



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-A
Date: 20 February 2013
Original: English

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Arlette Ramaroson
Judge Bakhtiyar Tuzmukhamedov

Registrar: Mr. John Hocking

Order of: 20 February 2013

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC

**ORDER FOR THE PREPARATION OF THE APPEAL
HEARING**

The Office of the Prosecutor:

Mr. Peter Kremer, QC

Counsel for the Defence:

Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
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

THE APPEALS 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 (“Appeals Chamber” and “Tribunal”, respectively),

NOTING the “Scheduling Order for Appeal Hearing”, issued on 18 January 2013, the “Final Decision on ‘Notice of Withdrawal of Dragoljub Ojdanić’s Appeal Against the Judgement of Trial Chamber III Dated 26 February 2009’ and ‘Notice of Withdrawal of Prosecution’s Appeal Against the Judgement of Trial Chamber III Dated 26 February 2009 in Relation to the Accused Dragoljub Ojdanić’” issued on 31 January 2013, and the “Order Amending Scheduling Order and Setting the Timetable for the Appeal Hearing”, also issued on 31 January 2013;

CONSIDERING the need to ensure that the time allotted for the appeal hearing is used as efficiently as possible;

RECALLING that the parties are expected to focus their oral arguments on the grounds of appeal raised in their briefs and that an appeal hearing is not the occasion for presenting new arguments on the merits of the case;¹

EMPHASISING that the present order in no way expresses the Appeals Chamber’s views on the merits of the appeals;

HEREBY INFORMS Nikola Šainović (“Šainović”) and the Office of the Prosecutor (“Prosecution”) that, during the course of the appeal hearing, in addition to other matters advanced in their submissions or that the Appeals Chamber may wish to raise, they are invited to:

- i) discuss, with reference to the record, whether there would be any effect on Šainović’s appeal regarding his convictions pursuant to the third category of joint criminal enterprise (“JCE III”),² if the Appeals Chamber were to accept the Prosecution’s argument that the Trial Chamber applied an incorrect *mens rea* standard for JCE III liability;³

¹ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-A, *Addendum* to the Scheduling Order for Appeal Hearing, 15 October 2012, p. 1, referring to *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, *Addendum* to the Order Scheduling the Appeal Hearing, 15 December 2009, p. 2.

² Defence Appeal Brief, 23 September 2009, paras 397-410.

³ See Prosecution Appeal Brief, 10 August 2009 (confidential; public redacted version filed on 21 August 2009) (“Prosecution’s Appeal Brief”), paras 64-65.

HEREBY INFORMS Nebojša Pavković (“Pavković”) and the Prosecution that, during the course of the appeal hearing, in addition to other matters advanced in their submissions or that the Appeals Chamber may wish to raise, they are invited to:

- i) discuss, with reference to the record, whether there would be any effect on Pavković’s appeal regarding his convictions pursuant to JCE III,⁴ if the Appeals Chamber were to accept the Prosecution’s argument that the Trial Chamber applied an incorrect *mens rea* standard for JCE III liability;⁵
- ii) discuss, with reference to the record, whether, in the event the Appeals Chamber were to grant the Prosecution’s argument that the sexual assaults of K62, K14, and K31 constituted persecutions, Pavković should be held responsible for these persecutions pursuant to JCE III;⁶

HEREBY INFORMS Šainović, Pavković, and the Prosecution that they are also invited to:

- i) discuss the relevance of the indictment made public on 27 May 1999⁷ on the *mens rea* of Šainović and Pavković,⁸ given that the indictment was made public after the last crime for which Šainović and Pavković were convicted was committed on 25 May 1999;⁹

HEREBY INFORMS Vladimir Lazarević (“Lazarević”) and the Prosecution that, during the course of the appeal hearing, in addition to other matters advanced in their submissions or that the Appeals Chamber may wish to raise, they are invited to:

- i) discuss, with reference to the Trial Chamber’s findings on Lazarević’s contribution to the commission of the crimes of deportation and other inhumane acts (forcible transfer) through his failure to take adequate measures to ensure the proper investigation of serious crimes committed by the VJ, whether the breach of a duty imposed by national military disciplinary law may amount to aiding and abetting by omission under customary international law;
- ii) discuss, as a legal matter as well as with respect to the particular Trial Chamber’s findings, whether the *actus reus* and *mens rea* of aiding and abetting crimes that formed

⁴ General Pavković’s Amended Appeal Brief, 30 September 2009 (filed as Annex A to General Pavković’s Submission of his Amended Appeal Brief, 30 September 2009), paras 209-212.

⁵ See Prosecution’s Appeal Brief, paras 64-65.

⁶ Prosecution’s Appeal Brief, paras 83-104.

⁷ See Exhibit P968. See also Trial Judgement, vol. 3, paras 453, 755.

⁸ See Trial Judgement, vol. 3, paras 464, 755, 766, fn. 1955.

⁹ See Trial Judgement, vol. 2, paras 1148, 1259-1262.

part of the JCE may be fulfilled prior to the existence of the common purpose of the JCE; and

- iii) discuss whether and under what circumstances the *mens rea* of aiding and abetting deportation and other inhumane acts (forcible transfer) may be inferred from the accused's knowledge of crimes committed in 1998, including crimes other than deportation and other inhumane acts (forcible transfer);

HEREBY INFORMS Sreten Lukić ("Lukić") and the Prosecution that, during the course of the appeal hearing, in addition to other matters advanced in their submissions or that the Appeals Chamber may wish to raise, they are invited to:

- i) discuss, with reference to the record, whether there would be any effect on Lukić's appeal regarding his convictions pursuant to JCE III,¹⁰ if the Appeals Chamber were to accept the Prosecution's argument that the Trial Chamber applied an incorrect *mens rea* standard for JCE III liability;¹¹
- ii) discuss evidence on the record, if any, showing Lukić's involvement in the disarming of the Kosovo Albanian population;

HEREBY INFORMS Šainović, Pavković, Lukić, and the Prosecution that they are also invited to:

- i) discuss, as a legal matter as well as with respect to the particular Trial Chamber's findings for each appellant convicted of JCE I, whether the *actus reus* and *mens rea* of a JCE member may be fulfilled prior to the existence of the common purpose of the JCE; and
- ii) discuss whether and under what circumstances the *mens rea* under JCE I for deportation and other inhumane acts (forcible transfer) may be inferred from the accused's knowledge of crimes committed in 1998, including crimes other than deportation and other inhumane acts (forcible transfer);

HEREBY INFORMS the parties that they are also invited to:

- i) discuss whether the incident in Tušilje/Tushila on 29 March 1999 should have been pleaded in the Indictment, whether a defect in this respect, if any, was cured, and whether

¹⁰ Defense [*sic*] Appellant's [*sic*] Brief Refiled, 7 October 2009 (public with confidential annexes), paras 498-503, 700-705.

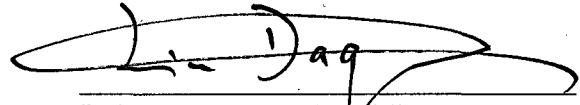
¹¹ Prosecution's Appeal Brief, paras 64-65.

Šainović, Pavković, Lazarević, and Lukić suffered prejudice as a result of any such defect.

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

Dated this twentieth of February 2013

At The Hague,
The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]