Cour Pénale Internationale

International Criminal Court

No.: **ICC-02/04**

Date: **27 June 2005**

Original: **English**

PRE-TRIAL CHAMBER II

Before: **Judge Tuiloma Neroni Slade, Presiding Judge**
Judge Mauro Politi
Judge Fatoumata Dembele Diarra

Registrar: **Mr. Bruno Cathala**

SITUATION IN UGANDA

Under seal
Ex parte only available to the Prosecutor

Registration in the record of material presented during the *ex parte* hearing held in closed session on 16 June 2005

The Office of the Prosecutor
Ms. Bensouda, Deputy Prosecutor
Ms. Chung, Senior Trial Attorney
Mr. Guariglia, Senior Appeals Counsel
Mr. MacDonald, Associate Appeals Counsel

The Registrar of the International Criminal Court (the "Court"),

Noting that pursuant to rule 121, sub-rule 10 of the Rules of Procedure and Evidence, the Registrar is responsible for creating and maintaining a full and accurate record of all proceedings before the Pre-Trial Chamber,

Noting that during the *ex parte* hearing held in closed session on 16 June 2005 (the "Hearing"), the Office of the Prosecutor quoted material thus far not part of the record of the proceedings;

Noting that during the Hearing, the Registrar announced that the material referred to respectively as "Annex 1" and "Annex 2" were to be registered in the record of the proceedings;

Noting that the Prosecutor did not raise any objection to the registration of the material;

For these reasons, the Registrar registers in the record of ICC-02/04 the attached material submitted during the hearing, hereby numbered as follows:

> **H1-02/04-Conf-Exp** – The Prosecutor v. Limaj, Confirmation of indictment, 27 January 2003, Confidential, ICTY IT-03-66-I;
>
> **H2-02/04-Conf-Exp** – The Prosecutor v. Ratko Mladić, Order Granting leave to File an Amended Indictment and Confirming the Amended Indictment, 8 November 2002, ICTY IT-95-5/18-I;

~~ICC-02/04-15-US-Exp 28-06-2005 3/19 SL PT~~

Refers to the transcript of the hearing as follows:

H1 – referred to by the OTP on page 109, line 24 of the transcript T-02/04-2-Conf-Exp-EN and page 83, line 21 of the transcript T-02/04-2-Conf-Exp-FR; announced to be filed in the record on page 112 line 20 of T-02/04-2-Conf-Exp-EN, and page 85, line 16 of T-02/04-2-Conf-Exp-FR

H2 – referred to by the OTP on page 110, line 11 of the transcript T-02/04-2-Conf-Exp-EN and page 84, line 4 of the transcript T-02/04-2-Conf-Exp-FR; announced to be filed in the record on page 112 line 20 of T-02/04-2-Conf-Exp-EN and page 85, line 16 of T-02/04-2-Conf-Exp-FR

On behalf of the Registrar
Marc Dubuisson
Head of the Division of Court Services

Dated this 23rd day of June 2005

At The Hague, The Netherlands

~~ICC-02/04-15-US-Exp 28-06-2005 4/19 SL PT~~

H1-02/04-Conf-Exp

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-03-66-I
	Date:	27th January 2003
	Original:	English

BEFORE A JUDGE OF THE TRIBUNAL

Duty Judge: **Judge Amin El Mahdi**

Registrar: **Mr. Hans Holthuis**

Decision of: **27th January 2003**

PROSECUTOR

v.

Fatmir LIMAJ, a.k.a. Çeliku
Haradin BALA, a.k.a. Shala
Isak MUSLIU, a.k.a. Qerqiz
Agim MURTEZI, a.k.a. Murrizi

CONFIDENTIAL

CONFIRMATION OF INDICTMENT

Office of the Prosecutor:

Andrew Cayley
Alex Whiting

I, Judge Amin El Mahdi, Judge 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"), having been designated by the President as Duty Judge for the review of an indictment under Rule 28(A) of the Tribunal's Rules of Procedure and Evidence ("the Rules"):

