



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-04-74-AR72.3
Date: 23 April 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 23 April 2008

PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
BERISLAV PUŠIĆ**

PUBLIC

DECISION ON PETKOVIĆ'S APPEAL ON JURISDICTION

Office of the Prosecutor:

Mr. Kenneth Scott
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Mr. Michael Karnavas and Ms. Suzana Tomanović for Jadranko Prlić
Ms. Senka Nožica and Mr. Karim Khan for Bruno Stojić
Mr. Božidar Kovačić and Ms. Nika Pinter for Slobodan Praljak
Ms. Vesna Alaburić and Mr. Nicolas Stewart for Milivoj Petković
Ms. Dijana Tomašegović-Tomić and Mr. Dražen Plavec for Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Appeals Chamber” and “International Tribunal”, respectively) is seized of the “Petković Defence Appeal Against the Trial Chamber’s Rule 98*bis* Oral Decision to Further Postpone Decision on the Defence Submission of 12 February 2007 to Strike from the Amended Indictment Certain Parts Alleging Jurisdictionally Invalid Forms of Liability (of Co-Perpetration, Indirect Co-Perpetration, Indirect Perpetration and Aiding and Abetting [*sic*] of JCE) Until the Judgement, and the Request for Variation of Time-Limit Pursuant to Rule 127 of the Rules” filed on 5 March 2008 (“Appeal”) by Milivoj Petković (“Appellant”) against an oral ruling of Trial Chamber III issued on 20 February 2008 (“Impugned Decision” and “Trial Chamber”, respectively).¹ The Prosecution responded on 14 March 2008.² The Appellant replied on 21 March 2008.³

I. PROCEDURAL HISTORY

2. On 12 February 2007, the Appellant filed a Motion before the Trial Chamber claiming that the forms of liability of co-perpetration, indirect co-perpetration, indirect perpetration and aiding and abetting a joint criminal enterprise (“JCE”) fall outside the International Tribunal’s jurisdiction.⁴

3. On 19 February 2007, Counsel for the co-Accused filed a Joinder to Petković’s Motion of 12 February 2007.⁵

4. On 25 April 2007, the Trial Chamber decided to postpone the decision on the merits of the Motion of 12 February 2007 until the issuing of its decision pursuant to Rule 98*bis* of the Rules of Procedure and Evidence of the International Tribunal (“Rules”).⁶

¹ T. 20 February 2008, p. 27211.

² Prosecution Response to Petković Defence Appeal Against the Trial Chamber’s Rule 98*bis* Oral Decision to further Postpone Decision on Forms of Liability and Request for Variation of Time-Limit Pursuant to Rule 127 of the Rules, 14 March 2008 (“Response”).

³ Petković Defence Reply to the Prosecution Response to Petković Defence Appeal Against the Trial Chamber Rule 98*bis* Oral Decision to further Postpone Decision on Forms of Liability and Request for Variation of Time-Limit Pursuant to Rule 127 of the Rules, 21 March 2008 (“Reply”).

⁴ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Petković’s Submission to the Trial Chamber to Order the Prosecution to Strike From the Amended Indictment Certain Parts Alleging Co-Perpetration, Indirect Co-Perpetration, Indirect Perpetration and Aiding and Abetting of JCE, 12 February 2007 (“Motion of 12 February 2007”), para. 12.

⁵ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Joint Defence Joinder to Petković’s Submission to the Trial Chamber to Order the Prosecution to Strike From the Amended Indictment Certain Parts Alleging Co-Perpetration, Indirect Co-Perpetration, Indirect Perpetration and Aiding and Abetting of JCE, 19 February 2007.

⁶ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Defence Motion to Strike from the Amended Indictment Certain Parts Alleging Co-Perpetration, Indirect Co-Perpetration, Indirect Perpetration and Aiding and Abetting of Joint Criminal Enterprise, 25 April 2007 (“Decision of 25 April 2007”), p. 4.

