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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case No. IT-95-12-I

IN THE TRIAL CHAMBER

Before: JUDGE R. SIDHWA

Registrar: MRS. DE SAMPAYO GARRIDO-NIJGH

Decision of 29 AUGUST 1995

THE PROSECUTOR OF
THE TRIBUNAL

AGAINST

IVICA RAJIĆ
Also Known as
VIKTOR ANDRIĆ

REVIEW OF THE INDICTMENT

The Office of the Prosecutor

Mr. Graham Blewitt
Mr. Eric Ostberg
Mr. Andrew Cayley

On 28 August 1995 the indictment filed by the Prosecutor against Ivica Rajic came before me for confirmation.

About a week earlier, when the Deputy Prosecutor had visited my office in order to present certain files of the case with regard to the indictment, I had informed him that on the date of hearing I would also hear arguments from him regarding Articles 18 and 19 of the Statute and Rule 47 of the Rules of Procedure and Evidence regarding what the expression *"prima facie case"* meant and whether Rule 47 was not *ultra vires* of the Statute.

Yesterday, when the indictment formally came up before me, I heard Mr. Graham Blewitt, the Deputy Prosecutor, and Mr. Ostberg, the Senior Prosecuting Attorney, in connection with the evidence which they had in support of the indictment and Mr. Graham Blewitt in respect of his views regarding Articles 18 and 19 of the Statute and Rule 47 of the Rules of Procedure and Evidence.

The transcript of the in camera hearing which took place in the Chambers yesterday has been placed on the record.

After the hearing, Mr. Graham Blewitt, Deputy Prosecutor, appeared before me and submitted his written arguments with regard to his views on Articles 18 and 19 of the Statute and Rule 47 of the Rules of Procedure and Evidence and requested that I should take the same as his views in the matter. Out of respect for him, I have taken his written submission on the record and will regard them as his final views in the matter.

Yesterday, I had reserved order in the case. I proceed to record my decision in the matter today.

DECISION

The questions before me - and on which I have sought assistance - are what does the expression *"prima facie case"* mean in Articles 18(4) and 19(1) of the Statute, to what extend does Rule 47 of the Rules of Procedure and Evidence explain that expression and whether the said Rule is not *ultra vires* the Statute.

According to the Deputy Prosecutor's written submissions filed yesterday, he submits that Rule 47 of the Tribunal's Rules is *intra vires* the Tribunal's Statute (Articles 18(4) and 19). His written submissions inter alia state:

Article 18(4) provides that "Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment...". Article 19 provides that "The Judge ... shall review it (and) (i)f satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment..". The expression *"prima facie case"* is not defined in the Rules, but the Tribunal has interpreted the term to mean "sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the

Tribunal". This interpretation may be a lower standard that that recognised by the common law, but that is irrelevant. Having regard to the jurisdiction of the Tribunal, which has been created by the Security Council, it has been expressed that it is not relevant to have regard to national or domestic interpretations of the expression *"prima facie case"*. Indeed, Rule 89 provides that "The Chambers shall not be bound by national rules of evidence". It is clear that the judges of the Tribunal have the power, under Article 15, to adopt Rules of Procedure and Evidence and that Rule 47 is within that power. Accordingly, it is submitted that Rule 47 is *intra vires* the Statute of the Tribunal.

In Latin the expression *"prima facie"* means at first sight, or on the face of it, or on first impression. However, the extended expression *"prima facie case"* means the assessment of the case by way of first impression. But the matter does not end here. In the legal context, the amplitude of its meaning varies.

The expression *"prima facie case"* carries different meanings in different contexts; the range varying upon whether the legal instrument under consideration is civil or criminal, substantive or procedural, or national or international. The expression, as such, may appear in a legal instrument, with or without some indication as to the principles governing its appraisal, though the tendency is that it would be without any such indication. Whatever be the position, the expression would invite interpretation. The expression may infrequently be used by a judge to explain what is generally understood as a properly established case.

