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UNITED NATIONS

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-95-12-R61

Date: 5 July 1996

Original English

IN THE TRIAL CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Rustam S. Sidhwa
Judge Lal C. Vohrah

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **5 July 1996**

THE PROSECUTOR

v.

IVICA RAJIĆ
also known as VICTOR ANDRIC

RULE 61 DECISION
SEPARATE OPINION OF JUDGE SIDHWA

The Office of the Prosecutor:

Mr. Eric Ostberg
Mr. Andrew Cayley

I. INTRODUCTION

1. I agree with the decision of the Chamber, as recorded in the main judgement. However, I would like to express myself on certain issues regarding the treatment of evidence, which I do so herewith.

2. The procedural background of this case has been detailed in the Trial Chamber's decision. Accordingly, I will confine myself to setting out the information that is most relevant to the issues addressed in this opinion.

3. The indictment against Ivica Rajić, also known as Victor Andric, was confirmed by me on 29 August 1995. At that time, the Prosecution submitted a number of documents, including summary notes of interviews and information provided by a number of witnesses and the statements of the undernoted witnesses, which had been recorded by representatives of the Office of the Prosecutor:

Brigadier Angus Ramsay
Witness A (protected witness)
Major Hakan Birgir
Sergeant Ruzdi Ekenheim
Brigadier Ulf Henricsson
Dr. Bjorn Borgwall
Warrant Officer Patrick Gustafsson, and
Dr. Thomas Matzsch

4. On 6 March 1996, I ordered that the indictment against Rajić be submitted to my Trial Chamber for review under Rule 61 of the International Tribunal's Rules of Procedure and Evidence. On 19 March 1996, the Prosecutor submitted to the Registry of the International Tribunal additional evidence comprising of the statements of several witnesses, with accompanying documents. These materials were marked Exhibit 20 by the Registry and seven of the witnesses were given pseudonyms.

5. The Rule 61 hearing regarding Rajić was held on 2 and 3 April 1996. During the hearing, the Prosecutor called the following witnesses to testify orally before this Chamber:

Mr. Ehsanullah Bajwa, S.P., Investigator, Office of the Prosecutor
Brigadier-General Ulf Henricsson, Commanding Officer, UNPROFOR
Sergeant Ruzdi Ekenheim, Interpreter, UNPROFOR
Petty Officer Bernard Petterson, Photographer, UNPROFOR
Lieutenant Colonel Jan Koet, UNPROFOR

II. NATURE AND PURPOSE OF A RULE 61 PROCEEDING

6. A Rule 61 proceeding takes place if the Prosecutor is unable to execute a warrant of arrest in respect of a person who has been accused in an indictment that was confirmed by a Judge of the Tribunal pursuant to Rule 47. At this stage, it is appropriate to say a few words about the relationship between confirmation of an indictment under Rule 47 and Rule 61 proceedings. Article 18(4) of the Statute of the International Tribunal ("Statute") and Rule 47(A) lay down the Prosecutor's responsibility to make an independent assessment of the evidence before him to determine whether it constitutes a *prima facie* case against a suspect. If there is such a case, the Prosecutor may frame an indictment against the suspect, thereby setting in motion the machinery of the law for the suspect's eventual arrest and trial. Article 19 of the Statute and Rule 47 deal with the confirmation of the indictment by a Judge. A confirmation hearing is one of the first steps by which the Judge takes cognisance of a case, *i.e.*, takes notice of an alleged offence for the purpose of proceeding in a particular way in accordance with the provisions contained in the International Tribunal's Statute and Rules for holding a trial. It involves an *ex parte* judicial review by a Judge of a Trial Chamber of the indictment and supporting material presented by the Prosecutor to see whether the evidence provides reasonable grounds for believing that the suspect has committed the crime imputed to him. The Rules do not provide for a public hearing in respect of Rule 47 proceedings. Nor do they provide for oral evidence to be tendered at this stage. The Prosecutor may, under Rule 47(D), present additional material in support of any count of the indictment. The Judge, depending upon whether a *prima facie* case has been made out or not, may confirm or dismiss each count, as the case may be or may adjourn the hearing. However, under Rule 47(E), the dismissal of a

