and cause of the charges against him or her.

11. While the Appeals Chamber has left open the possibility of pleading *mens rea* by simply specifying the relevant state of mind, the Appeals Chamber has held that, where that state of mind

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[15] *Prosecutor v. Krnojelac,* Case No. IT-97-25-PT, Decision on Form of Second Amended Indictment ("*Krnojelac* Decision on Form of Second Amended Indictment"), 11 May 2000, para. 16. *See also Kvočka et al.* Appeal Judgement, para. 42.

[16] *Prosecutor v. Blaškić,* Case No. IT-95-14-A, Appeal Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 219, referring to *Brđanin & Talić* 26 June 2001 Decision, para. 33; *Prosecutor v. Mrkšić,* Case No. IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003 ("*Mrkšić* Decision"), paras. 11–12.

[17] *Blaškić* Appeal Judgement, para. 213, referring inter alia to *Prosecutor v. Krnojelac,* case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("*Krnojelac* 11 February 2000"), para. 18 and *Prosecutor v. Brđanin and Talić,* Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001 ("*Brđanin & Talić* 20 February 2001 Decision"), para. 20.

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is to be established by inference from other facts, particularly the acts and conduct of the accused, the indictment may be defective if it does not include notice of these matters. For example, in *Prosecutor v. Kordić & Čerkez*, the Appeals Chamber considered that a meeting, which Kordić was alleged at trial to have attended and which the Appeals Chamber found was a fundamental part of the Prosecution's case against Kordić, constituted a material fact that should have been pleaded in the Indictment.[18] In the *Ntakirutimana* case, the Prosecution had pleaded the specific conduct of the accused in rather general terms in the indictments without describing various aspects of the acts and conduct of the accused. The ICTR Appeals Chamber quashed several of the Trial Chamber's findings of fact relating to specific acts and conduct, on the basis that the indictment was defective due to the failure by the Prosecution to include the relevant factual allegations in it.[19]

12. As far as responsibility pursuant to Article 7(3) of the Statute is concerned, the Appeals Chamber held in the *Blaškić* case the following:

> 218. In accordance with the jurisprudence of the International Tribunal, the Appeals Chamber considers that in a case where superior criminal responsibility pursuant to Article 7(3) of the Statute is alleged, the material facts which must be pleaded in the indictment are:
>
> (a) (i) that the accused is the superior of (ii) subordinates sufficiently identified, (iii) over whom he had effective control—in the sense of a material ability to prevent or punish criminal conduct—and (iv) for whose acts he is alleged to be responsible;
>
> (b) the conduct of the accused by which he may be found to (i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates, and (ii) the related conduct of those others for whom he is alleged to be responsible. The facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision, because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue; and
>
> (c) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[20]

13. The Trial Chamber will now apply the above law to the specific objections to the Indictment raised by Đorđević, some of which were also raised by his former co-Accused and some of which are new.

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[18] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), paras. 144, 147. *See also Kvočka et al.* Appeal Judgement, para. 29.

[19] *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana,* Case Nos. ICTR-96-10-A & ICTR-96-17-A ("*Ntakirutimana* Case"), Appeal Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement"), paras. 86, 99, 555, 566; *see also Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana,* Case Nos. ICTR-96-10-T & ICTR-96-17-T, Trial Judgement, 23 February 2003, paras. 832, 834.

[20] *Blaškić* Appeal Judgement, para. 218 (footnotes omitted).

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III. Discussion

A. Acts by which Đorđević is alleged to have participated in the various forms of responsibility, including Đorđević's participation in the JCE

14. Đorđević submits that the Indictment fails to inform him of the acts that he is alleged to have concretely taken that would lead to his responsibility under Article 7(1) of the Statute.[21] Đorđević argues that the Indictment also fails to describe the nature and cause of the specific allegations under this form of responsibility given that the Indictment only reproduces the wording of Article 7(1) of the Statute in pleading his participation.[22] Đorđević further argues that, in paragraphs 16 through 22 of the Indictment, the same general allegations were made in relation to the individual criminal responsibility of each accused without distinction or mention of his specific acts or conduct.[23] Đorđević also points out that other known participants of the JCE, who allegedly participated and shared the intent to effect the JCE, are not indicted.[24]