BEING SEIZED of the Prosecution's "Motion for Confirmation of the Indictment, for the Issuance of Arrest Warrants and for Protective Measures", filed confidentially on 15th January 2003" ("the Motion"), to which was attached an indictment against **Fatmir LIMAJ**, a.k.a. Çeliku, born on 4th February 1971 in Banja (Kosovo), **Haradin BALA**, a.k.a. Shala, born on 10th June 1957 in Gornja (Kosovo), **Isak MUSLIU**, a.k.a. Qerqiz, born on 31st October 1970 in Ra~ak (Kosovo), and **Agim MURTEZI**, a.k.a. Murrizi, born on 20th February 1956 in ^u~uljaga (Kosovo), (altogether "the Accused persons");

HAVING EXAMINED, under Rule 47(E) of the Rules, the Motion, the Indictment, the attached Supporting Material and the Addendum to the Supporting Material, but finding in the Indictment certain issues in need of further clarification;

HAVING HEARD the Prosecutor on the 22nd January 2003 pursuant to Rules 47 and 53 of the Rules on the matter;

HAVING ADJOURNED the review under Rule 47(F)(iv) so as to give the Prosecutor the opportunity to modify the indictment, upon which a revised indictment was submitted by the Prosecutor to me on the 24th January 2003 along with a Declaration of 15th January 2003 by Howard Tucker in Support of the Indictment, the latter filed *confidentially and ex parte*;

TAKING INTO CONSIDERATION that pursuant to Article 19 of the Statute of the International Tribunal ("the Statute") and Rule 47 of the Rules, I must be satisfied on the basis of my examination of each of the counts set forth in the Indictment that the Prosecution has established a *prima facie* case;

NOTING that in the Indictment, the Accused persons are alleged to have committed in Kosovo within the territory of The Former Yugoslavia, the following crimes: Crimes Against Humanity (imprisonment, torture, cruel treatment and murder), punishable under Article 5 of the Statute, and

Violations of the Laws and Customs of War (cruel treatment, torture and murder), punishable under Article 3 of the Statute;

AFTER HAVING CAREFULLY EXAMINED each count in the revised indictment and considered the Supporting Material provided by the Prosecutor, including the statements of 4 witnesses, three of which were themselves victims of the alleged crimes, and the two Declarations made by Howard Tucker, the last of which was filed confidential and *ex parte* on 24 January 2003;

BEING THEREBY SATISFIED that a *prima facie* case has been made out by the Prosecutor in the case against the Accused in respect of the crimes for which they are charged in the Indictment;

PURSUANT to Article 19 of the Statute and Rules 47, 53, 54, 55 and 59bis of the Rules;

HEREBY CONFIRM the Indictment in respect of each and every count therein;

AND ORDER THAT

1. Copies of the Arrest Warrants for the Accused persons, addressed to the Prosecutor, the United Nations Mission in Kosovo ("UNMIK"), to the NATO Kosovo Force ("KFOR") and to the competent authorities of any State Member of the United Nations, shall be transmitted to the Prosecutor who may, in her discretion, transmit them to UNMIK, KFOR and/or the said authorities for search and apprehension of the Accused persons;
2. With the exception of UNMIK, KFOR and the said authorities, there shall be no disclosure of the Indictment, this Decision or the Arrest Warrants until the Arrest Warrants are served upon the Accused, or until further order;
3. There, in any case, be no public disclosure of the Supporting Material until further order;

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

Judge Amin El Mahdi

Dated this twenty seventh day of January 2003
At The Hague
The Netherlands

~~ICC-02/04-15-US-Exp 28-06-2005 8/19 SL PT~~

(Seal of the Tribunal)

H2-02/04-Conf-Exp

IT-95-5/18-I
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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-95-5/18-I

Date: 8 November 2002

Original: English

THE CONFIRMING JUDGE

Before: **Judge Alphons Orie**

Registrar: **Mr. Hans Holthuis**

Decision of: **8 November 2002**

PROSECUTOR

v.