count does not preclude the Prosecutor from subsequently bringing a new indictment on the same count, if it is supported by additional material. If an indictment is confirmed, the Prosecutor may apply for warrants of arrest or transfer orders as may be necessary for securing the custody or presence of the accused and for any other necessary orders. As to the meaning of the expression "prima facie case", which appears in Rule 47(A) of the International Tribunal's Rules and in Articles 18 and 19 of its Statute, I have expressed myself fully in that respect in my confirmation order dated 29 August 1995, passed in this case, and do not want to drag a greater length of chain by repeating the same here.

7. Rule 61 provides a procedure for reconfirmation of the indictment at a higher authoritative level after an open public hearing, unless the proceedings are ordered to be held *in camera*, so as to inform the global community of the heinousness of the crimes allegedly committed by the accused and the existence of a *prima facie* case against him that could ultimately warrant his conviction, should he appear to stand trial. This procedure is used when all attempts to execute warrants of arrest on the accused and the issuance of advertisements in the press have failed to secure his custody or presence. The procedure does not seek to secure the accused's conviction. Rule 61 is basically an apology for this Tribunal's helplessness in not being able to effectively carry out its duties, because of the attitude of certain States that do not want to arrest or surrender accused persons, or even to recognise or cooperate with the Tribunal. In such circumstances, it is the International Tribunal's painful and regrettable duty to adopt the next effective procedure to inform the world, through open public hearings, of the terrible crimes with which the accused is charged and the evidence against the accused that would support his conviction at trial.

8. Where the requirements of Rule 61(A) have been fulfilled, the Prosecutor can be directed to submit the indictment to the Trial Chamber in open court, together with all the evidence that was initially submitted to the confirming Judge. The Prosecutor also has the right to call before the Chamber and examine any witness whose statement had been submitted to the confirming Judge. Rule 61(C) permits the Chamber to examine additional evidence that the Prosecutor may desire to tender. It therefore permits the Prosecutor to tender statements of additional witnesses, whose statements were never tendered to the confirming Judge, and to call before the Chamber and examine any of the new witnesses. Thus, under Rule 61(C), if the Judges of the Chamber are satisfied on the basis of the earlier evidence, as tendered before the

confirming Judge, and the additional evidence, as later tendered before them, that there are reasonable grounds for believing that the accused has committed any or all of the crimes charged in the indictment, they shall record such a finding, whereupon the Prosecutor can apply for international arrest warrants in respect of the indicted accused. If the Trial Chamber should find that failure to effect personal service was due, wholly or in part, to a failure or refusal of a State to cooperate with the Tribunal, in accordance with Article 29 of the Statute, the Trial Chamber can certify accordingly, upon which the President of the Tribunal, after consulting the Presiding Judges of all Chambers, can notify the Security Council thereof in such manner as he thinks fit.

9. The procedure relating to the oral examination of witnesses in Rule 61 proceedings is somewhat akin to that relating to committal proceedings prevailing in certain national jurisdictions. However, whilst in committal proceedings the accused is generally present and can cross-examine the witnesses fully in open court to demolish the whole case, Rule 61 proceedings are *ex parte* proceedings and I would assume would only permit the Judges to put questions to the witnesses, if they should so desire, not forgetting the parameters of their jurisdiction, which is only to examine whether a *prima facie* case exists. Thus, this procedure, which is somewhat innovative, is peculiar to this Tribunal. Although it does not permit the Judges to cross-examine witnesses in the established sense, it permits them to scrutinise and appraise the evidence with some care and close attention and to put questions to the witnesses in that behalf on a fair basis to see if the Prosecutor has a *prima facie* case.

III. CONFIDENTIALITY OF SUPPORTING MATERIALS

10. The Prosecution has taken the position that all supporting material submitted by it in Rule 61 proceedings, except the oral testimony of witnesses presented by it in open court, remains under a blanket of secrecy. *See* Memorandum on Rule 61 Proceedings and Public Disclosure at 3, *Prosecutor v. Rajić,* Case No. IT-95-12-R61 (T. Ch. II, 1996) [hereafter "*Prosecutor's Brief*"].