15. The Prosecution, rejecting these arguments, submits that the Indictment describes the nature and purpose of the JCE, in addition to the period over which the enterprise is alleged to have existed, the identity of those engaged in the enterprise, and the nature of Đorđević's participation. The Prosecution asserts that, in paragraph 18, it specifies that by "committing" the Prosecution intends participation of Đorđević in a JCE, not a physical or personal perpetrator.[25]

16. More specifically, the Prosecution asserts that the JCE came into existence no later than October 1998 and continued through the time period of the Indictment, and that Đorđević's participation in the JCE refers to that entire time period, as he was the Assistant Minister of the Ministry of the Interior and Chief of the Public Security Department for all times relevant to the Indictment.[26] Furthermore, paragraphs 61 and 62 of the Indictment contain a detailed exemplification of the ways in which Đorđević participated in the JCE and of the facts from which his participation in the crimes charged can be inferred.[27] In sum, the Prosecution argues that it has

[21] Motion, para. 17.
[22] Motion, paras. 17–18.
[23] Motion, para. 19.
[24] Motion, para. 22.
[25] Prosecution's Response to Vladimir Đorđević's Preliminary Motion Alleging Defects in the Form of the Indictment, 1 November 2007 ("Response"), para. 15
[26] Response, para. 16.
[27] Response, para. 17.

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clearly set out the composition, structure, chain of command, purpose of the JCE, and crimes committed in furtherance of it sufficiently enough to allow Đorđević to prepare his defence.[28]

17. On 8 July 2005, the Trial Chamber found that the previous Indictment failed to plead the facts upon which the Prosecution intended to rely to prove that the Accused were individually responsible under Article 7(1) of the Statute.[29] The Prosecution was therefore ordered to amend the Indictment.[30] Furthermore, the Trial Chamber considered that the Prosecution did not appear to have pleaded the specific state of mind required for each of the various forms of responsibility under Article 7(1) of the Statute. The Trial Chamber therefore ordered the Prosecution to amend the Indictment.[31]

18. On 22 March 2006, the Trial Chamber found that the Proposed Indictment provided Lukić with ample details of his alleged involvement in the crimes charged because it adequately identified the alleged conduct and facts upon which Lukić's criminal responsibility and state of mind might be proved under Article 7(1) of the Statute.[32] This increase in the level of detail was also done for the other Accused in relation to their individual criminal responsibility, including that of Đorđević (paragraphs 61–62, 64). This Chamber has carefully reviewed the Third Amended Joinder Indictment and is satisfied that it is pleaded in sufficient detail.

19. In relation to Đorđević's argument that other known participants of the JCE are not indicted, it is the Prosecution's discretion to decide whether to indict the other known participants in the JCE. Moreover, Đorđević does not show that this prevents him from preparing his defence. This objection is therefore without merit.

B. Required state of mind for the various forms of responsibility under Article 7(1)

20. Đorđević argues that the Indictment fails to mention the specific state of mind required for each of these various forms of responsibility.[33] Đorđević asserts that there is no averment that he had knowledge, actual or constructive, of the existence of the alleged JCE.[34] Đorđević also claims that the Indictment fails to specify any facts to support the Prosecution's charges that the crimes

[28] Response, para. 18.
[29] *Lazarević* Decision of 8 July 2005, para. 19.
[30] *Lazarević* Decision of 8 July 2005, para. 21.
[31] *Lazarević* Decision of 8 July 2005, para. 21.
[32] 22 March 2006 Decision, para. 26. The Trial Chamber noted that the Proposed Indictment contained over two dozen allegations regarding the acts and state of mind required for Lukić's conviction under 7(1) of the Statute.
[33] Motion, para. 20.
[34] Motion, paras. 22–23.