RATKO MLADIĆ

ORDER GRANTING LEAVE TO FILE AN AMENDED INDICTMENT AND CONFIRMING THE AMENDED INDICTMENT

Office of the Prosecutor:

Andrew Cayley

11072

1. I, Judge Alphons Orie, Judge 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 ("International Tribunal"), am seized of the Prosecution's "Motion for Leave to File an Amended Indictment, for Confirmation of the Amended Indictment and for an Order in Terms of Rules 53(A) and 59 *bis*(A) - in support of which is attached a memorandum[1]" as assigned to me by the President of the Tribunal;

I- Procedural Background

2. Pursuant to Rule 50 of the Rules of the Procedure and Evidence (the "Rules"), the Prosecution is seeking leave to amend its two outstanding indictments against Ratko Mladić filed under case numbers IT-95-5-I (hereinafter the "First Indictment") and IT-95-18-I (hereinafter the "Second Indictment"). In their place, the Prosecution has submitted a new consolidated indictment (hereinafter "the Amended Indictment") and is requesting that it be confirmed. The Prosecution explained its reason to me in my Chambers on 17 October 2002 and the next day, 18 October 2002, filed an addendum to the supporting material it had submitted on 11 October 2002.

3. The First Indictment was originally filed on 24 July 1995 and confirmed by Judge Jorda on 25 July 1995. The sixteen-counts contained therein charge both Radovan Karadžić and Ratko Mladić with genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949 and violations of the laws and customs of war. The indictment states *inter alia* that Ratko Mladić, the former commander of the Bosnian Serb army, is responsible for serious violations of international humanitarian law committed by Bosnian Serb forces in Bosnia and Herzegovina from May 1992 through July 1995. These acts include the detention under horrific conditions of civilian Bosnian Muslims and Croats in a network of prison camps; the plunder and destruction of Muslim and Croat property, including religious and cultural institutions; the forcible expulsion or deportation of thousands of civilians from their homes in an effort to eliminate the Muslim and Croat population in certain parts of Bosnia and Herzegovina; the shelling of civilian gatherings in Sarajevo, Srebrenica, Žepa, Goražde, Bihać and Tužla; a systematic sniping campaign against civilians in Sarajevo; and the taking of United Nations peacekeepers as hostages and human shields.

4. The Second Indictment was filed on 15 November 1995 and was confirmed by Judge Riad on 16 November 1995. It charges that Radovan Karadžić and Ratko Mladić are responsible for serious violations of international humanitarian law committed by Bosnian Serb forces during

[1] "Memorandum in Support of Prosecutor's Motion for Leave to File an Amended Indictment, for Confirmation of the

the take-over of the "safe area" of Srebrenica in Bosnia and Herzegovina in July 1995. During and immediately after the military take-over of the enclave, it is alleged that thousands of Bosnian Muslim civilian men were systematically executed in a variety of locations. The twenty-count Second Indictment includes the charges of genocide, crimes against humanity and violations of the laws and customs of war.

5. Further to these indictments, arrest warrants were issued and then sent to the Federal Republic of Yugoslavia, the Republic of Bosnia and Herzegovina and the Bosnian Serb administration in Pale. Radovan Karadžić and Ratko Mladić however were not arrested. On 18 June 1996, in accordance with a procedure set out in Rule 61, the Confirming Judges ordered that both indictments be submitted to a Trial Chamber for review. Hearings were held over several days in June and July 1996. On 11 July 1996, on the basis of testimony and the supporting material of the indictment, the Trial Chamber issued a Decision in which it ordered that international arrest warrants be served on "all States". In addition, the Trial Chamber invited the Prosecution to supplement the indictments and, in particular, to add to the genocide charge (based on Article 7(3) of the Statute) the allegation of responsibility under Article 7(1) of the Statute.

6. On 18 May 2000, the Prosecutor submitted an amended indictment against Radovan Karadžić. Leave to amend the First and Second Indictments against Radovan Karadžić was granted by Judge Wald on 31 May 2000. Satisfied that the Prosecution had established a *prima facie* case on all the counts of the amended indictment, she confirmed it and noted that the Prosecution had not sought leave to amend the indictments against Ratko Mladić.