11. With all due respect to the Prosecutor, I am afraid I cannot accept this position. My view is based on an examination of the provisions of the International Tribunal's Rules that are

relevant to this issue. The text of these provisions, included in Rules 52, 53 and 66(A), is set forth below:

Rule 52
Public Character of Indictment

> Subject to Rule 53, upon confirmation by a Judge of a Trial Chamber, the indictment shall be made public.

Rule 53
Non-disclosure of Indictment

> (A) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.
>
> (B) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.

Rule 66
Disclosure by the Prosecutor

> (A) The Prosecutor shall make available to the defence, as soon as possible after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses.

12. The Prosecutor argues that Rules 52 and 66(A) provide a blanket of secrecy to the written supporting material submitted by him for a Rule 47 confirmation of an indictment or for a Rule 61 proceeding and that only the oral testimony presented in open court during a Rule 61 hearing is public. *See Prosecutor's Brief* at 2. In support of this assertion, the Prosecutor first points out that Rule 52 requires only that a confirmed indictment be made public and is silent on the issue of the supporting material. This, the Prosecutor argues, impliedly places the supporting material under a blanket of secrecy.

13. In my view, Rule 52 does not impliedly place the "supporting material" under any automatic blanket of secrecy. It says only that if there is no order of non-disclosure of the

indictment passed under Rule 53, the indictment "shall be made public" as soon as it is confirmed by a Judge. Rule 52 cannot be read as impliedly meaning that the supporting material automatically remains under a blanket of secrecy because the indictment alone is signalled out for publicity. The object of the Rule is not to impliedly treat the "supporting material" as remaining under a blanket of secrecy, but to give wide publicity to the indictment for public consumption. Like Rule 61 proceedings, the object is to give the result of the Rule 47 proceedings some publicity for public consumption. The opening words of Rule 52, namely, "Subject to Rule 53", show only that if there is no order prohibiting public disclosure of the indictment under Rule 53(A) or (B), wide publicity should be given to it, but if there is an order prohibiting public disclosure, the indictment shall not be made public. The word "shall" in Rule 52 is therefore not of unequivocal application with mandatory import, but is explicitly subject to Rule 53.

14. This reading of Rule 52 is supported by the host of provisions in the International Tribunal's Rules which compel the Prosecutor to secure diverse orders to prevent the public disclosure of evidence, statements and information, including what may be termed "supporting material." If the Prosecutor's view was accepted, it would cause conflict with these Rules. We must place a reasonable and sensible construction on the Rules and avoid absurdity or inconsistency. The only such construction is that the indictment and supporting material, once filed with the Registry, assume the character of public records which can be inspected and that to secure their non-disclosure specific orders to that effect have to be obtained based on a host of rules which provide for such orders. Moreover, if an indictment is confirmed and no order under Rule 53 has been passed for its non-disclosure, it can receive a fanfare of publicity. If an argument was advanced that Rule 52 could be taken to imply that "supporting material" could be bracketed with the indictment to receive publicity, that would be precluded. By itself, Rule 52 cannot be taken to conversely imply that "supporting material" remains under any blanket of secrecy. The interpretation or construction can only be confined to the indictment and must remain *quantum satis* (as much as it is sufficient).

15. The Prosecutor's second argument in support of his assertion of confidentiality for supporting material is that Rule 66(A), which states that at the time of an accused's first appearance the Prosecutor shall provide the accused with the supporting materials that accompanied the indictment when confirmation was sought, implies that until this time these

