

INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-87-A

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrézia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Date Filed: 29 September 2009

THE PROSECUTOR

v.

NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

PUBLIC

**GENERAL PAVKOVIĆ SUBMISSION OF HIS AMENDED NOTICE OF
APPEAL**

The Office of the Prosecutor

Mr. Paul Rogers

Counsel for the Accused

Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Aleksandar Alekšić 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

GENERAL PAVKOVIĆ SUBMISSION OF HIS AMENDED NOTICE OF APPEAL

1. On 15 September 2009 General Pavković filed his Request to Amend his Notice of Appeal to Adopt Ground Seven of his Co-Appellant General Ojdanić's Amended Notice of Appeal.¹ In this request General Pavković sought to adopt and join the legal arguments of General Ojdanić regarding the alleged error of the Trial Chamber in the interpretation of the *mens rea* element of crimes against humanity.
2. This request was granted in part by the Appeals Chamber on 22 September whereby General Pavković was not permitted to simply adopt the legal arguments of General Ojdanić, and therefore an order was made for General Pavković to file an amended Notice of Appeal and an Amended Appellant Brief by 30 September 2009.²
3. General Pavković now files his Amended Notice of Appeal to include this new Ground of Appeal (as Ground 13) as per the order of the Appeals Chamber as Annex A.

Word Count: 205

Respectfully Submitted



Counsel for Nebojša Pavković

John E Ackerman

¹ *Sainović et al.*, General Pavković Request to Amend his Notice of Appeal to Adopt Ground Seven of his Co-Appellant General Ojdanić's Amended Notice of Appeal, 15 September 2009

² *Sainović et al.*, Decision on Nebojša Pavković's Second Motion to Amend his Notice of Appeal, 22 September 2009

ANNEX A

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

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SRETEN LUKIĆ**

PUBLIC

NOTICE OF APPEAL FROM THE JUDGEMENT OF 26 FEBRUARY 2009

The Office of the Prosecutor

Mr. Paul Rogers

Counsel for the Accused

Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Mr. Dragoljub Ojdanić
Mr. John Ackerman and 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

NOTICE OF APPEAL FROM JUDGEMENT OF 26 FEBRUARY 2009

1. Pursuant to Article 25 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("Statute") and Rule 108 of the Rules of Procedure and Evidence, General Pavković hereby files his Notice of Appeal setting out his grounds of appeal against the Judgement of the Trial Chamber in the case of *Prosecutor v Milutinovic et al.* dated 26 February 2009.
2. General Pavković reserves the right to raise any and all errors of law or fact in addition to those raised in this Notice of Appeal that may become apparent subsequent to General Pavković receiving a copy of the Judgement in his own language enabling him to assist his Defence Counsel in these proceedings and thus exercise his rights recognised under the Statute.
3. For the sake of clarity each error of law alleged herein was such as to invalidate the decision, and each error of fact alleged herein, individually and/or cumulatively, occasioned a miscarriage of justice. In respect of each error of fact it is alleged that no reasonable trier of fact would have made the error.
4. General Pavković submits that the Appeals Chamber should consider the cumulative effect of these errors since each and all errors of fact identified above resulted in a miscarriage of justice; each and all errors of law identified below invalidates the Judgement.
5. General Pavković submits that for the reasons set out below and in more detail in his Appeal Brief, the Appeals Chamber should reverse the Judgement of the Trial Chamber and find him not guilty. In the

alternative he submits that the Trial Chamber committed a discernable error in exercising its discretion in relation to sentencing and thus the Appeal Chamber should reduce the sentence handed down to General Pavković.

GROUND OF APPEAL

GROUND 1: THE TRIAL CHAMBER COMMITTED AN ERROR IN LAW AND FACT BY CONVICTING GENERAL PAVKOVIĆ ON THE BASIS OF A JOINT CRIMINAL ENTERPRISE

This error arose as a number of sub-errors listed here as A – G

SUBGROUND 1(A) – THE TRIAL CHAMBER ERRED IN LAW AND FACT AS TO FINDINGS REGARDING JOINT CRIMINAL ENTERPRISE

(i) The Trial Chamber in paragraph 783 of Volume III of the Judgement simply made a blanket conclusion that all crimes committed by VJ or MUP forces were attributable to General Pavković. This applies an erroneous legal standard. Such a finding fails to comply with the Joint Criminal Enterprise principles announced by the Appeals Chamber in recent cases. There must be a finding that at least one JCE member used a non-JCE member to commit a crime, and that the JCE member in doing so was acting in accordance with the common objective.