II- The Amended Indictment

7. As set out above, on 11 October 2002, the Prosecution requested leave to amend the two outstanding indictments against Ratko Mladić and confirmation of the Amended Indictment. The Prosecution submitted that the Amended Indictment consolidated the First and Second Indictments and reduced the total number of charges, leaving only the most serious ones. The Prosecution submits that the amendments are more in keeping with the current charging practices of its Office and reflect the evolving jurisprudence of the International Tribunal.[2] It also submits that the Amended Indictment would provide an appropriate basis for a motion of

Amended Indictment, and for an Order in Terms of Rules 53(A) and 59 *bis* (A)".
[2] Memorandum in Support of the "Prosecutor's Motion for Leave to File an Amended Indictment, for Confirmation of the Amended Indictment, and for an Order in Terms of Rules 53 (A) and 59 *bis* (A)" filed on 11 October 2002, para 16.

joinder with the Amended Indictment against Radovan Karadžić already approved on 31 May 2000.[3]

8. The following changes, among others, appear in the Amended Indictment. The facts underlying the charge of genocide in the First and Second Indictments are now incorporated into one count of genocide and one count of complicity in genocide (counts 1 and 2 respectively). The facts underlying the charge of persecution of the First Indictment are now incorporated into count 3 in the Amended Indictment. The facts underlying the charge of extermination and murder in the Second Indictment are now incorporated into counts 4, 5 and 6 in the Amended Indictment. The facts underlying the charges in counts 10-12 of the First Indictment are now incorporated into counts 10, 11, 13 and 14 of the Amended Indictment. The facts underlying the charge of taking of hostages are now incorporated into count 15 in the Amended Indictment.

9. Counts 3 to 9, 13, 15 and 16 of the First Indictment (unlawful confinement of civilians, outrages upon personal dignity, deliberate attack on the civilian population and individual civilians, destruction or wilful damage to institution dedicated to religion, destruction of property, appropriation of property, plunder of public or private property, taking civilians as hostage, inhumane treatment and cruel treatment) have been eliminated. However, the factual allegations underlying these charges have been shifted to support the remaining counts in the new indictment. Counts 3 to 20 of the Second Indictment (murder) have been deleted but, here too, the factual allegations underlying these charges have been shifted to support the remaining counts.

10. Several new charges have been added, namely: Count 2 (complicity in genocide); Count 7 (deportation); Count 8 (inhumane acts-forcible transfer); Count 9 (unlawful infliction of terror on civilians); and Count 12 (cruel treatment). The Amended Indictment also lists precisely the municipalities in which the crimes were allegedly committed and for which the responsibility of Ratko Mladić is entailed. Furthermore, the Amended Indictment expressly argues that Ratko Mladić participated in a joint criminal enterprise as a co-perpetrator and/or aider and abettor and emphasises the responsibility of Ratko Mladić for all the natural and foreseeable consequences of the execution of the joint criminal enterprise.

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[3] *Ibid.*

III- The applicable test for review of the Amended Indictment

11. Before confirming the Indictment submitted pursuant to Articles 18 and 19 of the Amended Statute of the International Tribunal (hereinafter "the Statute"),[4] and Rule 47 of the Rules, I must be satisfied that the Prosecution has established a *prima facie* case.

12. The Statute does not define the concept of a *prima facie* case. The lack of such a definition is reflected in the case-law of the Tribunal. Reviewing judges, in determining whether a *prima facie* case has been established, have sometimes determined a test to be applied but no unanimously adopted interpretation of the concept of *prima facie* has emerged. I will provide several examples of this.