materials remain confidential. In my view, Rule 66(A) deals only with the time when the Prosecutor may deliver the "supporting material" to the accused, namely, after the initial appearance of the accused. If such an obligation is imposed on the Prosecutor, he must comply with it, but it does not impliedly mean that the "supporting material" which is submitted at confirmation or re-confirmation proceedings automatically carries the blanket of secrecy with it. If that had been the intention, the Judge confirming the indictment and the Chamber re-confirming the indictment would have been warned in Rules 47(A) and 61(B) to consider the "supporting material" *sub rosa* or under protective measures guaranteeing their non-disclosure to the public. As the Rules are currently framed, the blanket of secrecy over the supporting material, once presented to the Registry, can only materialise out of Rules 53(B), 66(C), 69(A) and 75(B). Once it does, under any of these Rules, the Prosecutor can waive it, because he has the right to present his best case and he can present witnesses for oral examination or read in open Chamber documents, notes, etc., and thus lift the secrecy over whatever supporting material he desires. As regards the balance, the Prosecutor can request the Judges to convene a closed session, where he can provide evidence *in camera*, or can request the Judges to peruse the same privately in Chambers.

16. For the reasons set out above, I believe that the supporting material submitted by the Prosecution for a Rule 47 confirmation or a Rule 61 proceeding is public unless a specific non-disclosure order covering that material has been obtained.

IV. THE TESTIMONY OF ESHSANULLAH BAJWA

17. I now turn to the second issue with respect to which I wish to express myself. The Prosecution's first witness during the Rule 61 hearing was Mr. Ehsanullah Bajwa, S.P., an investigator in the Officer of the Prosecutor. He not only testified to the fact that he had recorded the statements of the pseudonymed witnesses "A" to "G", who were eye-witnesses and victims of the murderous attack launched on Stupni Do on the morning of 23 October 1992, but also testified, in a summary manner, as to the facts given by them to him about the said murderous attack and the results thereof.

18. The question, therefore, that arises is whether Mr. Ehsanullah Bajwa's narration of the incident, as given to him by the eye-witnesses "A" to "G", is admissible and, if so, to what extent?

19. To answer this question, it is necessary to first consider the meaning of the word "witness". A witness is a person who is acquainted with the facts and circumstances of a case and who needs to be examined in that connection. In respect of criminal cases, a witness is one who has seen an occurrence or heard a matter or who is acquainted with the facts and circumstances of a case or can supply the necessary information in regard to the commission of an offence and who is required to be examined in the investigation, inquiry or trial to be held in regard to the said offence. A witness therefore is one who is privy to some information or material, which determines his character, *e.g.*, as an eye-witness, a medical witness, a recovery witness, etc. It is in this context that the word "witness", as it appears in Rule 61(B), should be understood. A witness's proxy or substitute or a person who has recorded his statement, is not covered by Rule 61(B).

20. The next question is whether the Chambers are constrained to accept "direct evidence", as opposed to secondary evidence. Direct evidence means "evidence in the form of testimony from a witness who actually saw, heard or touched the subject of questioning." BLACK'S LAW DICTIONARY 460 (6th ed. 1991). There is no gainsaying the fact that judicial tribunals in national jurisdictions are generally obligated, by a cardinal principle that is inherent in their procedural systems, to only accept, in principle, direct evidence, where available, and where direct evidence is not available, indirect or other circumstantial evidence, unless for special reason the law has made a specific exception. The issue is, however, whether the International Tribunal, which is not bound by national rules of evidence, is similarly constrained.

21. Rule 90(A) may be regarded as relevant to this inquiry. It provides that: "Witnesses shall, in principle, be heard directly by the Chambers." This does not, however, require direct evidence to be recorded. The expression "direct examination" means the personal examination of a witness standing physically before the Court. Therefore, the opening words of Rule 90(A) have relevance to the mode of examination of a witness, rather than to the type of evidence. In short, what is intended is that the witnesses shall, in principle, be personally examined by the Chamber, rather than by any form of out of court examination.

22. Although there is no specific Rule relating to direct evidence in our Rules of Procedure and Evidence, from the Statute and Rules it cannot be said that the principle does not bind the Tribunal or has been specifically excepted. The following provisions of the International Tribunal's Statute and Rules are relevant to this matter. Article 20 of the Statute provides that a Chamber has to ensure that the trial is fair and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Under Rule 89(B), in cases not otherwise provided for in the Tribunal's evidentiary rules, a Chamber must apply rules of evidence which best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. Rule 89(C) provides that a Chamber can admit any relevant evidence which it deems to have probative value and, under Rule 89 (D), a Chamber can exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. Finally, Rule 95 states that a Chamber need not admit evidence, if its admission is antithetical to, and could seriously damage, the integrity of the proceedings.