5. On 1 May 2007, the Appellant filed a request for certification before the Trial Chamber.⁷ Pursuant to Rule 72 of the Rules, he also filed an appeal of the Decision of 25 April 2007 before the Appeals Chamber on 10 May 2007.⁸

6. The Trial Chamber denied certification to appeal on 30 May 2007,⁹ and on 4 June 2007, the Appeals Chamber dismissed the Appeal of 10 May 2007 as inadmissible, noting that the Appellant would suffer no prejudice since the Trial Chamber had indicated that it would consider his challenge prior to the presentation of the Defence case.¹⁰

7. On 28 January 2008, during the Rule 98bis hearings, the Appellant reminded the Trial Chamber of his Motion of 12 February 2007 and of its Decision of 25 April 2007.¹¹ The Trial Chamber indicated on the same day that “as far as criminal responsibility is concerned, the Trial Chamber will respond when it hands down its decision orally since this issue was raised on 12th February 2007. The Appeals Chamber had then clearly stated that the Trial Chamber should rule on the matter [...] as part of [Rule] 98bis. So we will rule on the matter as part of [Rule] 98bis. This is what the Appeals Chamber had asked us to do.”¹²

8. In the Impugned Decision rendered orally on 20 February 2008, the Trial Chamber nevertheless decided to further postpone its ruling on the Motion of 12 February 2007 until the end of the trial, dismissing the argument that there had been a violation of the accused’s right to a fair trial and finding that “even if the constituent elements of these various modes of responsibility were different from the elements of the other modes of responsibility alleged in the [I]ndictment, the same evidence may, nevertheless, be used to establish all these modes of responsibility”.¹³

⁷ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Request of the Petković Defence for Certification to Appeal the Trial Chamber’s Decision on its Submission to the Trial Chamber to Order the Prosecution to Strike from the Amended Indictment Certain Parts Alleging Co-Perpetration, Indirect Perpetration, Indirect Co-Perpetration and Aiding and Abetting of JCE, 1 May 2007.

⁸ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR72.2, Petković Defence Appeal Concerning the Trial Chamber’s Decision on the Defence Motion to Strike From the Amended Indictment Certain Parts Alleging Co-Perpetration, Indirect Co-Perpetration, Indirect Perpetration and Aiding and Abetting of JCE, 10 May 2007 (“Appeal of 10 May 2007”).

⁹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision relative à la demande de certification d’appel de la Décision portant sur la demande de la Défense de supprimer certains passages de l’Acte d’accusation du 25 avril 2007*, 30 May 2007, p. 4.

¹⁰ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR72.2, Decision on Petković Appeal Against Decision on Defence Motion to Strike the Amended Indictment, 4 June 2007 (“Appeals Chamber’s Decision of 4 June 2007”), paras 4 - 5.

¹¹ T. 28 January 2008, pp. 26922-26926.

¹² T. 28 January 2008, p. 26928.

¹³ T. 20 February 2008, p. 27211.

9. On 26 February 2008, the Appellant filed a request for certification to appeal the Impugned Decision pursuant to Rule 73(B) of the Rules.¹⁴ The Trial Chamber denied certification to appeal the Impugned Decision on 13 March 2008,¹⁵ after the filing of the present Appeal on 5 March 2008.

II. PARTIES' ARGUMENTS

10. In his Appeal, the Appellant claims that the Amended Indictment "alleges against the accused jurisdictionally invalid forms of liability for the crimes charged",¹⁶ namely, co-perpetration, indirect perpetration and/or indirect co-perpetration, which fall outside the jurisdiction of the International Tribunal,¹⁷ as was clearly established in the *Stakić*,¹⁸ *Milutinović et al.*,¹⁹ *Gotovina et al.*,²⁰ and *Popović et al.* cases.²¹ The Appellant specifically refers to paragraph 218 of the Indictment,²² which charges the Appellant as a "co-perpetrator and/or indirect perpetrator or indirect co-perpetrator", paragraphs 224 and 225, which allege that all of the accused "participated in those systems 'including (i.e. in addition to the JCE form of responsibility, parenthesis added) as a co-perpetrator and/or indirect perpetrator'",²³ and to paragraph 226, which alleges that the Appellant "is criminally responsible for substantially aiding and abetting those systems (or either of them) or persons who participated in them, pursuant to Article 7(1)."²⁴