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enumerated in counts 1 to 5 were "within the object of" the JCE and that he and his co-perpetrators "shared the joint criminal object."[35]

21. The Prosecution counters that paragraph 17 of the Indictment spells out the *mens rea* requirement and that it is incorporated by reference in relation to the crimes charged.[36] Furthermore, the Prosecution asserts that paragraph 19 of the Indictment sets out the purpose of the JCE: that it was to be achieved, *inter alia*, through the crimes charged in counts 1 to 5, and that paragraph 21 states that Đorđević shared the intent for those crimes to be perpetrated.[37]

22. On 8 July 2005, the Trial Chamber found that the previous Indictment was defective with respect to the question of whether the Accused "shared the joint criminal object."[38] Furthermore, the Trial Chamber noted that the Indictment contained (a) no averment that the Accused were aware of the existence of the JCE or (b) any reference to material facts from which knowledge might be inferred.[39] The Trial Chamber therefore ordered the Prosecution to amend the Indictment.[40]

23. After submission of this revised version of the Indictment, the Trial Chamber found on 22 March 2006 that the Indictment provided Lukić with facts upon which the Prosecution intended to rely to prove that the Accused had the requisite *mens rea* under Article 7(1) of the Statute.[41] This conclusion implicitly indicates that the Indictment informed Lukić of the fact that he allegedly "shared the joint criminal object" and of his knowledge of the existence of the alleged JCE. The same amount of detail was added by the Prosecution to the parts of the Indictment related to the individual criminal responsibility of the other Accused, including Đorđević.

24. This Chamber has carefully reviewed the Third Amended Joinder Indictment and is satisfied that it adequately places Đorđević upon notice that he is alleged to have "shared the joint criminal object" and to have knowledge of the existence of the alleged JCE. Moreover, this Chamber considers that the facts upon which the Prosecution's allegation is based—that the crimes enumerated in counts 1 to 5 were "within the object of" the JCE—are not material facts to be pleaded in the Indictment, but rather a matter of evidence.[42]

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[35] Motion, para. 23
[36] Response, para. 12.
[37] Response, para. 13.
[38] *Lazarević* Decision of 8 July 2005, para. 29.
[39] *Lazarević* Decision of 8 July 2005, para. 29.
[40] *Lazarević* Decision of 8 July 2005, paras. 29–30.
[41] 22 March 2006 Decision, para. 26.
[42] *See Lazarević* Decision of 8 July 2005, para. 28.

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C. Composition of the "forces of FRY and Serbia"

25. Đorđević argues that the category of persons alleged to have committed the crimes charged are not specified and that it is not clear which forces and units allegedly subordinated to Đorđević were involved in the events in each municipality. Đorđević asserts that the Prosecution refers throughout the Indictment to "forces of FRY and Serbia" and points out that, in paragraph 20, the Indictment states that "[a]t least one VJ and one MUP unit participated in each of the crimes enumerated in Counts 1 to 5 of this Indictment." Đorđević argues that this is insufficient because he was the Chief of only one of several parts of the MUP and was not connected to the FRY.[43]

26. The Prosecution submits that it has already amended the Indictment to identify more specifically the forces responsible in compliance with the Trial Chamber's order.[44] The Prosecution contends (a) that paragraph 20 now clearly sets out the composition of the forces, noting the units that it encompasses, and (b) that the allegation that "at least one VJ and at least one MUP unit were present at each crime site" meets the notice requirements toward Đorđević.[45]

27. The Prosecution also points to the fact that it provides details of Đorđević's ability to command the MUP units in other sections.[46] Finally, the Prosecution contends that it cannot offer further particulars regarding the specific units present at each crime site and that, because Đorđević was allegedly a member of the JCE, which exercised effective control over the forces of the FRY and Serbia in Kosovo, it is unnecessary to specify which particular units were at which particular locations.[47]

28. On 8 July 2005, the Trial Chamber considered that the mere reference in previous Indictment to "forces of the FRY and Serbia" did not constitute a sufficient description of the categories of the forces that were involved in the events in each municipality.[48] The Trial Chamber therefore ordered the Prosecution to amend the Indictment to provide greater detail.[49]

29. The Chamber notes that paragraph 20 of the Third Amended Joinder Indictment now details the units included in the phrase "forces of the FRY and Serbia" as follows:

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[43] Motion, paras. 24–26.

[44] Response, para. 19.

[45] Response, paras. 20–21.

[46] Response, para. 22.

[47] Response, para. 24.

[48] *Lazarević* Decision of 8 July 2005, para. 33.

