THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-05-87-PT

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Date Filed: 31 October 2005

THE PROSECUTOR

v.

MILAN MILUTINOVIC
NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
NEBOJSA PAVKOVIC
VLADIMIR LAZAREVIC
VLASTIMIR DJORDEVIC
SRETEN LUKIC

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# REPLY BRIEF: GENERAL OJDANIC'S PRELIMINARY MOTION CHALLENGING JURISDICTION: INDIRECT CO-PERPETRATION

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The Office of the Prosecutor:
Mr. Thomas Hannis
Ms. Christina Moeller

Counsel for General Ojdanic: :
Mr. Tomislav Visnjic
Mr. Peter Robinson

Mr. Eugene O'Sullivan and Mr. Slobodan Zecevic for Milan Milutinovic
Mr. Toma Fila and Mr. Vladimir Petrovic for Nikola Sainovic
Mr. John Ackerman and Mr. Aleksander Aleksic for Nebojsa Pavkovic
Mr. Mihaljo Bakrac for Vladimir Lazarevic
Mr. Theodore Scudder for Mr. Sreten Lukic

1. In *General Ojdanic's Preliminary Motion Challenging Jurisdiction: Indirect Co-Perpetration* (7 October 2005), General Ojdanic contended that "indirect co-perpetration" is unknown in the Statute of the Tribunal and in customary international law as a form of liability. On 21 October 2005, the prosecution responded to the preliminary motion. General Ojdanic now seeks leave to file this reply.

**Leave to Reply**

2. Rule 126 *bis* provides, in pertinent part, that a reply to a response to a motion shall be filed within seven days of the filing of the response, with leave of the relevant Chamber.

3. General Ojdanic respectfully submits that the issues presented by the motion and the response are complex and that the response of the prosecution introduces explanations and clarifications of the "indirect co-perpetrator" concept introduced for the first time in the Amended Joinder Indictment. General Ojdanic believes that a reply brief would assist the Trial Chamber in better understanding the positions of both parties and in framing the issues which are to be decided. Therefore, he seeks leave to file this reply brief.

4. General Ojdanic also seeks leave to file the reply brief one day after the deadline set by Rule 126 *bis*. The prosecution's response was filed on Friday, 21 October 2005, but not served on counsel until Tuesday, 25 October 2005.[1] At that time, the lawyer responsible for preparing a reply was in the midst of the trial of *Prosecutor v Karemera et al*, No. ICTR-98-44-T, in Arusha, Tanzania. Not only was the trial in session from 8:45 a.m. to 6:15 p.m. each day, but the lawyer was engaged in cross-examination on each of those days. Therefore, he was unable to work on this reply brief until the weekend. It is respectfully requested that leave to file the reply brief one day late be granted.

**Jurisdiction**

5. General Ojdanic filed his preliminary motion pursuant to Rule 72(A)(i). That Rule pertains to motions which challenge jurisdiction. The prosecution has not opposed that aspect of the motion. Therefore, the Trial Chamber is requested to make a finding that the motion is one which challenges jurisdiction within the meaning of Rule 72(A)(i).

[1] See Annex "A"

**Indirect Co-Perpetration Unmasked**

6. The prosecution's response has clarified its true purpose in seeking to add "indirect co-perpetration" as a new form of liability at the Tribunal.

7. In *Prosecutor v Brdjanin*, the Trial Chamber, in its Judgement, held that:

> ""[I]n order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of JCE, the Prosecution must, *inter alia*, establish that between the person physically committing a crime and the Accused, there was an understanding or an agreement to commit that particular crime. In order to hold him responsible pursuant to the third category of JCE, the Prosecution must prove that the Accused entered into an agreement with a person to commit a particular crime (in the present case the crimes of deportation and/or forcible transfer) and that this same person physically committed another crime, which was a natural and foreseeable consequence of the execution of the crime agreed upon."[2]

8. The prosecution appealed from this Judgement, contending that the Trial Chamber erred in holding that the physical perpetrator of a crime must be a member of the joint criminal enterprise (hereinafter "JCE") in order for the accused to be held liable for that person's crimes.[3] The prosecution's appeal was hampered by the fact that, at trial, it had agreed that the physical perpetrator must be a member of the JCE.[4] A motion to dismiss this ground of appeal was rejected by the Appeals Chamber, which indicated that, although it could not be applied to the accused Brdjanin, the issue was of general importance to the jurisprudence of the Tribunal.[5] The appeal has yet to be argued or decided.

9. The prosecution has invented the "indirect co-perpetration" form of liability as a way of holding an accused liable for the acts of perpetrators with whom he has no agreement. By moving away from the concept of an "enterprise", the prosecution is seeking to free itself from having to prove who was a member of the enterprise and who was not. Under its "indirect co-perpetration" theory, an accused would be liable for the acts of all persons who carried out crimes which were foreseeable. This is a dramatic

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[2] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at para. 344.
[3] *Prosecution's Brief on Appeal* (28 January 2005) at Ground 1
[4] *Prosecution's Final Trial Brief* (17 August 2004) Appendix A, question 1, page 1, para. 2
[5] *Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal* (5 May 2005)

expansion of individual liability under Article 7(1) of the Statute and customary international law.[6]

10. The prosecution has stated that:

> "The accused is liable under a theory of indirect co-perpetration if he has an agreement with others, plays a key role in the agreement and one or more of the participants used others to carry out crimes."[7]

11. In paragraph 22 of the Amended Joinder Indictment, the prosecution has alleged that the *mens rea* for the "indirect co-perpetration" form of liability is that the accused "acted with the mutual awareness of the substantial likelihood that crimes would occur as a direct consequence of the pursuit of the common goal…"[8]

12. Therefore, "indirect co-perpetration", like a category three, extended form of JCE liability, allows for an accused to be convicted for acts which were not only the intended object of his agreement, but those which were foreseeable as well. "Indirect co-perpetration" differs from the extended form of JCE by allowing an accused to be held liable for acts of others who are not part of the agreement.