11. The Appellant also argues that there is good cause to bring a jurisdictional challenge at this stage of the proceedings and asks the Appeals Chamber "to recognize as validly done, pursuant to Rules 127(A)(i)(ii), 54, 107, and 116bis [of the Rules] and Articles 20 and 21 of the Statute, the Defence Submission filed after the expiration of a time prescribed by Rule 72(A) of the Rules".²⁵ The Appellant explains that while the Rules "have not expressly anticipated situations where the defence would request a modification of the [I]ndictment during the trial phase of the proceedings

¹⁴ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Petković Defence Request for Certification to Appeal the Trial Chamber's Rule 98bis Oral Decision on its Submission to the Trial Chamber to Order the Prosecution to Strike from the Amended Indictment Certain Parts Alleging Co-Perpetration, Indirect Perpetration, Indirect Co-Perpetration and Aiding and Abetting of JCE of 12 February 2007, 26 February 2008.

¹⁵ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision portant sur la Demande de la Défense Petković du 26 février 2008 de certification d'appel*, 13 March 2008 ("Decision on Certification").

¹⁶ Appeal, para. 22.

¹⁷ *Ibid.*

¹⁸ Appeal, para. 23 citing *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement"), para. 62.

¹⁹ Appeal, para. 24 citing *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006 ("*Milutinović et al.* Decision"), para. 40.

²⁰ Appeal, para. 25 citing *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-PT and *Prosecutor v. Gotovina*, Case No. IT-01-45-PT, [Joint] Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006 ("*Gotovina et al.* Decision"), paras 24-26.

²¹ Appeal, para. 26, citing *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, 31 May 2006 ("*Popović et al.* Decision"), para. 22.

²² *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Amended Indictment, 16 November 2005 ("Indictment").

²³ Appeal, para. 30 (emphasis added by Appellant).

²⁴ Appeal, para. 32 (emphasis added by Appellant).

²⁵ Appeal, para. 62.

[...] such situations may exceptionally occur due, for example, to the subsequent development of the ICTY jurisprudence or to [...] changes in the ICTY Statute” and “that certain substantial defects in the Indictment [may] somehow survive the review(s) pursuant to Rule 72 and/or 50 [of the Rules] within the time limits prescribed therein”.²⁶ The Appellant claims that in the present case, it would be unfair and contrary to the letter and spirit of the Statute and the Rules to deny on formal grounds the right of the accused to move the Chamber, by way of motion, for an appropriate ruling or relief.²⁷

12. Secondly, the Appellant contends that the reason jurisdictional issues are to be decided before the commencement of trial, as provided for under Rule 72(A) of the Rules, is to guarantee the accused’s right to a fair trial in accordance with Article 21 of the Statute.²⁸ In his view, “if the literal [*sic*] interpretation and application of the Rules [were to] cause injustice [*sic*] to the accused and consequentially endanger the overall fairness of the proceedings”, the Judges of the Tribunal “[would] have a right, even a duty pursuant to Article 20(1) of the Statute [...] to interpret and apply the Rules in accordance with Articles 20(1) and 21(1)-(4) of the Statute”.²⁹ The Appellant adds that the right to a fair trial also entails the right to be heard and for parties’ submissions to be promptly and fairly considered and decided by the relevant Chamber,³⁰ and that Rule 72(A) and (B) of the Rules must be interpreted accordingly.³¹

13. The Appellant further alleges that he repeatedly raised these issues during the pre-trial proceedings, including in his pre-trial brief, but that the Trial Chamber nevertheless failed to resolve them before commencement of the trial.³² The Appellant also claims that he was prevented from challenging the form and jurisdiction of the Indictment pursuant to Rule 72 of the Rules and was then denied certification to appeal that ruling.³³ In his Motion of 12 February 2007, he once

²⁶ Appeal, para. 51.

²⁷ *Ibid.*

²⁸ Appeal, para. 52.

²⁹ Appeal, para. 53.

³⁰ Appeal, para. 55.

³¹ Appeal, para. 56.