[49] *Lazarević* Decision of 8 July 2005, para. 34; Disposition, p. 21, Point 1, fourth bullet point. On 22 July 2005, the Trial Chamber further instructed the Prosecution to amend the previous indictment by specifying the category of persons involved in the "forces of FRY and Serbia" alleged to have committed the crimes charged (*Prosecutor v. Milutinović et al.*, Decision on Nebojša Pavković's Preliminary Motion on form of indictment, 22 July 2005, p. 3).

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- the VJ, including the Third Army, in particular the Priština Corps of the Third Army and other units temporarily or permanently deployed to Kosovo or otherwise participating in the conflict;
- the MUP, including Special Police Units (PJP), the Special Anti-terrorist Unit (SAJ), police reservists, MUP secretariat (SUP) personnel, the Special Operations Unit (JSO), and State Security (RDB) operatives;
- the Priština Military District and military-territorial units within it;
- Civil Defence units;
- Civil Protection units;
- civilian groups armed by the VJ and/or the MUP and formed into village defence units acting under the control and authority of the VJ and/or the MUP; and
- volunteers incorporated into units of the VJ and/or the MUP.

Paragraph 20 of the Third Amended Joinder Indictment also alleges that "[a]t least VJ and at least one MUP unit participated in each of the crimes enumerated in Counts 1 to 5 of this Indictment." On 22 March 2006, the Trial Chamber found that "asserting that at least one VJ unit and at least MUP unit participated in each of the charged crimes adequately specifies the alleged physical perpetrators"[50] and reiterated on 11 May 2006 that this assertion was sufficient.[51] With respect to the question of whether this assertion was sufficient to inform Đorđević of the identity of the persons who committed the alleged crime in light of the pleading requirements for superior responsibility under Article 7(3) of the Statute, the Trial Chamber pointed out in the 22 March 2006 Decision that, in cases based on superior responsibility, it is sufficient to identify the persons "by means of the category or group to which they belong." The Trial Chamber added that "the MUP is the 'category or group' identified," and that similar averments had been found acceptable in other cases.[52] In *Prosecutor v. Stanišić & Simatović*, for example, the Trial Chamber held that, although "police forces" was too vague a description of the alleged physical perpetrators, changing that phrase to "RS MUP" would make the indictment adequately precise.[53] Similarly, in *Prosecutor v. Milošević*, the Trial Chamber found an allegation that the accused commanded Bosnian Serb forces comprising or attached to the Sarajevo Romanija Corps to be sufficiently specific.[54]

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[50] 11 May 2006 Decision, para. 6, referring to 22 March 2006 Decision, para. 33(3)(a); para. 9.

[51] 11 May 2006 Decision, para. 6.

[52] 22 March 2006 Decision, para. 9.

[53] *Prosecutor v. Stanišić & Simatović*, Case No. IT-04-79-PT, Decision on Defence Preliminary Motion on the Form of the Indictment, 19 July 2005, para. 30; *Prosecutor v. Stanišić & Simatović*, Case No. IT-04-79-PT, Order, 11 October 2005, p. 1.

[54] *See Prosecutor v. Milošević*, Case No. IT-98-29/1-PT, Decision on Defence Preliminary Motion Under Rule 72(A)(ii), 18 July 2005, para. 21.

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30. This Chamber has carefully reviewed the Third Amended Joinder Indictment and is satisfied that the Prosecution's assertion—that "at least one MUP unit" was present at each crime scene—adequately describes the alleged physical perpetrators of the crimes charged such that Đorđević is able to prepare a defence, in respect of his alleged responsibility under both Article 7(1) and Article 7(3) of the Statute. The Chamber also notes that Đorđević will have the opportunity, should he so decide, to demonstrate at trial that he was the Chief of "only one of several parts of the MUP" and that he was "only one of [the] several Assistant Ministers of the MUP"—both of which are matters of evidence, not notice.

