

EFFECTIVE MILITARY JUSTICE SYSTEMS AND WAR CRIMES TRIALS

Linda Strite Murnane



Prosecutor v. Milutinovic, et al.

485. The Chief of the General Staff was the highest ranking military officer in the VJ, and under the FRY Law on Defence was subordinate only to the civilian organs in which overall command of the VJ was vested. He had authority over all the VJ forces, including those in Kosovo. The primary function of the Chief of the General Staff was to command the VJ through the issuing of orders. His tasks included determining the plan for manning and training VJ personnel, promoting officers up to the rank of colonel, and nominating the president, judges, prosecutors and their staff to serve on military disciplinary courts. The Chief of the General Staff could also propose candidates to the FRY President for appointment to posts requiring the rank of general or admiral.

Individual responsibility of General Ojdanic



Prosecutor v. Milutinovic, et al.

486. According to the FRY Law on the VJ, Ojdanić could instigate proceedings against any other member of the VJ and, under article 159, there was an obligation to ensure that VJ members who committed offences and infractions against VJ military discipline were held responsible. This included taking measures against any subordinate failing to execute an order due to indiscipline.

Refusing to obey an order in the VJ was also a criminal offence, punishable with up to five years' imprisonment. During a state of war, an obligation existed to conclude disciplinary measures as urgently as possible. Ojdanić had the ability to issue orders requiring commanders of VJ units to investigate VJ members committing crimes in Kosovo and to have them prosecuted in the military courts, and he exercised this power on a number of occasions during the NATO air campaign. The VJ Rules of Service stated that, in the case of unusual incidents that affected the VJ's combat readiness or reputation, the Chief of the General Staff was obliged to form a commission to enquire into the incident.





Ojdanić

A meeting of the MUP Staff for Kosovo on 7 May 1999 also discussed how crimes by VJ members, including murder, looting, and torching homes, were not being adequately dealt with by the military justice system. Božidar Filić testified that, following the meeting, he investigated further and found out that those VJ members who had been found committing crimes were investigated but were returned to their VJ units pending the end of the NATO campaign. This information is consistent with accounts of the 4 May meeting, which indicate that numerous crimes against civilians had been committed in Kosovo in the preceding weeks, including by VJ members, and that Ojdanić was made aware of this.



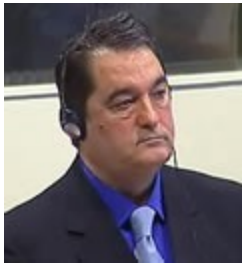
Ojdanic

611. However, he was also made aware of serious concerns over the impartiality and effectiveness of the military justice system. In combination with his awareness of widespread criminal activity, and the lack of effective criminal prosecutions, this information alerted Ojdanić to the fact that reliance on the military justice system would not constitute an effective measure to punish the crimes committed by his subordinates. At the conclusion of the NATO air campaign he received reports indicating that a large number of VJ personnel had been prosecuted for less serious offences against the VJ, such as desertion, but very few for serious offences or violations of international humanitarian law. He was aware of the widespread commission of crimes, including those alleged in the first indictment. Although he continued to be Chief of the General Staff until February 2000, reports from the VJ military justice system show that no prosecutions of VJ commanders were initiated in relation to the events alleged in the indictment, and he did not establish a commission to enquire into the veracity of the charges in that indictment, which included the involvement of the VJ in widespread and systematic forcible displacement of Kosovo Albanians. This evidence is relevant to the question whether the mental element required for any form of responsibility is established.



Ojdanic

- 1209. The Trial Chamber finds **Dragoljub Ojdanić** to be **GUILTY** of counts 1 and 2 of the Indictment, pursuant to Article 7(1) of the Statute, and **NOT GUILTY** of counts 3 to 5 of the Indictment, pursuant to Articles 7(1) and 7(3) of the Statute. The Trial Chamber hereby sentences Dragoljub Ojdanić to a single sentence of 15 years of imprisonment. Dragoljub Ojdanić has been in custody since 25 April 2002; and, pursuant to Rule 101(C) of the Rules, he is entitled to credit for time spent in detention thus far. Pursuant to Rule 103(C) of the Rules, Dragoljub Ojdanić shall remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the state where he shall serve his sentence.