13. In August 1995, Judge Sidhwa confirmed the indictment against the accused Rajić pursuant to Rule 47 which provides that the Prosecution shall submit an indictment if there are reasonable grounds for believing that a suspect has committed a crime and noted that the rule interprets Article 19 of the Statute.[5] Judge Riad, in November 1995, accepted that interpretation and confirmed the Indictments against the accused Mrkšić, Karadžić and Mladić. In both cases, he stated that there was sufficient evidence to provide reasonable grounds for believing that the accused had committed the crimes charged.[6]

14. In November 1995 also, Judge Kirk MacDonald reviewed the indictment against *Kordić et al.*[7] and was not satisfied that Rule 47, which applied to Article 18(4) of the Statute, was a satisfactory interpretation of Article 19 of the Statute. Seeking another interpretation, she turned to the commentary of Article 27 of the draft Statute for an International Criminal Court ("ICC") adopted by the International Law Commission in 1994 which states that "a prima facie case for this purpose is understood to be a credible case which would (if not contradicted by the

[4] Article 18-4 of the Statute "Investigation and Preparation of Indictment" provides that: "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"; Article 19 of the Statute "Review of an Indictment" provides that "1. 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. 2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial".

[5] *Prosecutor v Rajić*, Review of the Indictment, Case No. IT-95-12-I, 29 August 1995. Judge Sidhwa stated that the expression "*prima facie* case" was not grounded in "any uniform principle or set parameters" so far as international law was concerned.

[6] *Prosecutor v Mrkšić et al.*, Confirmation of Indictment, Case No. IT-95-13-I, 7 November 1995; *Prosecutor v Karadžić and Mladić*, Review of the Indictment, Case No. IT-95-5/18/I, 16 November 1995.

[7] *Prosecutor v Kordić et al*, Decision on Review of the Indictment, Case No. IT095-14-I, 10 November 1995.

~~ICC-02/04-15-US-Exp 28-06-2005 15/19 SL PT~~

11068

Defence) be a sufficient basis to convict the accused on the charge".[8] This interpretation was subsequently applied by other Confirming Judges.[9]

15. In 2001, Judge Hunt, the Confirming Judge in the *Milošević et al.* case who had previously applied the test used by Judge Kirk McDonald,[10] stated that ever since 1999 there had been considerable investigation into the definition of a *prima facie* case.[11] Quoting various decisions on acquittal and the *Delalić* Appeal Judgement, Judge Hunt considered that, although the test was, in substance, the same, the definition of a *prima facie* case was now expressed as "whether there is evidence (if accepted) upon which a reasonable trier of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question".[12]

16. That formulation originates from the test the Judges applied when ruling on a motion for a judgement of acquittal, presented pursuant to Rule 98 *bis*, once the Prosecution case has been tested by the Defence, that is, at a stage of the proceedings subsequent to the review of the indictment.[13] On that basis, Judge May in the *Milošević et al.* case considered that the test for review of an indictment as formulated in 1995 by Judge Kirk McDonald was the most appropriate for that stage of the proceedings.[14]

17. I note however that although Judge Kirk McDonald adopted the test set out in the draft Statute for the ICC,[15] the Rome Statute of the ICC of 1998 adopted a different one. Whereas Article 58 of the Statute states that a suspect may be arrested and detained if there are reasonable grounds for believing that he/she committed the crimes charged, Article 61(7) requires that there be sufficient evidence to establish substantial grounds for believing that the accused committed each of the crimes charged in order for him/her to be put on trial.

18. As seen above, no generally accepted and uniformly applied definition of what constitutes a *prima facie* case in the Tribunal exists.[16] In the absence of such a definition in the Tribunal and

[8] *Ibid*, at 2-3, adopting the Report of the International Law Commission (containing both the Draft Statute and its commentary), UN Document A/49/10 (1994), at 94-95.
[9] See e.g., *Prosecutor v Milošević et al*, Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, Case No IT-99-37-I, 29 June 1999, para 4, footnote omitted (Judge Hunt confirming).
[10] See footnote 9.
[11] *Prosecutor v Milosević et al*, Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, Case No IT-99-37-I, 29 June 2001, para 3, footnote omitted.
[12] *Ibid.*
[13] See e.g., *Prosecutor v Jelisić*, Appeal Judgement, Case No. IT-95-10-A, 5 July 2001, para 36.
[14] *Prosecutor v Milošević et al*, Decision on Review of Indictment, Case No IT-99-37-I, 22 November 2001, para 14.
[15] See footnote 8.
[16] Judge Sidhwa reviewed interntational law sources and concluded that the expression *prima facie* was not grounded on uniform principle or parameters so far as international law was concerned, *see supra* footnote 5.