23. Rule 89 (C) permits relevant evidence to be admitted if it has probative value. Evidence which tends to prove or disprove a fact, or makes it more or less probable, or tends to throw light upon a particular matter, is treated as relevant evidence. Since evidence can be both direct, such as an ocular account, and indirect or circumstantial, such as a chain of circumstances or facts which lead to the irresistible conclusion of the existence or non-existence of a fact, Rule 89(C) would permit both to be admitted, leaving it to the Chamber to deduce the necessary conclusions from both types of evidence that have been recorded. This Rule requires that the evidence must be relevant and have probative value, *i.e.,* have the effect of proof, or lead to or actually establish an issue. One can therefore assume that *ex facie* this Rule does not strictly lead towards the receipt, by way of first option, of direct testimony, and that both direct and indirect testimony can be received, subject to the same having probative value, and ultimately being appraised for their worth.

24. Although the Rules do not explicitly require the Chambers to hear only direct evidence, such a requirement may be imposed on them as a result of their duty to receive the best evidence. Best evidence is defined as: "Primary evidence, as distinguished from secondary; original, as distinguished from substitutionary; the best and highest evidence of which the nature of the case is susceptible". BLACK'S LAW DICTIONARY, *supra*, at 106. It includes "the

best evidence which is available to a party and procurable under the existing situation, and all evidence falling short of such standard, and which in its nature suggests there is better evidence of the same fact, is 'secondary evidence'." *Id.*

25. No judicial tribunal charged with conducting a fair trial would accept indirect or circumstantial evidence if direct evidence was available and was not produced without valid reason. Even assuming that a court was compelled to or did receive indirect evidence, it would not rely on it if direct evidence was improperly withheld. Thus, I doubt that this Chamber can permit indirect evidence to be recorded in preliminary proceedings if direct evidence is available and can be produced. This is especially so because the object of Rule 61 proceedings is to show to the world that a *prima facie* case still stands made out against the accused and that this assessment is not being made on a basis that lowers the threshold of appraisal which would be used if the accused were to stand trial. How can the standard be lowered to determine a *prima facie* case, but raised when determining the main case? No indirect testimony can therefore be admitted if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. In the midst of teething troubles, we are still trying to find our bearings. Speaking for myself, I can only say that we should be circumspect and careful, not lay down standards which inherently destroy a fair trial or destroy the application of the best evidence rule, a cardinal principle honoured by almost all superior courts of record.

26. I would emphasise that my views in this regard would not exclude the evidence of a properly qualified expert witness. Such witnesses testify based on their survey of facts and/or materials and regarding general issues, not the individual guilt of the accused. Thus, the best evidence rule would not normally prevent a Chamber from admitting expert testimony.

27. Whilst on this subject, another matter arises. Rule 61 proceedings are *ex parte* proceedings. They are only intended to seek a re-confirmation of the earlier confirmation order. They are not *ex parte* proceedings in any form of *in absentia* trial of the accused. The object of Rule 61 proceedings is merely to re-demonstrate the existence of a *prima facie* case against the accused before three Judges of a Chamber in open court, subject to public attention and scrutiny. It is not to sentence the accused *in absentia* in any way. Because Rule 61 proceedings are *ex parte* and trial *in absentia*, if permitted, could also be *ex parte*, can any laxity be shown in the application of Rule 90(A) in both such proceedings? Generally the preliminary inquiry in