(ii) In Volume I, paragraph 101 the Trial Chamber cited correctly the law regarding JCE and the physical perpetrators of crimes and then failed to apply this principle by failing to

find that with regard to each crime for which Pavković was found responsible under JCE principles that he “closely cooperated with the physical perpetrator or intermediary perpetrator in order to further the common criminal enterprise.”

SUBGROUND 1(B) – THE TRIAL CHAMBER ERRED IN FACT AND LAW IN FINDING THE EXISTENCE OF A COMMON PLAN TO EXPEL KOSOVO ALBANIANS

One of the fundamental requirements for a finding of JCE is the existence of a common criminal purpose or plan.³ No evidence supports the conclusion that there was a common plan to ensure continued control by the FRY and Serbian authorities over Kosovo, through crimes of forcible displacement. An example of the Trial Chamber’s error in this regard is found in Volume III of the Trial Judgement, paragraph 40, where the Chamber erred in finding that the confiscation and destruction of identity documents was some of “the strongest evidence” in the case showing the existence of a common plan. The Trial Chamber failed to take proper account of the evidence presented by the defence that countered this evidence. In addition by failing to make correct credibility findings regarding the evidence of certain witnesses, the Trial Chamber committed error in law and in fact by finding that this evidence demonstrates the existence of a common plan by the highest level of civil, military and police members.

³ *Brđanin* Appeal Judgement, para. 364 (citing *Tadić* Appeal Judgement); *Tadić* Appeal Judgement, para. 227.

SUBGROUND 1 (C) – THE TRIAL CHAMBER ERRED IN FACT BY FINDING THAT GENERAL PAVKOVIĆ ENGAGED IN DISARMING KOSOVO ALBANIANS AND ARMING SERBS AND MONTENEGRINS ON AN ETHNIC BASIS.

The Trial Chamber erred in its analysis of the trial record in regard to this issue in Volume III, in paragraph 72 finding that this disarming was done on a discriminatory basis and was done at the same time as “empowering” the non-Albanian population. They failed to have adequate regard to evidence pointing to another reasonable explanation.

The Trial Chamber erred in fact in finding in Volume III, paragraph 667 that General Pavković demonstrated support for arming of the non -Albanian population .The Trial Chamber also erred in fact in finding in Volume III , paragraph 669 in finding that General Pavković concurrently disarmed the Kosovo Albanian population.

SUBGROUND 1 (D) – NO REASONABLE TRIER OF FACT COULD HAVE DRAWN THE CONCLUSION THAT GENERAL PAVKOVIĆ’S PROMOTIONS DID NOT GO THROUGH THE REGULAR PROCEDURE AND WERE THUS EVIDENCE OF HIS MEMBERSHIP IN THE JOINT CRIMINAL ENTERPRISE.

In Volume III, in paragraphs 649 and 778 the Trial Chamber erred in concluding that Pavković’s promotions did not go through the regular procedure. No reasonable trier of fact could have found that this was the only reasonable interpretation of this evidence.

The Trial Chamber erred in fact in its findings regarding the appointment and powers of General Pavković . In Volume III , paragraph 680 the Trial Chamber erred in finding that tension existed between General Pavković and Dušan Samardžić concerning the use of the VJ in Kosovo. It is concluded that this "tension" contributed to the promotion of Pavković to 3rd Army Commander. The Trial Chamber failed to take due consideration of defence evidence to the contrary.

SUBGROUND 1 (E) THE TRIAL CHAMBER ERRED IN FACT IN THEIR FINDINGS REGARDING THE POWERS AND RESPONSIBILITIES OF GENERAL PAVKOVIĆ

The Trial Chamber erred in fact in Volume III , paragraph 684 in holding that General Pavković as 3rd Army Commander could issue orders to 3rd Army Brigade commanders. This conclusion ostensibly showed his direct control over the VJ forces operating in Kosovo at the relevant times, although no such orders are in evidence in the case.

SUBGROUND 1 (F) - THE TRIAL CHAMBER ERRED IN FACT AND IN LAW BY INFERRING INTENT TO PARTICIPATE IN A JOINT CRIMINAL ENTERPRISE IN FINDING GENERAL PAVKOVIĆ HAD A CLOSE RELATIONSHIP WITH SLOBODAN MILOSEVIC

In Volume III , paragraph 778 the Trial Chamber erred by inferring General Pavković 's intent to participate in the joint criminal enterprise from his close relationship with Milosevic in 1998 and 1999.