11067

in customary or conventional law,[17] it may be of assistance to turn to screening mechanisms in domestic criminal procedure systems which deal with the question whether there is a case for a suspect or an accused to answer, whether he can be put on trial.

19. In most[18] of the domestic systems I consulted, I found that the courts hand down decisions in respect of that question at the end of the pre-trial proceedings and before the commencement of the trial. Once the prosecution or a pre-trial judge considers that the pre-trial investigations or examinations have been completed, a hearing is held during which the accused may contradict or otherwise challenge the Prosecution evidence. The judge, a panel of judges[19] or a jury then decides whether it is justified to proceed against the accused at trial. Such decisions necessarily involve a provisional assessment of the strength of the case. It is worth noting that while in the Tribunal the review of the indictment is coeval with the decision on the arrest of the accused, in most domestic jurisdictions an arrest warrant or order for detention may be issued before the charges held against a suspect are confirmed. Thus, a provisional assessment of the strength of the prosecution's case is made before the confirmation of the charges[20] on the basis of a standard of proof usually lower so as to take into consideration the early stage of the proceedings.[21]

20. In examining decisions concerning whether to send the accused to trial, I noted that the standard of proof to assess the strength of the case, including both its legal and factual elements, is sometimes formulated negatively to indicate when the accused should be discharged. For example, if, on the basis of all the evidence, the Judge believes that a sufficient case has not been made in order to justify bringing the accused to trial,[22] or if the evidence[23] or rational indicia[24] are insufficient, the accused should be discharged. At times, however, decisions to proceed and to try the accused are formulated positively,[25] namely if "there is sufficient

[17] *Ibid.*.
[18] In the Rwandan system of criminal procedure e.g., I fail to find such a mechanism.
[19] We find such panels of judges, e.g., in the (amended) 1953 Criminal Procedural Code of the SFRY (art. 249) and in the 1977 Criminal Procedural Code (art. 270) of the SFRY.
[20] Then the test is whether the case against the accused is strong enough to justify, if other requirements are also met, that he will remain in pre trial custody, e.g., the initial appearance in the United States of America.
[21] A lower standard of proof is similarly applied, in the Tribunal, at an early stage of the proceedings by the Prosecution when applying for a review of an indictment, *see* Rule 47 (B).
[22] These wordings are for instance used in Article 548.1 of the Criminal Code of Canada and Article 135 of the South African Criminal Procedure Act. The evidence will certainly be insufficient if it appears that the accused has not committed the offence, as Article 425 of the Codice di Procedura Penale (Italian Code of Criminal Procedure) puts it.
[23] Article 177 of the Code de Procédure Pénale (French Code of Criminal Procedure) provides "s'il n'existe pas de charges suffisantes contre la personne [...]" or Schedule 3 to the Crime and Disorder Act 1998 (England) "if it appears to him that the evidence against the applicant would not be sufficient for a jury properly to convict him [...]".
[24] Article 637 of the Ley de Enjuiciamiento (Spanish Act on Criminal Procedure) "Cuando no existan indicios racionales [...]".
[25] See e.g., return of an indictment by a grand jury in the United States of America or the Eröffnungsbeschluß under Article 203 of the German Code of Criminal Procedure (StPO).

evidence to put the accused on trial for the offence" [26] or if, on the basis of the pre-trial investigations, the suspicion has been sufficiently substantiated.[27]

21. Differences in domestic systems are not limited to the formulation of the applicable standard. The procedural context can differ as well. Sometimes screening takes place without the accused's having been informed, sometimes after a hearing in which he/she appears or may appear. In some legal systems the accused must apply for screening of the prosecutor's case[28] whereas in others a decision will, as a rule, precede the commencement of the trial. However different the domestic systems in this respect may be, the function of such screening, I believe, is the same everywhere and serves the same purpose which I see served in Article 19 of the Statute.