I need not labour on the use of this expression in the national civil jurisdiction, as it rides untrammeled in multidimensional directions. However, in the national criminal jurisdiction, the expression *"prima facie case"* has come to acquire some sort of standard meaning, but not without its nuances, which clothe it in different hues, in the different contexts in which it appears. In a case where at a preliminary hearing it is to be shown that the case is fit for the accused to be put to trial, or for the accused to enter appearance in order to defend himself, or for the case to go to trial, the shades vary. A judge may consider it sufficient to permit the prosecution to produce or show it possesses evidence sufficient to draw a reasonable inference in favour of the allegations it asserts or the conclusions it desires to draw. It may permit the prosecution by a similar process to raise a degree of probability in its favour that the evidence must prevail, unless rebutted or the contrary is proved. It may similarly permit the prosecution to show that the evidence is sufficient to call for an answer from the accused, or establish legally required presumptions that may be rebutted. It may call the prosecution to actually produce some reasonable evidence through witnesses to be examined and possibly cross-examined before it (like in committal proceedings), to determine that the evidence is sufficient to commit the accused for trial for the offences found fit to go for trial. In a case which has been committed or has proceeded to trial and in the final determination it is to be shown that a proper case has been made out, and the accused should be convicted, the judge may use the expression - not within the permissible limits of its original classical context - to mean that the prosecution

evidence sufficiently allows all conclusions to be drawn which the prosecution seeks, or that all the ingredients of the offences attributed stand satisfactorily proved, and that the accused's evidence in rebuttal thereof has not been able to displace the said proof.

Whilst the above may be treated as some form of limited review of this expression, in the varying contexts where applied in the national criminal jurisdiction, one cannot help but observe that the following situations bring about the subtle differences in semantics. Where a preliminary assessment of the case is to be made to determine whether it can go to trial: (i) whether the expression, as such, appears in the legal instrument to be evaluated, (ii) whether any provision in the legal instrument, or in any subordinate legislation framed thereunder, has the effect of influencing its meaning in any particular direction or (iii) whether the accused or his counsel has the right of being heard in disproof. Where a final assessment of the evidence is to be made in a trial that has concluded to determine whether the accused is guilty: (iv) whether the nature and weight of evidence adduced compels certain facts to be proved or conclusions to be drawn, to hold the accused guilty. In the first case, the assessment will depend upon the intention of the law, and the object in view. Where the expression, as such, is not found in the legal instrument under consideration, but the language supplies such intention or implication, the range of its application would depend upon the parameters of what is intended or implied. In the second case, evaluation of the influencing factors would require special attention. Where subordinate legislation tends to affect the clear parameters of that expression, as found in the main legislation, the difficulty of *ultra vires* may present itself. In the third case, the right of representation granted to the accused or his counsel, would, despite any contrary indication, bring about a stricter scrutiny of the matter and the raising of the threshold. In the fourth case, different considerations as regards how much and what weight the evidence produced would compel certain conclusions to be drawn, so that the plea of guilt can be sustained, would produce their own varying effects, notwithstanding certain thumb-rule principles adopted by differing jurisdictions to guide the determination of such matters.

In the jurisdiction of international criminal law, the expression "*prima facie case*" has neither too consistent a placement not too uniform a meaning. The expression appears at relevant places in certain international statutes, like in the national field. At times, it does not appear at all. A discussion of some relevant statutes and academic tracts in the field of international criminal jurisdiction will explain the point.

The Treaty of Peace with Germany (Treaty of Versailles), signed at Versailles on 28 June 1919, which publicly arraigned William II of Hohenzollern, the former German Emperor, for the supreme offence against international morality and the sanctity of treaties and recognised the right of the Allied and Associated Powers to try persons accused of having committed acts in violation of the laws and customs of war and directed that special tribunals would be constituted to bring such persons to trial, did not lay down any pre-trial

procedure for the examination of any *"prima facie case"*, before proceeding with the trial.

In the Convention for the Creation of an International Criminal Court for the Prevention and Punishment of Terrorism (opened for signature at Geneva on 16th November, 1937 under the auspices of the League of Nations), Article 25(1) provided that the Court would stand seized of a case no sooner a High Contracting Party had committed an accused person to it for trial. Article 25(2) provided that the document committing an accused person to the Court for trial would contain a statement of the principal charges against him and the allegations on which they were based. The Convention did not lay down any pre-trial procedure for the examination of the said document to determine whether a *prima facie case* was made out, before proceeding with the trial. The Convention never entered into force and there are no precedents available for guidance.

In the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (commonly referred to as the London Charter of 18th August, 1945), all matters relating to the constitution, jurisdiction and functions of the International Military Tribunal, were set out in the Charter annexed to that Agreement, which Charter formed an integral part of that Agreement. Under Article 6 of the Charter, the Tribunal was given the power to try and punish persons who had committed any of the crimes listed in that Article. No preliminary hearings to assess whether *prima facie* cases were made out against the persons who were accused in the various indictments that were filed, was provided for. Under the Rules of Procedure that were adopted by the Tribunal on 29th October, 1945, there was nothing therein for the examination of a *prima facie case* at any pre-trial hearing. The Military Tribunal received indictments and proceeded with the trials without examining the cases at any preliminary hearings to decide whether *prima facie* cases stood made out.