D. Alleged superior responsibility of Đorđević

31. Đorđević argues that the Indictment fails to plead the conduct by which he may be found to have had reason to know that crimes were about to be committed by subordinates and/or to have failed to take necessary and reasonable measures to prevent such crimes or punish their perpetrators.[55] Đorđević contends that the Indictment merely copies the wording of Article 7(3) without providing material facts or specifying aspects of his conduct, the particulars of the superior/subordinate relationship, the types of crimes known to him or crimes he had reason to know about, and measures he could have taken, but omitted to take.[56]

32. The Prosecution contends that, read as a whole, the Indictment sets out the basis by which Đorđević knew or had reason to know that crimes were about to be or had been committed by his subordinates and failed to take necessary and reasonable measures to prevent crimes or punish their perpetrators.[57] The Prosecution also contends that the Indictment shows that Đorđević had the authority to control his subordinates by setting out the chain of command for reporting incidents and for enforcing orders. Furthermore, the Prosecution asserts that the failure to prevent these crimes and the lack of evidence that Đorđević did anything to punish them are the omissions that form the basis of Article 7(3) liability.[58]

33. On 8 July 2005, the Trial Chamber observed that there were no averments in the previous Indictment with respect to the conduct of the Accused by which they may be found to have the requisite state of mind under Article 7(3) of the Statute and/or to have failed to take the necessary and reasonable measures to prevent the crimes or to punish their perpetrators. The Trial Chamber

[55] Motion, para. 30.
[56] Motion, para. 31.
[57] Response, para. 25.
[58] Response, para. 26.

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therefore ordered the Prosecution to amend the Indictment.[59] On 22 March 2006, the Trial Chamber found, with respect to Lazarević and Lukić's objections related to the pleading requirements for superior responsibility under Article 7(3) of the Statute, that the Proposed Indictment provided "an adequate description of the conduct for which a conviction under Article 7(3) could be secured."[60]

34. The Prosecution included the same additional description for Đorđević in relation to his responsibility as a superior. For example, paragraph 62(j) of the Third Amended Joinder Indictment alleges that Đorđević failed "to take reasonable measures to prevent or punish persons responsible for the crimes charges," and paragraph 64(b) pleads that Đorđević knew "of the likelihood that MUP units, and in particular volunteers and volunteer unit which he knew had committed serious crimes in other situations of ethnic tension, would commit crimes in Kosovo." The Chamber therefore considers that the Indictment adequately places Đorđević upon notice so that he may prepare his defence in respect of his alleged responsibility under Article 7(3) of the Statute.

E. Alleged crime of murder as a crime against humanity and as a violation of the laws or customs of war

35. Đorđević submits that the Indictment fails to separate out the material and legal qualifications of Count 3 (murder as a crime against humanity) and Count 4 (murder as a violation of the laws or customs of war), and instead summarises them all as crimes of murder without denoting whether they are punishable under Article 3 or Article 5.[61] Furthermore, Count 4 of the Indictment does not specify which of the Geneva Conventions is being applied when the Prosecution cites "Article 3(1)(a)(murder) of the Geneva Conventions."[62] Đorđević contends that he cannot ascertain which murders are being charged under Count 3 and which are being charged under Count 4.[63]

36. The Prosecution submits that Đorđević seems to be looking for evidence rather than facts and that the relevant paragraphs contain clear descriptions of the crimes charged and the acts and omissions involved in those episodes.[64] The Prosecution argues that the allegations need not be separated: the crime is charged as both a crime against humanity, punishable under Article 3, and a violation of the laws or customs, punishable under Article 5(a). Additionally, the Prosecution

[59] *Lazarević* Decision of 8 July 2005, Disposition, p. 22, Point 1, sixth bullet point.
[60] 22 March 2006 Decision, para. 29.
[61] Motion, para. 33.
[62] Motion, para. 34.
[63] Motion, para. 35.
[64] Response, para. 27.

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points out that Article 3 of the Statute recognises common Article 3 found in each of the Geneva Conventions.[65]

37. The Chamber considers this objection to be without merit. The Third Amended Joinder Indictment indicates that the alleged murders constitute crimes both under Article 3 and under Article 5 of the Statute. Moreover, it is firmly established in the jurisprudence of the Tribunal that Article 3 of the Statute refers to Article 3 common to the four Geneva Conventions.[66]

F. Period during which Đorđević allegedly participated in the JCE

38. In relation to participation in a JCE, Đorđević submits that the period in which he participated in the JCE is not specified in the Third Amended Joinder Indictment, contending that he cannot be responsible for crimes committed during the time when he did not participate in the alleged JCE.[67] The Prosecution avers that Đorđević's participation in the JCE refers to the entire period during which the JCE existed.[68]

39. The Chamber is of the view that Đorđević's objection is without merit. The Third Amended Joinder Indictment clearly indicates the period over which the JCE is said to have existed and the period when the crimes in Counts 1 to 5 are alleged to have occurred.[69] Moreover, paragraph 14 of the Third Amended Joinder Indictment explains that Đorđević was "responsible for all units and personnel of the RJB in Serbia, including Kosovo, between 1 January and 20 June 1999."