criminal proceedings to determine whether a *prima facie* case exists does not call for too close or too technical an examination of the Prosecutor's evidence or any compulsory examination of any witness in open court, the issue of the application of anything like Rule 90(A) does not arise. But this is a preliminary inquiry under Rule 61 where the Prosecutor has been given the option of having evidence of all or some of his witnesses recorded. In these circumstances, whilst the general features of examination of a *prima facie* case are not disturbed, no laxity can be shown in the application of Rule 90(A). Assuming the Tribunal's Statute had provided for trials *in absentia*, no laxity could have been shown in the application of Rule 90(A) when examining the witnesses *ex parte*. The effect of placing the examination of a *prima facie* case at a higher authoritative level, with a hearing open to the public, so that the world at large may be able to assess the involvement of the accused in the crime imputed, cannot be allowed to be degraded by permitting a procedure which involves ocular accounts being accepted through proxies and substitutes. I cannot permit the Rule 61 procedure to look so cheap, or should I say inversely proportional to the higher authoritative level at which it is expected to be presented and approved? If the Prosecution wants to produce eye-witnesses to spotlight the tragedy of events that it believes occurred, it must produce witnesses to the said events in court. Otherwise, it should rely on their statements — like that of the other witnesses not produced — and, if desired, read portions of them out, retaining the balance under the cover of secrecy and confidentiality, if so ordered.

28. Turning to the particular issue at hand, Mr.. Bajwa's testimony, it is clear that a scribe who takes down the statement of an eye-witness on behalf of the Prosecution, by virtue of authority given to him, is not a witness to the occurrence. If there is an objection as to who recorded the statement of such a witness, or that it was not so recorded, the evidence of the scribe may be relevant for this limited purpose. Again, if the witness was dead, or could not be found or had permanently become incapable of giving evidence, one could say that there was some scope for the scribe's testimony being recorded. Other than this, the scribe cannot be permitted to give evidence as to what the eye-witnesses of the case told him because his evidence would be against the best evidence rule.

29. If it is suggested that the International Tribunal's Rules permits hearsay evidence to be recorded because it is nowhere provided that such evidence will not be accepted, I am afraid I cannot accept this interpretation as some open rule which permits hearsay evidence being

recorded with abandon because Rules 89(D) and 95 look upon this with disfavour. I would say that even in the case of direct testimony, where some hearsay evidence may be admitted, it should only be permitted with care and caution, ensuring that it is in line with a fair determination of the matter, with the spirit of the Tribunal's Statute and Rules and in consonance with well-known general and equitable principles of law. Without some principle being laid down for the judicious acceptance of hearsay evidence, a blind and open application would prejudice the rights of the accused and lead to an unfair trial.

30. Mr. Bajwa's testimony indicated that he personally recorded the statements of pseudonymed eye-witnesses "A" to "G". I would accept this limited part of his testimony under Rule 89(E) as verification of the authenticity of evidence of the said witnesses obtained out of court. As regards his testimony on what the eye-witnesses told him, which he had earlier recorded, I would not accept the same. The said evidence, which is a summary of these statements, is hearsay. It has been recorded with abandon. Mr. Bajwa is not a witness to the crime or and does not have direct knowledge of the crime. Therefore, he is not a witness as visualised by Rule 61(A). Direct evidence of the eye-witnesses was available and could have been produced. Mr. Bajwa's testimony violates the principle of Rules 61(A) and 95 and places the principle laid down in Rule 89(D) open to grave abuse. I would, therefore, reject that part of his testimony which seeks to recount what eye-witnesses "A" to "G" narrated to him.

31. My conclusions regarding Mr. Bajwa's testimony do not, however, destroy the Prosecution's case. The original statements of eye-witnesses "A" to "G" are on the record. These statements, with the identifying material excised, with the statements of the other witnesses which were recorded before and after the indictment and who have not been produced to give oral testimony before us, together with the oral testimony of the five witnesses produced before us, with Mr. Bajwa's statement being accepted only in the limited context stated above, along with the balance material on the record, clearly show that there are reasonable grounds for believing that Ivica Rajić committed the crimes imputed to him in Counts I, III, IV and VI of

the indictment as referred in the main judgement. I therefore share the final determination made by my colleagues that this is so and that the Chamber has subject matter jurisdiction to consider these Counts of the indictment.

Judge Rustam S. Sidhwa

Dated this fifth day of July 1996
At The Hague
The Netherlands

Seal of the Tribunal