In the Report of the UN Committee on International Criminal Jurisdiction (in its Session of 1st to 31st August, 1951), which produced a draft of an International Criminal Court for the trial of persons charged with genocide or other crimes over which jurisdiction could be conferred by international conventions, Article 33 thereof constituted a Committing Authority to examine the evidence offered by the complainant to support the case and where the Committing Authority was "satisfied that the evidence was sufficient to support the complaint", it so certified that fact to the Trial Court and the complainant. Before issuing such certificate, the Committing Authority was bound to give the accused reasonable opportunity of being heard and to adduce such evidence as he desired. Where certification was granted, the Prosecuting Attorney could file with the Trial Court an indictment of the accused on the findings certified by the Committing Authority, whereupon the trial could proceed. Under Article 2, the Court could apply inter alia the principles and rules of general international law or, where appropriate, national law. Thus, an organ was established to appraise the evidence in support of the charges, by way of a preliminary examination prior to the trial, to ascertain whether a *prima facie case* stood made out; the

parameters of the determination being "that the evidence (was) sufficient to support the complaint" and that the accused had been heard and given the opportunity to produce evidence in disproof thereof. In a subsequent Report by another Committee of Experts prepared between 27th July and 20th August, 1953, the Committee retained the same procedure, but instead of permitting the accused the reasonable opportunity of being heard and to adduce such evidence as he desired, it only permitted him the reasonable opportunity of being heard and granted to the Committing Authority the discretion to order further inquiry or the investigation of specific matters, if it thought fit. The appraisal of the *prima facie case* thus did not only depend upon the examination of the evidence to see if it was "sufficient to support the complaint", but also upon the accused's right to point out flaws in the evidence and the Committing Authority's co-relative duty to call for further inquiry or the investigation of certain facts. The threshold by all accounts stood raised.

The Interim Report of the Ad-Hoc Group of Experts submitted to the Commission on Human Rights in January, 1981, contained a draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of Apartheid. Under Article 8 thereof, the Investigative Division of the Procuracy had to determine whether complaints filed by State Parties to the Convention or Organs of the United Nations were manifestly unfounded or not. However, complaints filed by State Parties to the Convention as Organs of the United Nations were deemed to be as not manifestly unfounded. Unless otherwise directed by a Court, the Procuracy could either take no further action on manifestly unfounded complaints or could continue further investigations. Complaints determined "not manifestly unfounded" had to be transferred to the Prosecutorial Division of the Procuracy, for necessary prosecution. Under Article 9 (4), all cases found "not manifestly unfounded" had to be submitted to an appropriate Chamber of the Court, sitting in preliminary hearing, at which the accused was represented by counsel, so that the Chamber could determine that (a) the case was reasonably founded in fact and law; (b) no prior proceedings before the Tribunal or elsewhere barred the process in accordance with the principle *ne bis in idem* or fundamental notions of fairness; and (c) no conditions existed that rendered the adjudication unreliable or unfair. Under Article 8, the Investigative Division of the Procuracy, in respect of complaints not filed by the State Parties or by Organs of the United Nations, had to make a preliminary determination as to whether they were manifestly unfounded or not. The language of Article 8 here seems to indicate the *prima facie* determination of whether the complaint is manifestly unfounded or not, rather that whether it is reasonably founded or not. Again, even after it was determined that a complaint not manifestly unfounded existed, an appropriate Chamber of the Court, sitting in preliminary hearing, at which the accused was represented by counsel, had still to decide *inter alia* that the case was reasonably founded in fact and law. The determination of the *prima facie* case thus depended upon the appropriate Chamber finding the evidence reasonably sufficient to support the factual and legal requirements of the offences imputed to the accused. The fact that the accused was represented at such preliminary hearing, offset any impression that

the hearing would have any easy passage through the existence of any lower threshold.