SUBGROUND 1 (G) – THE TRIAL CHAMBER ERRED IN HOLDING THAT GENERAL PAVKOVIĆ BY-PASSED THE CHAIN OF COMMAND , AN ERROR CONTAINED IN COLUME III, PARAGRAPH 665.

GROUND 2 – THE TRIAL CHAMBER ERRED IN LAW AND IN FACT IN FINDING THAT THE CRIMES FALLING OUTSIDE OF THE COMMON PURPOSE OF THE JOINT CRIMINAL ENTERPRISE WERE REASONABLY FORSEEABLE TO GENERAL PAVKOVIĆ

In Volume III, paragraphs 784, 785 and 786 the Trial Chamber erred in finding that the crimes falling outside the common purpose of the JCE were reasonably foreseeable and attributable to General Pavković.

GROUND 3 – THE TRIAL CHAMBER ERRED IN LAW AND IN FACT IN RELATION TO THE ALLEGED BREACHES OF THE OCTOBER AGREEMENTS IN 1998

In Volume III, paragraph 689, The Trial Chamber erred in fact in holding that General Pavković brought the 72nd Special Brigade into the interior of Kosovo prior to 25 February 1999 despite an instruction from General Ojdanić to keep it in the border belt area . In Volume III, paragraph 690 the Trial Chamber erred in fact in finding that General Pavković introduced additional troops into Kosovo without notice to KVM, breaching October agreements.

GROUND 4 – THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY IMPUTING CRIMINAL LIABILITY TO GENERAL PAVKOVIĆ FOR CRIMES BASED UPON MATTERS OCCURING DURING 1998 NOT CHARGED IN THE INDICTMENT.

The Trial Chamber erred in this regard in Volume I, paragraph 920 and in Volume 3, paragraphs 688 and 690.

GROUND 5 – THE TRIAL CHAMBER ERRED IN LAW AND IN FACT IN FINDING THAT GENERAL PAVKOVIĆ FAILED TO BRING TO ACCOUNT THOSE RESPONSIBLE FOR CRIMES AND THAT HE COULD HAVE PREVENTED CRIMES BY REFUSING TO CO-ORDINATE WITH THE MUP.

In Volume III, paragraph 780 the Trial Chamber found that General Pavković did not use his authority to bring to account those responsible for crimes. The Trial Chamber failed to have sufficient regard to the evidence submitted by the defence on this matter. In Volume I, paragraph 529 they note the various 3rd Army combat reports which reported about the numbers of people being brought before the military courts but the Trial Chamber failed to give proper consideration to the same.

The Trial Chamber failed to give sufficient regard in Volume I, paragraphs 530 and 531 to the evidence presented of the difficulties of the working conditions of the court during war time . The Trial Chamber then failed to give these issues the appropriate weight in considering General Pavković's ability to bring to account those under his command that did commit crimes. The Trial Chamber also erred in fact by failing in Volume III , paragraph 777, to give proper consideration to the exculpatory evidence relating to General Pavković in this regard.

The Trial Chamber committed an error of fact and law in finding in Volume III , paragraph 780; that General Pavković positively participated in the joint criminal enterprise by continuing to approve

of the co-ordination of VJ and MUP activities through the Joint Command during 1999.

GROUND 6 – THE TRIAL CHAMBER ERRED IN FACT IN FINDING THAT GENERAL PAVKOVIĆ POSSESSED CRIMINAL INTENT

The Trial Chamber erred in fact in holding in Volume III, paragraph 781 that the *only* reasonable inference is that General Pavković had the intent to forcibly displace the Kosovo Albanian population and that he shared that intent with the other members of the joint criminal enterprise.

The Trial Chamber committed an error of fact and law when it failed to give proper consideration to its finding in Volume II, paragraph 1356; that involvement by General Pavković in the concealment of crimes was not established by the Prosecution . This finding was not given due regard by the Trial Chamber when assessing the evidence regarding General Pavković's intent.

GROUND 7 – THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY FAILING TO DEFINE A LEGAL DEFINITION OF EXCESSIVE USE OF FORCE AND BY MAKING FINDINGS WITHOUT OPINING A LEGAL DEFINITION

In Volume I, paragraphs 919 and 920 the Trial Chamber found that the VJ used excessive and indiscriminate force in "some areas" in 1998. However the Trial Chamber gave no legal definition of what excessive force consists or what elements the Prosecution must

prove for the Trial Chamber to make a factual finding of the same. Thus, their finding must be considered an error of fact and of law.

