



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-95-14 &
14/2-R77
Date: 21 December 2005
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Christine Van Den Wyngaert
Judge Bakone Moloto
Registrar: Mr Hans Holthuis
Decision: 21 December 2005

PROSECUTOR

v.

JOSIP JOVIĆ

**DECISION TO DENY THE ACCUSED JOSIP JOVIĆ'S
PRELIMINARY MOTION TO DISMISS THE INDICTMENT
ON THE GROUNDS OF LACK OF JURISDICTION AND
DEFECTS IN THE FORM OF THE INDICTMENT**

The Office of the Prosecutor:

Mr David Akerson

Counsel for the Accused:

Mr. Krešimir Krsnik for
Mr. Josip Jović

1. **TRIAL CHAMBER I** (“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 (“Tribunal”) is seised of Mr. Josip Jović’s (“the Accused”) Preliminary Motion to dismiss the indictment on the grounds of lack of jurisdiction and defects in the form of the indictment, filed on 26 October 2005 (“the Motion”).¹

I. INTRODUCTION

2. On 30 August 2005, the Prosecution filed an indictment against the Accused, which charged him with having committed and aided and abetted contempt of the Tribunal under the Tribunal’s inherent power and Rules 77(A), 77(A)(ii) and 77(A)(iv) of the Rules of Procedure and Evidence (the “Rules”).

3. On 12 September 2005, the confirming judge Alphons Orié confirmed the indictment against the Accused.

4. On 20 September 2005, the Prosecution filed a motion to join the Accused’s case with the cases of three other accused (“Motion for joinder”).² On 6 October 2005, the Accused filed the “Response of the Accused Josip Jović to the Prosecution’s Motion for Joinder of All Four Accused” (“Response”). On 11 October 2005, the Prosecution filed the “Prosecution Reply to Response of the Accused Josip Jović to the Prosecution’s Motion for Joinder of All Four Accused” (“Prosecution Reply”).

5. In the Motion, the Accused challenges the Indictment on the following grounds:

- i. The Tribunal has no personal jurisdiction;
- ii. The Tribunal has no subject matter jurisdiction;
- iii. The Prosecutor lacks the authority to prosecute the case; and
- iv. The form of the indictment is defective.

¹ Preliminary Motion of the Accused Josip Jović to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment.

² Motion for leave to amend the indictment of Šešelj and Margetić, Case Nos IT-95-14-R77.3, IT-95-14-R77.4 and IT-95-14 & 14/2.

II. THE RULES

6. The Accused brings the Motion under Rules 72(A)(i) and (ii), which identify motions challenging the Tribunal's jurisdiction and form of the indictment as preliminary motions. Rule 72(D) states that for the purposes of Rules 72(A)(i) and 72(B)(i) a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

- (i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;
- (ii) the territories indicated in Articles 1, 8 and 9 of the Statute;
- (iii) the period indicated in Articles 1, 8 and 9 of the Statute;
- (iv) any of the violations indicated in Articles 2, 3, 4 5 and 7 of the Statute.

III. JURISDICTION

7. The Accused argues that the Tribunal has no personal jurisdiction over the Accused because under Article 1 of the Tribunal's Statute,³ the Tribunal only has the jurisdiction to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.⁴ The Accused argues that as he is not charged with serious violations of international humanitarian law, the Tribunal has no personal jurisdiction over him.⁵ The Accused argues further that the Tribunal can claim jurisdiction over natural persons only pursuant to its ancillary powers in cases where the person in question can be of assistance to the Tribunal in its task of dispensing justice.⁶ The Accused submits that it has been "repeatedly confirmed in the decisions of the Tribunal, that such ancillary or incidental personal jurisdiction can be asserted only by means of a specific subpoena or an order, addressed to a specific person".⁷ In support of this argument, the Accused cites a decision of the Appeals Chamber in the *Blaškić* case,⁸

³ Article 1 of the Statute provides that: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."

⁴ The Motion at para 4.

⁵ *Ibid* at para 5.

⁶ *Ibid* at para 6.

⁷ *Ibid*.