I now turn to the 1994 draft Statute for an International Criminal Court adopted by the International Law Commission at its 46th Session. This visualises two preliminary assessments of the evidence before a case can proceed to trial. Under Article 27 (1), the Prosecutor, if upon investigation concludes that there is a *prima facie case*, he can file with the Registrar an indictment containing a statement of the allegations of fact and of the crime for which the accused is charged. Once the indictment is filed, under Article 27 (2), the Presidency has to determine whether a *prima facie* exists with regard to the crime triable by the Court and whether, having regard inter alia to matters referred to in Article 35, the case can be heard by the Court. If so, it has to confirm the indictment and establish a Trial Chamber to try the case. The Presidency can also adjourn the case to allow the Prosecutor to produce additional evidence. Under Article 33, the Court can apply inter alia the principles and rules of general international law or any rule of national law. Where a trial cannot be held because of the deliberate absence of the accused, the Court, under Article 37 (4) has to establish an Indictment Chamber for the purpose inter alia of recording the evidence and considering whether such evidence establishes a *prima facie case* of a crime within the jurisdiction of the Court. The wording clearly indicates that what is intended to be covered is that a *prima facie case* exists and that the crime is such over which the Court has jurisdiction. Article 19 permits the Judges to make rules inter alia regulating the conduct of investigation and the procedure of the Court. The principles governing the determination of the expression *"prima facie case"*, for the purposes of Article 27, are not defined in the Statute. However, the commentary accompanying the draft explains Article 27 and states that "a *prima facie case* for this purpose is understood to be a credible case which would (if not contradicted by the defence) be a sufficient basis to convict the accused on the charge." Whilst the jurists and academics may set the pace for interpretation, and the judicial courts the precedent, it yet remains to be determined how the Court, when established, will interpret that expression. One thing is certain, a too lax a meaning is not attracted, considering that Article 33 can lead to a stronger threshold, , and the rules, if any framed by the Judges, could place the matter in some form of safely defined parameters.

An appraisal of the above would show that the expression *"prima facie case"* in international criminal law is not grounded in any uniform principle or set parameters. The establishment of an international statute touching the creation of an international criminal court is an exercise in macro-dimensional conceptualisation. Experts in varying fields of law, with background knowledge pertaining to the legal systems in vogue in the countries they represent, sit down to settle international concepts and create new international mutations against a maze of ideas, both conflicting and harmonious. The insularity of single legal systems they represent, and the rigid principles emanating from such systems, are discarded, to make way for general and broader consensus. The object of the statute, the offences to be covered thereby, the need for expediency, the

necessity of effective disposal, and a host of other complex matters, all invite new and adventurous ideas that invite navigation in unchartered waters. To invariably thrust principles emanating out of national law into international concepts, would be to do disservice to international law. He who wants to serve international law, must ride the crest of high flood to reach the evolutionary source i.e. the new mutations that human knowledge and wisdom throws up.

This now brings me to our Statute. By Article 15 of the Tribunal's Statute, the Judges have been given power to adopt rules of procedure and evidence. Generally, such delegated power is granted subject to what is contained in the primary enactment. However, Article 15 is neither subject, nor without prejudice, to what is contained in the Statute. The Rules thus would carry great weight if they are in harmony with or supplement the thoughts contained in the Statute and make the Tribunal effective and workable. In any case, they cannot be permitted to contradict or supplement the clear provisions of the Statute.

I may now turn to our Statute. Under Article 18 (4), the Prosecutor, upon the determination that a *prima facie case* exists, has to prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment has to be transmitted to a single Judge of a Trial Chamber. Under Article 19 (1), the Judge, to whom the indictment is transmitted, has to review it. If satisfied that a *prima facie case* has been made out, he has to confirm the indictment. Both the Prosecutor and the Judge of a Trial Chamber are charged with the duty of determining whether a *prima facie case* exists, the former before preparing the indictment and the latter before confirming the same. However, Rule 47 (A) of the Tribunal's Rules of Procedure and Evidence, directs that if in the course of investigation the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, he shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material. Under Rule 47 (D) the Judge reviewing the indictment has to hear the Prosecutor, who may present additional material in support of any count. The Judge may then confirm or dismiss each count or may adjourn the review. Under Rule 47 (E), the dismissal of a count in an indictment does not preclude the Prosecutor from subsequently bringing a new indictment based on the acts underlying that count if supported by additional material.

