



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

Case No. IT-97-25/1-PT
Date: 27 July 2004
Original: English

IT-97-25/1-PT
D 378- D 375
27 JULY 2004

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IN TRIAL CHAMBER II

Before: Judge Carmel A. Agius, Presiding
Judge Jean-Claude Antonetti
Judge Kevin Parker

Registrar: Mr. Hans Holthuis

Decision of: 27 July 2004

PROSECUTOR

v.

MITAR RAŠEVIĆ

**DECISION ON THE “DEFENCE’S PRELIMINARY MOTION
PURSUANT TO THE RULES 50 (C) AND 72 (A)(ii)” OF 10
JUNE 2004**

The Office of the Prosecutor:

Ms. Hildegard Uertz-Retzlaff
Mr. William Smith
Ms. Christina Moeller

Counsel for the Accused:

Mr. Vladimir Domazet

TRIAL CHAMBER II (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“the Tribunal”):

BEING SEISED OF the “Defence’s preliminary motion pursuant to the rules 50 (C) and 72 (A)(ii)” (“Motion”), filed by Counsel for the Accused Mitar Rašević (“Defence”) on 10 June 2004, in which the Defence requests that the Trial Chamber order the Office of the Prosecutor (“Prosecution”) to “eliminate defects”¹ in the Prosecution’s “Amended Indictment” of 12 May 2004 (“Amended Indictment”), notably those referred to in paragraphs 69 (a), (b) and (c) of the disposition of the Trial Chamber’s “Decision regarding defence preliminary motion on the form of the indictment” (“Decision”) of 28 April 2004;

NOTING the “Prosecution response to Defence’s preliminary motion pursuant to the Rules 50 (c) and 72 (A) (ii)”, filed by the Prosecution on 22 June 2004, in which the Prosecution requests that the Motion be denied;

RECALLING the pleading principles as previously set out in the Decision;²

NOTING that the Defence, in paragraph 14 of the Motion, accepts that the Prosecution did in fact act upon the Trial Chamber’s order under paragraph 69(c) of the Decision;

NOTING that the Defence, in paragraph 15 of the Motion, submits that the Prosecution did not act upon the Trial Chamber’s order under paragraph 69(e) of the Decision;

NOTING FURTHER that the Defence, as far as the Trial Chamber is able to understand³, in paragraph 3 and paragraph 19 of the motion, claims that the Prosecution has inserted new allegations in the Amended Indictment, but that no request to amend these “defects” is made⁴;

FINDING therefore that the Defence is in fact requesting that the Trial Chamber order the Prosecution to comply with the orders contained in paragraphs 69 (a), (b) and (e) of the Decision;

RECALLING that, in paragraph 69 of the Decision, the Trial Chamber ordered the Prosecution to effectuate the following changes in the “First Amended Indictment with Schedules A to E” dated 2 December 2003 (“First Amended Indictment”):

- (a) resolve the ambiguity in paragraph 2;

¹ Defence’s preliminary motion pursuant to the rules 50 (C) and 72 (A)(ii)” (“Motion”), final para.

² Decision, section II.

³ the Defence arguments were often difficult to understand due to the poor use of language, which may to some extent result from translation difficulties.

⁴ Motion, para. 19

- (b) resolve the ambiguity in paragraph 8; and
- (e) amend it so that the form(s) of JCE being pleaded is/are clear;

RECALLING that “an indictment indicate(s) in relation to each individual count precisely *and expressly* the particular nature of the responsibility alleged. This would not be necessary where, for example, the nature of the responsibility alleged is the same in relation to every count but, where the nature of the responsibility differs, it should not be left to the accused (and ultimately to the Trial Chamber in the inevitable preliminary motion) to infer from the absence of any facts which indicate a personal responsibility that no such responsibility is being pursued”;⁵

NOTING that, in the First Amended Indictment, the Prosecution has specified its charges against the Accused such that the Accused is charged with physically committing acts only in relation to certain counts,⁶ and in addition that the Accused is cumulatively charged with participation in a JCE as a co-perpetrator or alternatively as an aider or abettor;

NOTING that the Appeals Chamber has stated that

Article 7(1) of the Statute covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute *might also occur* through participation in the realisation of a common design or purpose.⁷

CONSIDERING that both “committing” as a co-perpetrator or alternatively as an aider or abettor in a Joint Criminal Enterprise, *as well as* physically “committing” one of the crimes envisaged in Articles 2, 3 4 and 5 in the Statute can be considered as different heads of liability;⁸

UNDERSTANDING that the reference to “physically committing” in paragraph 8 of the Amended Indictment is limited by the restrictions as set out in paragraph 2 of the Amended Indictment;

NOTING the Trial Chamber’s findings in the Decision that the Prosecution has sufficiently pleaded *the mens rea* for categories one, two and three of the alleged Joint Criminal Enterprise;⁹

⁵ Decision, para 38 and footnote 59, citing the *The Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 60; see also *The Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, 24 March 2000, footnote 319.

⁶ See para. 2 of the Amended Indictment.

⁷ *The Prosecutor v. Milorad Krnojelac*, Case No. 97-25-A, Judgment, 17 September 2003 (“*Krnojelac Appeals Judgment*”), para, 73 (citing *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999 (“*Tadić Appeals Judgment*”), para. 188), emphasis added.

⁸ For arguments on the admissibility of cumulative charging, see Decision, paras. 29 and 30, reiterating that the Prosecution is not required to choose among different heads of responsibility and stressing that the approach of pleading heads of responsibility in the alternative has been accepted by the Tribunal’s jurisprudence.

⁹ Decision, paras. 50-58.

FINDING therefore that the Prosecution has largely resolved the ambiguities that existed in paragraph 2 and 8 of the First Amended Indictment, and that the First Amended Indictment has been amended such that the forms of JCE being pleaded are sufficiently clear;

FOR THE FOREGOING REASONS

PURSUANT TO Rule 72 of the Rules of Procedure and Evidence;

DENIES THE MOTION.

Done in French and English, the English version being authoritative.

Dated this 27th day of July 2004,

At The Hague

The Netherlands



Carmel Agius

Presiding Judge

[Seal of the Tribunal]