⁸ *Prosecutor v Tihomir Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997.

in which the Appeals Chamber held that the Tribunal has the power to address orders to individuals.⁹

8. The Accused explains that since the Chamber's Order of 1 December 2000 for the Immediate Cessation of Violations of Protective Measures for Witnesses, which he is charged with having violated, was not addressed to him, the Tribunal has no personal jurisdiction over him.¹⁰ In other words, the Accused explains that the Tribunal lacks subject matter jurisdiction owing to the fact that the Accused is charged with having violated a court order specifically addressed to him and that as "the Prosecution has failed to indicate such an order"¹¹ and that the Tribunal has no jurisdiction "arising directly from the provisions of the Statute, it logically follows that there is no possibility for the Tribunal to establish subject matter jurisdiction in the present case".¹²

9. The Chamber notes that the Tribunal's Statute does not deal with contempt, but that contempt is provided for in Rule 77 of the Rules. The Appeals Chamber, in the *Tadić*¹³ and *Aleksovski cases*,¹⁴ held that although the Tribunal's Statute does not deal with contempt, the Tribunal does possess an inherent jurisdiction, which derives from its judicial function, to ensure that its exercise of the jurisdiction, which is expressly given to it by that Statute, is not frustrated and that its basic judicial functions are safeguarded. As an international criminal court, the Tribunal must, therefore, possess the inherent power to deal with conduct which interferes with its administration of justice. The Appeals Chamber held that the content of the Tribunal's inherent power to prosecute contempt could be discerned by reference to the usual sources of international law and not by reference to Rule 77, although the formulations of contempt provided for in Rule 77 fall within, but do not limit such inherent power.¹⁵ The Chamber followed these findings in the *Beqaj case*.¹⁶ In the *Milošević case*,¹⁷ the Appeals Chamber held further that "Rule 72(D) is clear and unambiguous in its terms" and that the Tribunal's jurisdiction in contempt cases cannot be challenged under Rule 72.¹⁸

10. The Tribunal's inherent power to prosecute contempt is, therefore, well-founded in the Tribunal's jurisprudence. If the Tribunal has the subject matter jurisdiction to prosecute contempt, it

⁹ *Ibid* at para 48.

¹⁰ *Ibid* at para 12.

¹¹ *Ibid* at para 15.

¹² *Ibid*.

¹³ *Prosecutor v Tadić*, Judgment on allegations of contempt against prior counsel, Milan Vujin, Case No IT-94-1-A-R77, 31 January 2000.

¹⁴ *Prosecutor v Aleksovski*, Judgment on Appeal by Anto Nobile against finding of contempt, Case No IT-95-14/1-AR77, 30 May 2001.

¹⁵ *Prosecutor v Tadić*, note 10 above, at para 13; *Prosecutor v Aleksovski*, note 11 above, at para 30.

¹⁶ *Prosecutor v Beqaj*, Judgment on contempt allegations, Case No IT-03-66-T-R77, 27 May 2005 at paras. 8-11.

¹⁷ *Prosecutor v Slobodan Milošević Contempt Proceedings against Kosta Bulatovic*, Decision on Contempt of the Tribunal; Case No IT-02-54-A-R77.4, 13 May 2005.

clearly has the personal jurisdiction to prosecute persons who are accused of contempt of the Tribunal. Personal jurisdiction to prosecute contempt is the natural corollary of the Tribunal's subject matter jurisdiction to prosecute contempt of the Tribunal. The Tribunal finds no reason to distinguish between subject matter jurisdiction and personal jurisdiction with regards to the non-applicability of Rule 72 in contempt cases. The Tribunal, therefore, has both the subject matter and personal jurisdiction to prosecute contempt.

11. In relation to the Accused's argument that it has been "repeatedly confirmed in the decisions of the Tribunal, that such ancillary or incidental personal jurisdiction can be asserted only by means of a specific subpoena or an order, addressed to a specific person",¹⁹ the Chamber holds that such argument does not relate to the question of whether the Chamber has the personal jurisdiction to prosecute persons accused of contempt. The question of whether the Accused was bound by the order which he is accused of having violated is a matter to be adduced at trial when determining whether the accused did in fact commit contempt and is unrelated to the issue of whether the Chamber has personal jurisdiction over the accused. The Chamber, therefore, considers that the Accused's argument in this regard is beyond any challenge of jurisdiction.

12. The Chamber, therefore, dismisses the Motion.

IV. LACK OF THE PROSECUTOR'S AUTHORITY TO PROSECUTE

13. Rule 77(C) of the Statute provides that:

When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:

direct the Prosecutor to investigate the matter with a view to preparation and submission of an indictment for contempt;

where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or

(iii) initiate proceedings itself.

14. Rule 77(D) provides that:

If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:

¹⁸ *Ibid* at para 35.

¹⁹ *Ibid*.

(i) in circumstances described in paragraph (C)(i), direct the Prosecutor to prosecute the matter; or

(ii) in circumstances described in paragraph (C)(ii) and (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.