The Statute of the Tribunal does not define or outline the principles to be taken into consideration when assessing the expression *"prima facie case"* which appears at two stages, one for the guidance of the Prosecutor and the other for the Judge of a Trial Chamber. However, Rule 47 (A) provides guidelines for assessing that expression which appears for the guidance of the Prosecutor. The rule refers to "sufficient evidence" being in the possession of the Prosecutor to legally justify the action to be taken by him. The rule also states that this evidence must provide "reasonable grounds" to believe that the

suspect has committed the crime within the jurisdiction of the tribunal. The word "reasonable" is associated with what is fair, moderate, suitable, tolerable; that which is not immoderate or excessive. The expression "reasonable grounds" is used; not overly convincing, substantial or conclusive grounds. Reasonable grounds, therefore, point to such facts and circumstances as would justify a reasonable or ordinarily prudent man to believe that a suspect has committed a crime. To constitute reasonable grounds, facts must be such which are within the possession of the Prosecutor which raise a clear suspicion of the suspect being guilty of the crime. It predicates that all the ingredients of the offence are covered. The evaluation is to be made at the pre-trial stage of the proceedings and not what may turn out subsequently in the light of changing facts. It is sufficient that the Prosecutor has acted with caution, impartiality and diligence as a reasonably prudent prosecutor would under the circumstances to ascertain the truth of his suspicions. It is not necessary that he has double checked every possible piece of evidence, or investigated the crime personally, or instituted an enquiry into any special matter. It is sufficient that from an overall view of the evidence which he has collected and which covers all the ingredients of the offence, including the necessary legal implications which he seeks can be drawn therefrom, a clear suspicion of the accused being guilty of the crime arises. The evidence, therefore, need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime. The expression "sufficient evidence" is thus not synonymous with "conclusive evidence" or "evidence beyond reasonable doubt". As stated earlier, the expression *"prima facie case"* carries no universal meaning. Rule 47, therefore, neither raises the threshold nor lowers it; it explains the requirements which the Prosecutor has to meet, before filing the indictment, and to that extent can be taken as laying down some guidance for the assessment of that expression.

The next question that arises is whether the rule is not *ultra vires* the Statute. Rule 47 (A) sets out certain parameters, in order to channelize the Prosecutor in defined chartered waters. The rule has been framed by the Judges under the powers vested in them by Article 15 of the Tribunal's Statute, which empowers them *inter alia* to adopt rules of procedure for the conduct of the pre-trial phase of the proceedings. Article 18 (4) of the Statute relates to pre-trial stage of the proceedings. Rule 47 (A) also relates to the pre-trial stage and clarifies the principles to be taken into account when assessing what is meant by the expression *"prima facie case"* as appearing in Article 18 (4). The rule is explanatory or declaratory of Article 18 (4). It does not negate the essence of Article 18 (4). The rule does not conflict with any clear provision of the Statute. It operates in an unoccupied field. Taking all aspects into consideration, it is not *ultra vires* the Statute. Strangely, there is no such rule for the similar expression in Article 19 (1). There is no need for it, but assuming that there is, it appears to be an inadvertent case of *casus omissus.* However, I would adopt the principle of Rule 47 (A) when assessing the similar expression as appearing in Article 19 (1).

In the light of the above and on examination of the record I found that a *prima facie case* stands made out against IVICA RAJIC

ORDER ON REVIEW

I, Rustam Sidhwa, Judge of the International Criminal Tribunal for the former Yugoslavia,

UPON RECEIVING an Indictment from the Prosecutor, pursuant to Articles 18 and 19 of the Statute, and Rule 47 of the Rules of Procedure and Evidence

AND UPON HEARING the Prosecutor on 28 August 1995, pursuant to Rule 47 (D) of the Rules of Procedure and Evidence, regarding the items of evidence available with him to establish a *prima facie* case,

AND UPON HEARING the arguments of the Prosecutor with regard to the expression "*prima facie* case" as appearing in Articles 18 and 19 of the Statute and Rule 47 of the Rules of Procedure and Evidence and his view that the said Rule is not *ultra vires* the provisions of the Statute.

AND UPON ADJOURNING the review of the indictment to 29 August 1995, to consider the arguments aforesaid and to give a decision thereon,

AND UPON HAVING FOUND Rule 47 of the Rules of Procedure and Evidence to be *intra vires* Articles 18 and 19 of the Statute and the evidence with the Prosecutor as establishing a *prima facie* case,

PURSUANT TO Articles 18 and 19 of the Statute, and Rules 28 and 47 of the Rules of Procedure and Evidence,

CONFIRM the indictment submitted by the Prosecutor in respect of each and every count of the indictment;

FURTHER ORDER, after consultation with the Prosecutor, that there be not public disclosure of the indictment (in whole or in part), pursuant to Rule 53(A) of the Rules of Procedure and Evidence,

Rustam Sidhwa
Judge, Trial Chamber

Dated this 29th day of August, 1995,
At The Hague,
The Netherlands

[Seal of the Tribunal]