³² Appeal, paras 29, 57-58, 60 referring to, *inter alia*, the Appeal of 10 May 2007, paras 37-38, and to *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Milijov Petković’s Pre-Trial Brief Pursuant to Rule 65ter (F), 15 February 2006, paras 2-4, 14-28, 40, 69-73; see Reply, para. 4, referring to *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Response of the Accused Petković Defence to the Prosecution’s Submission of Proposed Amended Indictment and Application for Leave to Amend, 19 September 2005, paras 30(ii), 30(xii) [*sic*], 33; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Addendum to the Response of the Accused Petković Defence to the Prosecution’s Submission of Proposed Amended Indictment and Application for Leave to Amend, with Necessary Introductory Remarks, 17 October 2005 (“Addendum to Petković’s Response to Submission of Amended Indictment”), paras 14-17.

³³ Appeal, para. 57, referring to *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, 18 October 2005; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision on Milivoj Petković’s Application for Certification to Appeal Decision on Motion for Leave to Amend the Indictment and Form of Proposed Amended Indictment, 3 November 2005; see Reply, para. 4 vii) – viii).

again sought to “timely correct” through appropriate relief “such an obvious and substantial defect of the Amended Indictment in order to satisfy the interests of justice and ensure the fairness of the proceedings”.³⁴

14. Finally, the Appellant claims that the Trial Chamber erred in law and fact in finding that “there will be no prejudice to the Defence if [it] waits until the end of the trial to rule on the existence of these modes of responsibility”.³⁵ First, he claims that the postponement of the decision on the merits until the Judgement is inappropriate and unjust as the Trial Chamber must ensure that the Indictment pleads only those forms of liability which fall within the International Tribunal’s jurisdiction, and this must be determined before the start of the trial or, at the latest, before the commencement of the defence case.³⁶ Second, the Trial Chamber allegedly erred in fact by concluding that the Appellant would suffer no prejudice because the same evidence may be used to establish all the modes of liability pleaded in the Indictment.³⁷ The Appellant further claims that the preparation of his defence against the jurisdictionally invalid modes of liability will be particularly burdensome in terms of time, resources and efforts, and therefore prejudicial to him.³⁸ Furthermore, the Trial Chamber contradicted itself, reneged on its earlier Decision of 25 April 2007, and led the Appellant to believe that these issues would be resolved before the presentation of the Defence case.³⁹

15. The Prosecution responds that the Appeals Chamber has already found the identical earlier challenge to jurisdiction brought by the Appellant to be inadmissible⁴⁰ and “[n]othing has occurred that would change the Appeals Chamber’s finding”.⁴¹ It points out that a comparison between the procedural chronology of the present proceedings and the delivery of the *Kvočka et al.* and *Stakić* Appeals Judgements on 28 February 2005 and 22 March 2006 respectively shows that the Motion of 12 February 2007 was untimely.⁴² The Prosecution also opposes the Appellant’s application for a variation of time-limits pursuant to Rule 127 of the Rules, arguing that the Appellant was not

³⁴ Appeal, para. 33.

³⁵ Appeal, paras 40, 36, 39, 42-43, 47-48.

³⁶ Appeal, para. 39. At paragraphs 47-48 of the Appeal, the Appellant also claims that “it is [...] legally unacceptable that any operative indictment before this Tribunal, upon which this Judgement will be delivered, contains jurisdictionally invalid crimes and/or forms of liability” and that the Amended Indictment in this case is the only operative Indictment alleging co-perpetration, indirect co-perpetration and/or indirect perpetration; *see also* Reply, para. 4 ii).

³⁷ Appeal, paras 40, 42-43.

³⁸ Appeal, paras 44-45.

³⁹ Appeal, paras 34-35, 41.

⁴⁰ Response, paras 2, 4, 24 [note that due to duplicate numbering in the Response, this is the first para. 24].

⁴¹ Response, para. 4.