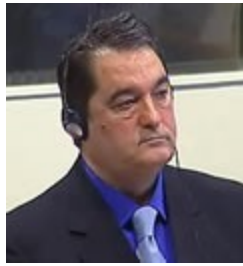
Pavkovic

729. Reports from the 3rd Army Command to the Supreme Command Staff at the start of April 1999 indicate that many criminal and disciplinary proceedings had been initiated for crimes against the VJ, but did not mention any specific investigations of war crimes or serious violent crimes. Moreover, the 3rd Army combat report of 31 March 1999 recorded that the military prosecutor's office attached to the 3rd Army had received 62 criminal reports, and requested 31 investigations. However, the vast majority of the crimes reported were for insubordination and property-related offences, and there do not appear to be any charges of murder or serious injury noted in this report. The reports from the 3rd Army to the General Staff of 1 and 2 April stated that crimes of looting from abandoned houses of Kosovo Albanians had occurred



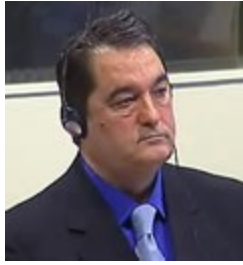
Pavković

731. On 26 April 1999 Pavković had a book on international humanitarian law distributed to his subordinate commanders. The Chamber has also examined the instructions given to military psychologists. These instructions for addressing military conscripts do not mention adherence to the laws of war, but rather stress that these soldiers were to be told to fulfil all combat tasks or else face imprisonment. 1831 Velimir Obradović, who was the Chief of the Operational Centre in the 3rd Army Command in 1999, testified that he became familiar with various orders and commands of the 3rd Army and that they were intended to prevent VJ members from committing crimes



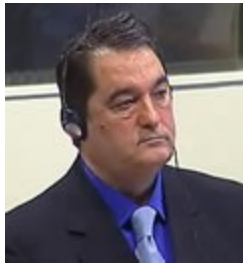
Pavković

Vasiljević gave evidence that he later found out that a decision had been taken by the 3rd Army Command in Priština/Prishtina not to report the occurrence of certain crimes in the regular combat reports, on the ground that they were being dealt with by the military judicial organs.¹⁸⁵⁸ He opined that this was not an attempt to cover up crimes by the security service, but merely a mistaken belief that reports were not necessary if the perpetrators of crimes had already been prosecuted. However, the Chamber notes that the excuse that it was thought there was no need to report serious crimes once they were referred to the military justice organs is inconsistent with the fact that lesser crimes continued to be reported to the superior commands even after being referred to the military justice system, as discussed herein



Pavković

The Chamber consequently finds that Pavković under-reported and sought to minimise the involvement of forces subordinate to him in the commission of crimes in Kosovo.



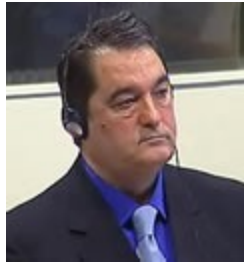
Pavković

Aside from his awareness of members of the military justice system being involved in criminal acts concerning Kosovo Albanian property, Pavković was aware of the more general improper functioning of the VJ military justice system. The discrepancy between the large number of incidents of forcible displacement and other serious crimes in relation to which he received information, as discussed below, and the small number of investigations and prosecutions for such crimes being undertaken by the military justice system, must have alerted him that it was not functioning adequately



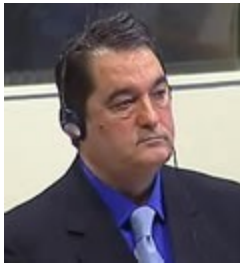
Pavković

776. Pavković under-reported crimes in 1999, including murder and attempted murder by his subordinates in the VJ, in breach of express obligations to report such incidents to the General Staff/Supreme Command Staff. The Chamber notes that the explanation provided for this under-reporting, *i.e.*, that it was an unimportant oversight and that effective prosecutions were being undertaken against the perpetrators, does not affect the finding that Pavković sought to minimise the VJ involvement in criminal activity, and is inconsistent with the fact that he continued to report on less serious crimes in those reports even where these cases were in the hands of the military justice organs.¹



Pavković

777. The Chamber has looked at evidence relating to Pavković's efforts to limit and investigate the commission of crimes in Kosovo, including the suggestion for a joint state commission, his dismissal of three brigade commanders, and his orders to adhere to international humanitarian law and to prevent Kosovo Albanians leaving Kosovo. These ineffective measures were manifestly insufficient in light of the widespread commission of crimes by VJ and MUP forces against Kosovo Albanians, of which Pavković was aware.



Pavković

778. Pavković's sharing of the intent to commit the crime or underlying offence that was the object of the joint criminal enterprise can be inferred from the evidence above.

1210. The Trial Chamber finds **Nebojša Pavković** to be **GUILTY** of counts 1 to 5 of the Indictment, pursuant to Article 7(1) of the Statute. The Trial Chamber hereby sentences Nebojša Pavković to a single sentence of 22 years of imprisonment. Nebojša Pavković has been in custody since 25 April 2005; and, pursuant to Rule 101(C) of the Rules, he is entitled to credit for time spent in detention thus far. Pursuant to Rule 103(C) of the Rules, Nebojša Pavković shall remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the state where he shall serve his sentence.