15. Paragraph IV(14) of the Practice Direction provides that:

In accordance with Rule 77(D) of the Rules, where the Prosecutor investigated the contempt allegation pursuant to Rule 77(C)(i), the adjudicating Chamber will direct the Prosecutor to prosecute the alleged contempt. Where an *amicus curiae* investigator was appointed to investigate the allegation pursuant to Rule 77(C)(ii), the adjudicating Chamber may direct the *amicus curiae* to prosecute the matter.

16. The Accused submits that:

- i. the Prosecutor's authority and competence under Articles 16 and 18 of the Statute to prosecute is limited to serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 and their perpetrators;²⁰
- ii. under Rule 77 of the Rules and paragraph 14(IV) of the Practice Direction on Procedure for the Investigation and Prosecution of Contempt before the International Tribunal No IT/227 ("the Practice Direction"), only a Chamber has the right to initiate contempt proceedings and only in cases where the Chamber has reason to believe that a person may be in contempt of the proceedings;²¹ and that
- iii. in the present case the Indictment shows no indication that such an initiative existed and the Prosecution, therefore, has no authority to prosecute under the provisions of Rule 77.²²

17. The Chamber takes note of the following procedure in the instant case:

- i. In its Order of 23 October 2003, the Trial Chamber took note of the *Slobodna Dalmacija's* violation of the Chamber's Order of 1 December 2000 and ordered the Registrar to appoint an *amicus curiae* in order to investigate the alleged responsibility of the former Editor-in-Chief of the *Slobodna Dalmacija* and his or her associates and the alleged involvement of Defence Counsel in the event of the intimidation of witnesses in the abovementioned cases;
- ii. The confirming judge Orie, when confirming the indictment, authorised the Prosecution to prosecute the case.

²⁰ The Motion at paras. 17-18.

²¹ *Ibid* at para 22.

²² *Ibid* at para 24.

18. The Chamber, therefore, finds that it authorised both the investigation and the prosecution of the present case. Accordingly, the Accused's arguments in this regard are dismissed.

V. ALLEGED DEFECTS IN THE FORM OF THE INDICTMENT

19. The Accused submits that the factual allegations in the indictment charge him with having violated a court order and that it is, therefore, unclear as to how he is supposed to have interfered with the Tribunal's administration of justice or threatened, intimidated, offered a bribe to or otherwise interfered with a witness who had been giving, had given or was about to give evidence in the proceedings before a Chamber, or a potential witness.²³ The Accused contends that it is clear that the Prosecutor did not substantiate the charges under Rule 77(A) and sub-Rule 77(A)(iv).²⁴

20. The Accused argues further that there is no factual allegation in the indictment from which it could be concluded that the Accused aided and abetted in the commission of contempt of the Tribunal.²⁵

21. The Accused claims that the indictment is, therefore, formally deficient and requests the Chamber to dismiss it as such.

22. Article 18(4) of the Statute of the Tribunal provides that "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" and Rule 47(C) provides that "the indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged. In addition, Article 21(4)(a) of the Statute provides that the accused is "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him" and Article 21(4)(b) of the Statute provides that the accused is "to have adequate time and facilities for the preparation of his defence."

23. The Appeals Chamber in the *Kupreškić* case stated in relation to these provisions that:

[i]n the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependant upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.²⁶

²³ *Ibid* at para. 25.

²⁴ *Ibid* at para 28.

²⁵ *Ibid* at para 27.

²⁶ *Prosecutor v Kupreškić et al*, Case No IT-95-16-A, Appeal Judgement, 23 October 2001 at para 88.

24. In relation to the Defence's argument that the Prosecutor did not substantiate the factual basis or the material facts for the charges in the Indictment under Rule 77(A) and Rule 77(A)(iv), the Chamber notes that in interpreting Rule 77(A)(iv), the Trial Chamber in the *Beqaj* case, held that:

Rule 77(A)(iv) gives a list of possible *actus reus* of the offence of contempt of court as follows: threat, intimidation, causing injury, offering of a bribe and otherwise interfering with a witness or a potential witness. The expression "otherwise interfering with a witness or a potential witness" is an indication that Rule 77 gives a non-exhaustive list of modes of commission of contempt of the Tribunal. In view of the *mens rea* indicated in Rule 77(A) the Chamber considers that otherwise interfering with a witness encompasses any conduct that it intended to disturb the administration of justice by deterring a witness or a potential witness from giving full and truthful evidence, or in any way to influence the nature of the witness' or potential witness' evidence. There is nothing to indicate that proof is required that the conduct intended to influence the nature of the witness's evidence produced as a result.²⁷

25. The Chamber endorses the finding of the *Beqaj* Trial Chamber that Rule 77(A)(iv) *encompasses*, but is not limited to, conduct that deters a witness from giving full and truthful evidence. The reasons for implementing protective measures for witnesses are to protect the witness's private or professional life and in order to encourage, or to make it possible for such witness, to testify before the Tribunal. The Chamber is satisfied that publishing the testimony of a protected witness could constitute "interference" with the witness, in particular with his private or professional life, and therefore such a conduct would be prohibited under Rule 77(A)(iv).