⁴² Response, paras 7-10. The Prosecution argues that in the wake of the delivery of the *Kvočka et al.* Appeals Judgement on 28 February 2005, the Appellant should have raised a jurisdictional challenge 30 days after the filing of the Amended Indictment on 16 November 2005, and that with respect to the *Stakić* Appeals Judgement, the Appellant

diligent, fails to provide any justification for such lack of timeliness and never before sought an enlargement of the time for bringing a jurisdictional challenge on the basis of either the *Kvočka et al.* or the *Stakić* appeals judgements.⁴³

16. The Prosecution contends that in any event, should the Appeals Chamber decide to consider the merits of the Appeal, it should be dismissed as moot. The Prosecution has indeed repeatedly expressed agreement with the view that the *Stakić* form of co-perpetration is not part of customary international law⁴⁴ and stated that it would not oppose the Trial Chamber striking the last two sentences of paragraph 218 of the Indictment. By the same token, the Prosecution acknowledges that paragraph 226 of the Indictment inaccurately refers to aiding and abetting a JCE as a form of liability.⁴⁵

17. The Prosecution finally contends that “[a]lthough the Appeals Chamber appears to have understood that the Trial Chamber would decide the issue at the Rule 98bis stage, it did not find that failure to do so would amount to prejudice.”⁴⁶ The Prosecution also opposes the Appellant’s contention that he is prejudiced by the Impugned Decision because of the resources and time that the Defence allegedly will have to expend to address these forms of liability.⁴⁷ The Prosecution asserts that because it has now completed its case-in-chief and the trial has proceeded past the Rule 98bis phase, the Appellant and other defendants “know what they need to defend”, *i.e.*, “that the evidence has been found capable of supporting a conviction under several modes of liability under Article 7(1) [of the Statute], including JCE 1, 2 and 3 and aiding and abetting”.⁴⁸ The Prosecution reiterates its previously stated position that “it will not pursue its case on the bases of *Stakić* ‘co-perpetratorship’ or aiding and abetting a JCE.”⁴⁹

18. The Appellant replies that it is in fact the Prosecution which lacked diligence by failing to seek leave to amend the Indictment pursuant to Rule 50 of the Rules following the delivery of the *Kvočka* and *Stakić* Appeals Judgements, something that the Prosecution did in the *Popović et al.* and *Gotovina et al.* cases.⁵⁰ The Appellant also emphasizes that there is no agreement between the

should have raised a similar challenge by the time of the opening statement on 26 April 2006, thus over a month after the delivery of that Appeals Judgement on 22 March 2006.

⁴³ Response, paras 11-14.

⁴⁴ Response, paras 3, 17-19, referring to *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Prosecution Consolidated Response to Motion to Strike Parts of Amended Indictment Alleging Co-Perpetration, Indirect Co-Perpetration, Indirect Perpetration and Aiding and Abetting JCE, 7 March 2007 (“Prosecution Consolidated Response”), paras 6, 25; see also the Prosecution’s Rule 98bis submissions, T. 5 February 2008, p. 27196.

⁴⁵ Response, paras 3, 20 quoting the Prosecution Consolidated Response, paras 8, 30, and citing its Rule 98 bis submissions, T. 5 February 2008, p. 27198.

⁴⁶ Response, para. 23.

⁴⁷ Response, para. 24 [note that due to duplicate numbering in the Response, this is the second para. 24]

⁴⁸ Response, para. 26 [note that due to duplicate numbering in the Response, this is the first para. 26].

⁴⁹ *Ibid.*

⁵⁰ Reply, para. 5.

parties on the forms of liability since he challenges not only the “co-perpetratorship” form of liability that was found to be invalid by the Appeals Chamber in *Stakić*, but also “the forms of liability of co-perpetration, indirect perpetration and indirect co-perpetration, which the Trial Chambers in *Milutinović et al.*, *Gotovina et al.* and *Popović et al.* also found jurisdictionally invalid and distinct from JCE and accordingly dismissed”.⁵¹

III. DISCUSSION

19. In its Decision of 4 June 2007, the Appeals Chamber held that, while the Appeal of 10 May 2007 could be “properly characterised as a jurisdictional challenge under Rule 72(D)(iv) [...], the motion [of 12 February 2007] which led to the Impugned [25 April 2007] Decision of the Trial Chamber was filed nine months into the trial of Petković and therefore, his Appeal is inadmissible before the Appeals Chamber.”⁵² The Appeals Chamber also considered that the failure to resolve the issue at that stage of the proceedings would not prejudice the Appellant since the Trial Chamber had indicated that it would address his challenge prior to the presentation of the Defence case.⁵³ The Appeals Chamber dismissed the Appeal of 10 May 2007 and concluded that “it would be acting *ultra vires* if it were to address the Appeal on the merits”.⁵⁴