G. General allegation of an imprecise and vague indictment

40. Đorđević submits that the Indictment is generally imprecise and fails to include the material facts underpinning the charges and that it is not possible to establish the material facts upon which the Indictment is based or the type of connection between the presented material facts and Đorđević, his position, and his acts or omissions.[70] Đorđević contends that these purported defects make any defence preparations impossible.[71]

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[65] Response, para. 28.

[66] *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 88–89.

[67] Motion, para. 22.

[68] Response, para. 16.

[69] Indictment, para. 20.

[70] Motion, paras. 15, 36. It also seems that paras. 27–28 of the Motion can be subsumed within the vagueness argument introduced in para. 15.

[71] Motion, paras. 36–37.

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41. The Prosecution affirms that it has an obligation to plead all material facts, but not the evidence, underpinning the charges against Đorđević, and that the degree of specificity required must be decided in the context of the case, with the facts regarding the acts of Đorđević generally requiring the most specificity.[72] The Prosecution asserts that a close reading of the Indictment places Đorđević upon notice of the case against him, providing adequate information on his role in the JCE and upon the facts underpinning the various charges.[73]

42. Đorđević's argument on this point is subsumed within the other, more specific, objections to the Indictment set forth in the Motion, all of which have been rejected. Although the Indictment could have been written differently and perhaps even more clearly, it is not the role of the Chamber to re-write the Indictment for either Đorđević or the Prosecution. As discussed above, the role of the Chamber is to ensure that the Indictment adequately places Đorđević upon proper notice of the case against him so that he may prepare his defence. For the foregoing reasons, the Chamber has decided that the Indictment does just that.

H. Prosecution's Notice of Intention to File A Motion for Leave to File an Amended Indictment

43. As is noted above in the discussion of the procedural history of this Indictment, the issues surrounding the challenges to the Indictment in the *Đorđević* case do not exist in a vacuum, and must be considered in light of the fact that the Accused Đorđević was at one time the Co-Accused of those charged in the case of *Prosecutor v. Milutinović et al.* The Prosecution in the instant case has notified the Chamber of its intention to request leave to amend the Indictment in this case.[74]

44. Mindful of the obligation of the Pre-Trial Chamber as set out in Rule 65 *ter*(B) of the Rules of Procedure and Evidence, requiring the Pre-Trial Judge to ensure that the proceedings are not unduly delayed and to take any measure necessary to prepare the case for trial, the Chamber is of the view that it is in the interests of a fair and expeditious trial to establish a reasonable deadline within which this proposed motion should be made, in light of the history of this particular case.

45. The risk of potential prejudice to the fair trial rights of the Accused would be minimised in the instant case if, in light of the Prosecution having indicated that it intends to amend the Indictment, any materials relating to amendment to the Indictment are provided to the Accused in as timely a manner as is possible. Following a Rule 65 *ter* Conference held with the Pre-Trial Judge on 28 March 2008, the Prosecution agreed to provide any such additional materials within 14

[72] Response, para. 9.
[73] Response, para. 10.
[74] *Prosecutor v. Vlastimir Đorđević*, Status Conference, 22 February 2008, Transcript, pp. 31–32.

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days of the date of that conference. Accordingly, the Chamber considers that it is appropriate to require the Prosecution to file its motion for leave to amend the Indictment, if it wishes to file such a motion, not later than Monday, 2 June 2008.

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IV. Disposition

46. For all the foregoing reasons, the Trial Chamber, pursuant to Rule 72 of the Rules of Procedure and Evidence of the Tribunal, hereby DENIES the Motion in its entirety.

47. Pursuant to Rule 54, the Trial Chambers hereby ORDERS the Prosecution, no later than 2 June 2008, to file the heralded motion to amend the Indictment, if any, or to show good cause why such a motion should be filed at a later date.

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

Judge Patrick Robinson
Presiding

Dated this third day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

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