GROUND 8 – THE TRIAL CHAMBER FAILED TO MAKE PROPER CREDIBILITY FINDINGS

8 (a) The Trial Chamber failed to make correct and reasonable credibility and reliability findings on the evidence of witness Lakić Dorović in Volume I, paragraphs 509, 524, 528, 538, 547, 549, 550, 552, 553, 554 555, 556, 559, 562, 563, 564, 567 and 568 and in Volume III paragraphs 760, 761, 762, 764.

8(b) The Trial Chamber failed to make correct and reasonable credibility and reliability findings on the evidence of witness Aleksandar Dimitrijević in Volume I paragraphs 74, 75, 477, 971, 979,1006, 1012, 1069, 1070, 1105, 1121 and in Volume III paragraphs 65, 84, 305, 322, 323, 324, 325, 515, 516, 518, 523, 525, 530, 545, 598, 599, 644, 649, 650, 654, 662, 663, 664, 676, 688, 689 and 778

GROUND 10 – THE TRIAL CHAMBER REACHED CONCLUSIONS IN VOLUME III, PARAGRAPH 678 OF THE JUDGEMENT THAT ARE UNREASONABLE WHEN REASONABLE CONCLUSIONS TO THE CONTRARY WERE APPARENT AND, ACCORDING TO LAW, MUST HAVE BEEN DRAWN.

GROUND 11 – THE TRIAL CHAMBER ERRED IN FACT AND IN LAW IN FINDING THAT CRIMES WERE UNDER-REPORTED.

In Volume III, paragraph 753 the Trial Chamber erred in fact in finding that crimes were under-reported. The Trial Chamber erred in law in not making an affirmative showing that crimes were indeed known about by General Pavković and that reporting was suppressed.

The Trial Chamber in Volume III, paragraph 776 found that General Pavković under-reported crimes in 1999, again the Trial Chamber committed an error of fact in this regard of which no reasonable trier of fact should have made.

GROUND 12 – THE TRIAL CHAMBER ERRED IN LAW BY CONDUCTING THE TRIAL WITH PROCEDURAL UNFAIRNESS TO GENERAL PAVKOVIĆ

General Pavković appeals the manner in which the trial was conducted which resulted in procedural unfairness against him and which constituted an error of law. General Pavković appeals the following decisions by the Trial Chamber:

- (i) 7 September 2005 – *Decision on Pavković Motion to set aside Joinder or in the Alternative to Grant Severance*
- (ii) 2 December 2005 – *Decision on Nebjoša Pavković’s Motion to Delay Start of Trial or in the Alternative to Reconsider and Grant Previous Motion for Severance*
- (iii) 28 April 2006 – *Second Decision on Motions to Delay Proposed Date for Start of Trial*
- (iv) 12 May 2006 – *Decision on Defence Request for Certification of an Interlocutory Appeal of Second Decision Denying Motion for Delay of Trial*

(v) 27 September 2007 – *Decision on Pavković Motion for Partial Severance*

GROUND 12 – THE TRIAL CHAMBER ERRED IN THE APPLICATION OF MITIGATING AND AGGRAVATING FACTORS IN SENTENCING GENERAL PAVKOVIĆ

The Trial Chamber erred in Volume III in paragraphs 1190-1194; in assessing the aggravating and mitigating factors in sentencing General Pavković and asserts that his sentence was unjustifiably lengthened by these errors.

GROUND 13 – THE TRIAL CHAMBER ERRED IN LAW BY EXPANDING THE DEFINITION OF CRIMES AGAINST HUMANITY

The Trial Chamber erred in their findings at Volume I, paragraphs 153-162 of the Trial Judgement. The Trial Chamber erred by weakening the knowledge requirement under Article 5 of the Statute, thereby expanding the definition of crimes against humanity. This was an error of law which plainly invalidates the Judgement and thus General Pavković's conviction for crimes against humanity should be reversed.

The Trial Chamber committed the following errors:

- (a) finding that the knowledge requirement could be satisfied by evidence that the person "took the risk" that his acts were part of the attack (recklessness standard);
- (b) finding that some "intermediary perpetrator" could satisfy the knowledge requirement, even where the physical perpetrator and the accused lacked knowledge that the act was part of the attack;
- (c) finding that any member of a joint criminal enterprise could satisfy the knowledge requirement; and

- (d) finding the *mens rea* requirement satisfied without identifying that person or his or her role in the offence.

Word Count: 2, 635

Respectfully Submitted

A handwritten signature in black ink, appearing to read 'J. Ackerman', written in a cursive style.

Counsel for Nebojša Pavković

John E Ackerman

29 September 2009