20. While the Appellant’s jurisdictional challenge is obviously untimely under Rule 72(A) of the Rules,⁵⁵ the Appeals Chamber has discretion, in the interests of justice, to consider the present submission. The Appeals Chamber finds that the Trial Chamber’s failure to address the persistent ambiguity in the forms of liability charged in the Indictment before the start of the Defence case violates Articles 20(1) and 21(4) of the Statute. Furthermore, the Appeals Chamber recalls that jurisdictional challenges raise fundamental issues of fairness and that one of their underlying purposes is to avert the possibility of an accused being tried and convicted on charges that are not properly brought before the Tribunal.⁵⁶ The Appeals Chamber has also previously held that in accordance with Article 21(4)(a) of the Statute, the Prosecution must identify precisely the form or forms of liability alleged for the crimes charged in the indictment, so as to avoid any ambiguity.⁵⁷

⁵¹ Reply, paras 6-8.

⁵² Decision of 4 June 2007, para. 4.

⁵³ Decision of 4 June 2007, para. 5, referring to Decision of 25 April 2007, p. 4.

⁵⁴ Appeal, para. 6.

⁵⁵ See Response, paras 7-10.

⁵⁶ See *Prosecutor v. Tadić*, Case No. IT-94-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 6: “Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial”. The Appeals Chamber notes that while this statement dealt with the broader question of whether the Tribunal’s jurisdiction is lawful at all, it is applicable as well to the case at hand.

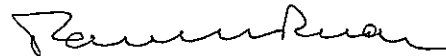
⁵⁷ See *Prosecutor v. Krnojević*, Case No. IT-97-25-A, Judgement, 17 September 2003, paras 138-139; *Popović et al.* Decision, para. 25.

21. The Appeals Chamber finds that in this case, the ambiguities existing in the Indictment could in fact have been easily removed, given the Appeals Chamber's dismissal of "co-perpetratorship" as a jurisdictionally valid mode of liability.⁵⁸ Thus, any reference, either explicit or implicit, to such mode of liability in the Indictment should have been struck out, specifically, the third sentence and the last two sentences of paragraph 218⁵⁹ as well as the last sentence of paragraphs 224 and 225 of the Indictment.⁶⁰ By the same token, given that the Appeals Chamber has held that "aiding and abetting a JCE" is not a valid form of liability,⁶¹ paragraph 226 of the Indictment should have been amended so as to exclusively refer to "aiding and abetting persons who participated in [systemic joint criminal enterprises]".

IV. DISPOSITION

22. In light of the foregoing, the Appeals Chamber **GRANTS** the Appeal and **ORDERS** the Trial Chamber to direct the Prosecution to amend the Indictment in accordance with the instructions provided under paragraph 21 of this Decision.

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



Judge Fausto Pocar
Presiding

Dated this 23rd day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

⁵⁸ *Stakić* Appeals Judgement, para. 62; see also *Milutinović et al.* Decision, paras 39-40; *Popović et al.* Decision, paras 21-22; *Gotovina et al.* Decision, paras 25-26.

⁵⁹ The third sentence of paragraph 218 of the Indictment reads: "Each accused is also charged as a co-perpetrator, and/or indirect perpetrator or indirect co-perpetrator". The last two sentences of paragraph 218 of the Amended Indictment are as follows: "In addition or in the alternative, each accused is responsible for the crimes which he committed or caused to be committed, directly or indirectly through other persons, based on the joint control or co-ordination which he possessed and effected with other persons (including the other persons charged in this indictment) over the criminal conduct of Herceg-Bosna/HVO authorities and forces which were used as tools, by or through organized structures of power which they controlled and in which each of them played a key role. Each accused acted with the knowledge and state of mind required for the commission of the crime charged, was aware of the importance of his own role and the control that he exercised over other persons that were used to commit the crime, and acted with the mutual awareness of the substantial likelihood that crimes would occur as a direct consequence of the pursuit of the common goal."

⁶⁰ The last sentence in both paragraphs 224 and 225 of the Indictment reads: "Each accused is criminally responsible for participating in this system, including as a co-perpetrator and/or indirect perpetrator".

⁶¹ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para. 91.