26. The Chamber notes that the Prosecution has stated that the testimony of the protected witness was published. The Chamber notes further that although it is therefore possible to conclude that, owing to the fact that the witness's identity and testimony was protected, publication of such identity and testimony would constitute interference with the witness's testimony, the Prosecution has not provided the factual basis setting out the manner in which the Accused's alleged publications have interfered with the witness. For this reason, the Chamber finds that the indictment is vague in setting out the material facts to support its charge under Rule 77(A)(iv) and orders the Prosecution to add the material facts which form the basis of its charge against the Accused of having "otherwise interfere[d] with the witness" under Rule 77(A)(iv).

27. The Chamber is satisfied that the Prosecution's material facts in the Indictment which purport to set out the details of the Accused's alleged knowing and wilful conduct, namely the publishing of the confidential testimony of a protected witness, are sufficiently clear and sufficiently explain the allegation brought under Rule 77(A)(iv) that the Accused allegedly

²⁷ *Ibid* at para 21.

otherwise interfered with a witness who has given evidence in proceedings before a Chamber so that the Accused may prepare his defence.

28. In relation to Rule 77(A), the Chamber notes that this sub-rule does not contain any legal or factual elements separate from Rules 77(A)(ii) and 77(A)(iv) in that Rule 77(A) contains both the material element (i.e. interference with administration of justice) and the mental element (i.e. knowledge and wilfulness) of the offence of contempt whereas sub-Rules 77(A)(ii) and (iv) are non-exhaustive examples of material elements by which the offence of contempt is constituted. The Chamber, therefore, holds that since the Prosecution has established a factual basis for the Accused's liability under Rules 77(A)(ii) it has automatically established a sufficiently clear factual basis for the Accused's liability under Rule 77(A). In short, the same alleged conduct of the Accused is charged cumulatively under Rule 77(A), sub-Rule 77(A)(ii) and Sub-Rule 77(A)(iv).

29. The Appeals Chamber in the case *Prosecutor v Delalić et al*, allowed the practice of cumulative charging as follows:

Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges will be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.²⁸

30. In relation to Jović's argument that there is no factual allegation in the indictment from which it could be concluded that he aided and abetted in the commission of contempt of the Tribunal, the Chamber notes that the Accused, in allegedly having published the relevant articles, must have acted in concert with others and that in pleading that the Accused committed the relevant acts of contempt, it may also argue, as a different legal characterisation of the same factual scenario, that the accused provided a substantial assistance in such acts. Proof of the mental element underlying a conduct or one set of facts, namely whether the Accused intended to commit the offence of contempt or knew that by providing substantial assistance to others he was aiding and abetting the offence of contempt is a matter of evidence for trial.

31. The Chamber notes, however, that the Prosecution has not indicated in the Indictment, what conduct on the part of the Accused amounted to the alternative charge of aiding and abetting or the manner in which such conduct occurred. The Chamber, therefore, finds that the Indictment is vague in this respect and requests the Prosecution to provide such information.

²⁸ Judgement Case No IT-96-21, Appeals Chamber, 20 February 1991, at para. 400.

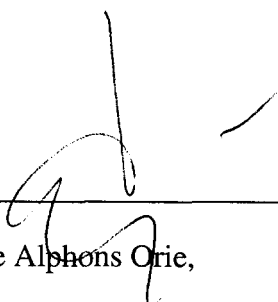
VI Disposition**FOR THE FOREGOING REASONS:****PURSUANT TO Rule 72, the Chamber hereby:**

DISMISSES the Motion in relation to the Accused's arguments that the Tribunal lacked jurisdiction and that the Prosecutor lacked the requisite authority; and

GRANTS the Motion in relation to the Accused's arguments on the form of the indictment and **ORDERS** the Prosecution to provide the additional factual information as specified above.

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

Dated this 21st day of December 2005
At The Hague,
The Netherlands



Judge Alphons Orie,
Presiding Judge, Trial Chamber I

[Seal of the Tribunal]