IMPORTANCE OF EFFECTIVE MILITARY JUSTICE

- Existence and proper reliance upon an effective military justice system can serve as a legitimate defense to allegations of complicity, joint criminal enterprise, aiding and abetting, and other forms of personal liability for commanders and civilian leadership.

What Constitutes an Effective Military Justice System?

- [A]n effective military justice system was defined as one that is “fair and open, assists in maintaining good order and discipline, promotes military efficiency and effectiveness, protects individual rights, and thereby contributes to national security”.

ThinkEvans Team, Australia, February 2004

Components

- Written
- Clear
- Concise
- Comprehensive
- Due Process Rights Guaranteed
- Representation
- Discovery/Disclosure
- Transparency
- Review Process

U.S. Manual for Courts-Martial

- SOURCES OF MILITARY JURISDICTION

- **1. Sources of military jurisdiction**

The sources of military jurisdiction include the Constitution and international law. International law includes the law of war.



U.S. Manual for Courts-Martial

- **Nature and purpose of military law**

Military law consists of the statutes governing the military establishment and regulations issued there under, the constitutional powers of the President and regulations issued there under, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the Armed Forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

Jurisdiction – Law of War

- (B) *Cases under the law of war.* (i) General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime or offense against:
 - (a) The law of war; or
 - (b) The law of the territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or part by the military authority of the occupying power. The law of the occupied territory includes the local criminal law as adopted or modified by competent authority, and the proclamations, ordinances, regulations, or orders promulgated by competent authority of the occupying power.

Preferral of Charges

(b) *How charges are preferred; oath.* A person who prefers charges must:

(1) Sign the charges and specifications under oath before a commissioned officer of the armed forces authorized to administer oaths; and

(2) State that the signer has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person's knowledge and belief

Specifications

- **R.C.M. 307(c)(3)**
- *Specification.* A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. Except for aggravating factors under R.C.M. 1003(d) and R.C.M. 1004, facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required.

Notification to the Accused

- **Rule 308. Notification to accused of charges**
- (a) The immediate commander of the accused shall cause the accused to be informed of the charges preferred against the accused, and the name of the person who preferred the charges and of any person who ordered the charges to be preferred, if known, as soon as practicable.

DoD Directive 2311.01E

May 9, 2006

3. DEFINITIONS

3.1. Law of War. That part of international law that regulates the conduct of armed hostilities. It is often called the “law of armed conflict.” The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

3.2. Reportable Incident. A possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.

DOD Directive 2311.01E

May 9, 2006

- 4. POLICY

It is DoD policy that:

- 4.1. Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.
- 4.2. The law of war obligations of the United States are observed and enforced by the DoD Components and DoD contractors assigned to or accompanying deployed Armed Forces.

DOD Directive 2311.01E

May 9, 2006

4.3. An effective program to prevent violations of the law of war is implemented by the DoD Components.

4.4. All reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.

18 U.S.C. Section 2441

- 2441. War crimes
- **(a) Offense.**— Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
- **(b) Circumstances.**— The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

18 U.S.C. 2441

- **(c) Definition.**— As used in this section the term “war crime” means any conduct—
 - (1)** defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
 - (2)** prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

18 U.S.C. 2441

- (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or
- (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

18 U.S.C. 2441

(d) Common Article 3 Violations.—

(1) Prohibited conduct.— In subsection (c)(3), the term “grave breach of common Article 3” means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows:

(A) Torture.— The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

18 U.S.C. 2441

- **(B) Cruel or inhuman treatment.**— The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.
- **(C) Performing biological experiments.**— The act of a person who subjects, or conspires or attempts to subject, one or more persons within his custody or physical control to biological experiments without a legitimate medical or dental purpose and in so doing endangers the body or health of such person or persons.

18 U.S.C. 2441

- (D) Murder.**— The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.
- (E) Mutilation or maiming.**— The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.

18 U.S.C. 2441

- **(F) Intentionally causing serious bodily injury.**— The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war.
- **(G) Rape.**— The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.

18 U.S.C. 2441

- (H) Sexual assault or abuse.**— The act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage, in sexual contact with one or more persons, or causes, or conspires or attempts to cause, one or more persons to engage in sexual contact.
- (I) Taking hostages.**— The act of a person who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons.

Article 134, Uniform Code of Military Justice

- **Article 134. General article:**

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special , or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

18 U.S.C. 3261

Military Extraterritorial Jurisdiction Act

- **3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States**
- **(a)** Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States--
 - **(1)** while employed by or accompanying the Armed Forces outside the United States; or
 - **(2)** while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.

18 U.S.C. 3261

Military Extraterritorial Jurisdiction Act

(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

18 U.S.C. 3261

Military Extraterritorial Jurisdiction Act

(c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

18 U.S.C. 3261

Military Extraterritorial Jurisdiction Act

- (d)** No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless--
- (1)** such member ceases to be subject to such chapter; or
 - (2)** an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter.