



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-95-16-I
Date: 10 November 1995
Original: English

Confirming Judge: Judge Gabrielle Kirk McDonald

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Date: 10 November 1995

THE PROSECUTOR

v.

**Zoran Kupreškić
Mirjan Kupreškić
Vlatko Kupreškić
Vladimir Šantić aka Vlado
Stipo Alilović aka Brko
Drago Josipović
Marinko Katava
Dragan Papić**

DECISION ON THE REVIEW OF THE INDICTMENT

The Office of the Prosecutor:

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

I. DECISION

Pursuant to Rule 28 of the Rules of Procedure and Evidence of the International Tribunal, the President of the International Tribunal has assigned to me the responsibility for reviewing indictments for Trial Chamber II during the month of November 1995. On 3 November 1995 this indictment, along with three others, were filed with the Registry for assignment to me. The accompanying material for this indictment were filed on 3 November 1995.

The Statute of the International Tribunal (hereinafter "Statute") and Rules of Procedure and Evidence of the International Tribunal (hereinafter "Rule" or "Rules") establish the framework for the issuance and review of indictments. As to the issuance of indictments, the Prosecutor is guided by Article 18, paragraph 4 of the Statute and Rule 47, paragraphs (A), (B) and (E).

Article 18, paragraph 4 of the Statute provides in part:

"Upon a determination that a prima facie case exists, the Prosecutor shall 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 shall be transmitted to a judge of the Trial Chamber." (emphasis added).

Rule 47 paragraph (A) provides:

"If in the course of an investigation the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that the 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." (emphasis added).

Judge R. Sidhwa in a Decision issued after the review of the indictment in Case IT-95-12-I has ruled that although Article 18, paragraph 4, uses the term "*prima facie*" and Rule 47 paragraph (A) uses the phrase "reasonable grounds", the latter neither raises nor lowers the standard set forth in the Statute and thus it is not *ultra vires* of the Statute. Judge Sidhwa defined reasonable grounds as those that "point to such facts and circumstances as would justify

a reasonable or ordinarily prudent man to believe that a suspect has committed a crime". at p.8.

In that matter, the Prosecutor had the same opinion, but for different reasons. He stated:

This interpretation [regarding Rule 47 paragraph (A)] may be, as I indicated yesterday, a lower standard than that recognised by the common law but I submit that this is irrelevant. Having regard to the jurisdiction of the Tribunal, which has been bestowed by the Security Council, 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.

Although the meanings are close, I am not completely convinced that "*prima facie* case" fits exactly the standard of "reasonable grounds". However, because I find that the Judge reviewing an indictment is bound to follow Article 19 of the Statute which requires that he be satisfied that a *prima facie* case is established, and because the Rules as they relate to the Judge's responsibility do not deviate from that standard, I need not decide this issue.

Unlike the Prosecutor, the Judge reviewing the indictment is directed by Article 19, paragraph 1 of the Statute which provides:

"The Judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied the indictment shall be dismissed". (emphasis added).

The only guidance from the Rules given the Judge in reviewing the indictment is found in Rule 47 (D) which provides:

"On reviewing the indictment, the Judge shall hear the Prosecutor, who may present additional material in support of any count. The Judge may confirm or dismiss each count or may adjourn to review."

The Draft Statute of an International Criminal Court prepared by the International Law Commission also incorporates the requirement that a Judge review the indictment submitted by the Prosecutor. Article 27 paragraph (2)(a) of that Statute provides that the Presidency shall

examine the indictment and any supporting material and determine “whether a *prima facie* case exists with respect to a crime within the jurisdiction of the Court.” The Commentary accompanying the Draft explains the meaning of the term *prima facie* as used in Article 27 paragraph (1) which also directs the Prosecutor to file an indictment if he “concludes that there is a *prima facie* case.” It 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.” See, Report of the International Law Commission on the Work of its 46th Sess., U.N. GAOR, 49th Sess., at 95, U.N. Doc. A/49/10(1994).

In reviewing the indictment and accompanying material filed with the Registry and submitted to me, I have applied the standard set forth in Article 19 of the Statute; and in determining the meaning of a *prima facie* case, I adhere to the definition contained in the Draft Statute for an International Criminal Court adopted by the International Law Commission.

The review of the indictment by a Judge under our procedures, has two separate and distinct components. First, the Judge should make an assessment of whether, from the face of the indictment, it is alleged that the accused committed acts which, if proven beyond a reasonable doubt, are crimes as charged and are within the subject matter jurisdiction of the International Tribunal. I find that the indictment makes that showing.

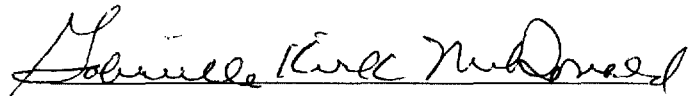
The second component of the review, however, entails an examination of the material accompanying the indictment. In a sense, the Judge is then discharging a function akin to that of an examining magistrate (*juge d'instruction*) or of a grand jury helping to ensure that the prosecution will not be frivolous or wilful. We are, of course, an International Tribunal not bound by the procedures of any national system; nevertheless a careful review of the evidence is contemplated by our Statute and Rules, and the indictment should be confirmed only if the Judge is satisfied that a *prima facie* case has been established by the Prosecutor. I find that the material which accompanied this indictment, viewed in its totality, establishes a *prima facie* case.

II. DISPOSITION

For the foregoing reasons, I Gabrielle Kirk McDonald, Judge of Trial Chamber II,

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

AND CONFIRM the Indictment submitted by the Prosecutor in respect of each and every count of the indictment,



Gabrielle Kirk McDonald

Trial Chamber II

Dated this tenth day of November, 1995

At the Hague

The Netherlands

[Seal of the Tribunal]