13. Thus, in General Ojdanic's case, if it is established that he was part of an agreement to deport Albanians from Kosovo, he can be held liable for not only the conduct of perpetrators in the "forces of the FRY and Serbia" who were part of the JCE, but for paramilitaries or psychopaths who went down to Kosovo on their own and used the opportunity to commit killings and sexual crimes. This liability would attach despite the fact that General Ojdanic had issued orders that paramilitaries committing crimes in Kosovo should be shot on sight, since it was foreseeable that in a mass deportation of an ethnic group, anti-social elements would take the opportunity to commit crimes.

14. Therefore, the concept of "indirect co-perpetration" represents a new, separate, and broader form of liability from those heretofore found in the Statute and international customary law. The object and purpose of its inclusion in the Amended Joinder Indictment is not simply to provide an alternative form of liability, but to provide an expanded one as well.

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[6] It is unfortunate that the prosecution chose not to cite the *Brdjanin* Trial Judgement among the 55 authorities cited in its well-researched brief.
[7] *Prosecution's Response* at para. 3
[8] Amended Joinder Indictment at para. 22

**Indirect Co-Perpetration in Customary International Law**

15. The prosecution bears the burden of showing that its "indirect co-perpetration" form of liability existed in customary international law in 1999. It has not met that burden.

16. This Trial Chamber must engage in the same analysis that the Appeals Chamber in *Tadic*[9] did when seeking to determine if JCE existed in customary international law.

17. By looking first to *opinio juris*, the Appeals Chamber in *Tadic* identified post-World War II cases in which the accused had been held liable for the foreseeable crimes of those with whom they had acted in concert.[10] However, these cases do not support the proposition that an accused can be liable for foreseeable crimes of remote perpetrators as the "indirect co-perpetration" form of liability would permit. In both the *Essen Lynching* and *Borkum Island* cases, the perpetrators and the accused were part of the same mob at the same time and place.

18. The prosecution has cited no *opinio juris* existing in 1999 to support its position that an accused can be liable under "indirect co-perpetration" for the crimes of persons with whom he had no agreement, express or implied. While it refers to the *Justice* and *RuSHA* cases arising out of Control Council Law. No. 10, it is clear that those cases did not impose liability on an "indirect co-perpetration" theory. In fact, the Appeals Chamber in *Rwamakuba*, said that:

> "[I]t is clear that the post-World War II judgements discussed above find criminal responsibility for genocidal acts that are **physically committed** by other **persons with whom the accused are engaged** in a common criminal purpose."[11] (emphasis added)

19. The prosecution attempts to rely on state practice to show that its "indirect co-perpetration" form of liability is part of customary international law. This is answered by the *Tadic* appeal, which found that "it is not the case" that the major countries of the

[9] *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999)
[10] For example, the *Essen Lynching Case*: *Trial of Eric Heyer and others*, Law Reports of Trials of War Criminals, United Nations War Crimes Commission, volume I, page 88 as discussed in *Tadic* at paras. 207-09 and fns. 259-60, and the *Borkum Island Case* discussed in *Tadic* at paras. 210-13
[11] *Prosecutor v Rwamakuba*, No. ICTR-98-44-AR72.4, *Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide* (22 October 2004) at para. 24

world adopt the same notion of common purpose.[12] If there was no uniform state practice to hold a person liable for the foreseeable acts of those with whom he acted in concert, there is certainly no uniform state practice to hold a person liable for the foreseeable acts of those with whom he did not act in concert.

20. The German jurisprudence relied upon in *Stakic* is a far narrower concept of criminal liability than the "indirect co-perpetration" theory advanced by the prosecution in its Amended Joinder Indictment and its Response.[13] However, even this very limited liability for the acts of others is unique to the German legal system and is not found in the principle legal systems of the world. For example in the United States, the *Pinkerton* form of liability is limited to acts of members of the conspiracy.[14] Thus, there is no uniform state practice which would permit application of the "indirect co-perpetration" form of liability to the crimes alleged against General Ojdanic in 1999.

**Conclusion**

Because the "indirect co-perpetration" form of liability invented by the prosecution is found nowhere in the Statute and is not part of customary international law, there is no jurisdiction to prosecute General Ojdanic under that form of liability. The preliminary motion should be granted.

Respectfully submitted,

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[12] *Tadic*, at para. 225

[13] The concept of "perpetrator behind the perpetrator" requires that the accused, as part of an organized system of power, actually order the crime in question, and that the accused does not allow the physical perpetrator to make the decision of committing the crime, rather he makes this decision himself. Claus Roxin, *Straftaten im Rahmen von organisatorischen Machtrappaeaten*, Goldhammer's Archiv fur Strafrecht (1963) at 193, 202-05

[14] *United States v Jensen*, 41 F.3d 946, 955-56 (5th Cir. 1994); *United States v Gonzales*, 121 F.3d 928 (11th Cir. 1997); *United States v Cherry*, 217 F.3d 811,817 (10th Cir. 2000): "We have described *Pinkerton's* liability as follows: 'During the existence of a conspiracy, each member of the conspiracy is legally responsible for the crimes of **fellow coconspirators**." (emphasis added) See also 32 Code of Federal Regulations 11.6(c)(6)(i) (2003) where regulations for United States Military Commissions trying "enemy combatants" include a requirement that the act be committed by "one of the coconspirators or enterprise members."