22. The purpose of the above-mentioned screening mechanisms is to protect the accused against oppressive unfounded charges. Standing trial is a difficult experience and an accused should not be put on trial if, from the very outset, a conviction is unlikely. The French text of Article 19 of the Statute also seems to express this concept. It states that when the Prosecutor "a établi qu'au vu des présomptions, il y a lieu d'engager des poursuites", the reviewing Judge shall confirm the Indictment. In French, the standard of proof which is implied is that there must be reasonable grounds to proceed and to put the defendant on trial. The French text does not seem to concern itself primarily with an unequivocal expression of the standard of the evidence to be presented but rather with the question of whether the evidence justifies proceeding against the accused. Still, it is self-evident that a decision as to whether it is reasonable to send an accused to trial always depends on there being realistic expectations that he/she will be convicted.

23. The gravity of the crimes over which the Tribunal exercises its jurisdiction makes me cautious. To stand trial for such offences is more burdensome than is usually already the case for common crimes. However, those persons who have come forward as the victims of the alleged crimes may legitimately trust that the Tribunal will not discharge a suspect or an accused lightly.[29] This would be the case if the Prosecutor were not allowed to proceed when there is a

[26] Article 548.1 of the Criminal Code of Canada.
[27] Article 203 of the Strafprozessordung (German Code of Criminal Procedure)
[28] E.g., under the English Crime and Disorder Act 1998, Schedule 3 (2-(1)) the person sent for trial may apply for a dismissal of the charges. Before that Act came into effect a screening of the available evidence would take place in Committal Proceedings. Although usually it is the accused who seeks review, in the South African system the prosecutor is exclusively entitled to initiate the preliminary examination that may result in an early discharge of the accused (Art. 135 of the South African Criminal Procedure Act).
[29] A dismissal under Rule 47 (F) does not preclude the Prosecution from subsequently bringing an amended indictment against the same person if supported by additional evidence under Rule 47 (I).

realistic prospect of a conviction on the basis of the evidence presented. The Trial Chamber however must make the final determination as to the guilt or innocence of the accused.

24. Another aspect I take into consideration is that in the legal system of the Tribunal, unlike in most criminal procedure systems, the accused has not yet had the opportunity to contradict or challenge the evidence. The likelihood of the accused's being convicted on the exclusive basis of unchallenged and uncontradicted evidence is higher. I agree that this aspect does not make it possible to apply a low standard of proof.

25. I further take into consideration the fact that the screening of the strength of a case before the Tribunal occurs at a relatively early stage of the proceedings and not, as in most domestic legal systems, immediately before the commencement of the trial.

26. For all these reasons and having regard to both the English and French texts, I will discharge my duty under Article 19 of the Statute and allow the Prosecutor to proceed to trial against the accused on the condition that the Prosecution evidence, if accepted and uncontradicted, sufficiently supports the likelihood of the accused's being convicted by a reasonable trier of fact.

IV- Conclusion and Orders

27. I agree that the consolidated Amended Indictment will expedite the proceedings should Ratko Mladić be arrested and therefore **GRANT** the Prosecution's request for leave to file the Amended Indictment.

28. On the basis of the material submitted by the Prosecution on 11 and 18 October 2002 and after having heard the Prosecution in Chambers on 17 October 2002, I am satisfied that, if accepted and uncontradicted, the Prosecution evidence sufficiently supports the likelihood of the accused's being convicted by a reasonable trier of fact.

29. Accordingly, pursuant to Rule Article 19 of the Amended Statute of the International Tribunal and Rule 47, I hereby **CONFIRM** the Amended Indictment in respect of each and every count therein.

30. In addition, pursuant to Rules 50, 53, 53 *bis*, 54, 55 and 59 *bis*, I hereby **ORDER** that:

1- copies of the arrest warrant attached be transmitted to the Prosecutor, who may transmit them to the International Stabilisation Force ("SFOR") and/or to the competent authorities of any Member State of the United Nations;

2- copies of the arrest warrant be transmitted to the authorities of the Federal Republic of Yugoslavia, in particular, to the authorities of the Republic of Serbia and to the authorities of Republika Srpska; and,

3- there be no public disclosure of the supporting materials until further order.

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

Judge Alphons Orie

Dated this eighth day of November 2002
At The Hague
The Netherlands