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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-97-25/1-PT

IN THE REFERRAL BENCH

Before: Judge Alphons Orie, Presiding
Judge O-Gon Kwon
Judge Kevin Parker

Acting Registrar: John Hocking

Date Filed: 20 April 2009

THE PROSECUTOR

v.
MITAR RAŠEVIĆ
SAVO TODOVIĆ

PUBLIC

PROSECUTOR'S FINAL PROGRESS REPORT

The Office of the Prosecutor:
Mr. Serge Brammertz

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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THE PROSECUTOR

v.

MITAR RAŠEVIĆ
SAVO TODOVIĆ

PUBLIC

PROSECUTOR'S FINAL PROGRESS REPORT

1. In accordance with the "Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II" of 8 July 2005,¹ the Prosecutor hereby files his eleventh and final progress report in this case.

2. The Decision on Referral ordered:

the Prosecutor to file an initial report to the Referral Bench on the progress made by the Prosecutor of Bosnia and Herzegovina in the prosecution of the Accused six weeks after transfer of the evidentiary material and, thereafter, every three months, including information on the course of the proceedings of the State Court of Bosnia and Herzegovina after commencement of trial, such reports to comprise or to include the reports of the international organisation monitoring or reporting on the proceedings pursuant to this Decision provided to the Prosecutor.²

3. The Tenth Progress Report in the *Rašević and Todović* case was filed on 19 January 2009.³

4. Following the agreement between the Chairman in the Office of the Organisation for Security and Co-operation in Europe's Mission to Bosnia and

¹ *Prosecutor v. Mitar Rašević and Savo Todović*, Case No. IT-97-25/1-PT, ("*Rašević and Todović* case"), Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, 8 July 2005 ("Decision on Referral").

² Decision on Referral, p. 46.

³ See *Rašević and Todović* case, Prosecutor's Tenth Progress Report, 19 January 2009.

Herzegovina (the "OSCE") and the Office of the Prosecutor, the Prosecutor received OSCE's tenth and final report on 14 April 2009.⁴

5. The OSCE summarises the proceedings in the Rašević and Todović case as follows:

- On 9 February 2009, the Appellate Panel of the State Court delivered a final and binding verdict in the Case of Mitar Rašević *et al.*, partially granting the defence appeals on two points. First, the Appellate Panel modified the mode of participation in the offence, explicitly vacating the appellants' conviction on command responsibility. Second, the Appellate Panel held that Mitar Rašević was not duly credited in the first instance with his acts of kindness at the KP Dom, Foča, although these acts had been considered a highly mitigating circumstance by the Trial Panel. Accordingly his sentence was reduced from eight and a half to seven years' of imprisonment.
- On 17 and 18 March 2009 respectively, Mitar Rašević and Savo Todović began serving their sentences of seven years' and twelve and a half years' imprisonment at the Penal Correctional Institution in Foča. Rašević has approximately 1 year and 8.5 months left to serve, when credited with the time he spent in custody, from 15 August 2003 to 28 November 2008. His prison term should expire around 1 January 2011. Todović has about 8 years and 7.5 months of imprisonment remaining, after consideration of his time in custody, from 15 January 2005 to 28 November 2008. His prison term will expire in November 2017.⁵

6. Reviewing the Appellate Verdict in the Rašević and Todović case, the OSCE noted two points of jurisprudential value. The first issue relates to the application of JCE. The Appellate Panel found that the analysis of the Trial Panel regarding JCE was correct in its entirety with the exception of the required degree of contribution of an Accused in a joint criminal enterprise. It stated also that JCE is irrefutably an institution of customary international law which existed and was applied long before the commission of the offences in this case, and that the provisions pertaining to JCE were binding on BiH and before that on the Socialist Federal Republic of Yugoslavia (SFRY). Hence, no principle of legality was found to be violated. Moreover, it stated that although the criminal procedure codes of BiH, of the SFRY, and the ICTY Statute do not explicitly mention JCE as a form of individual criminal responsibility, the ICTY and State Court jurisprudence has recognized it.⁶

⁴ Tenth Report in the *Mitar Rašević and Savo Todović* Case Transferred to the State Court Pursuant to Rule 11bis, April 2009 (hereinafter "Report").

⁵ Report, p. 1.

⁶ Report, p. 2.

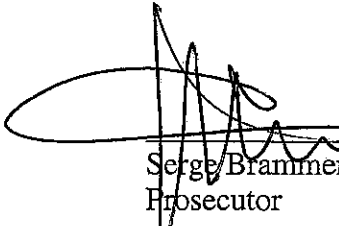
7. Regarding Rašević's conduct, the Appellate Panel pointed out that the occasional offering of assistance to certain detainees was never directed at undermining the management and operation of the detention camp but rather constituted individual acts that were carried out in secrecy: they never grew to become possible attempts to change the established system or the ill-treatment.⁷ Furthermore, the Appellate Panel found that it is not possible, and that it would be illogical, to convict the appellants under both the notion of joint criminal enterprise and that of command responsibility for the same acts, as the Trial Panel had done. Rather, it opined that the Trial Panel should have only rendered a single conviction under the theory of responsibility that gives the most accurate account of the appellants' conduct. Thus, the Appellate Panel vacated the conviction under command responsibility.⁸

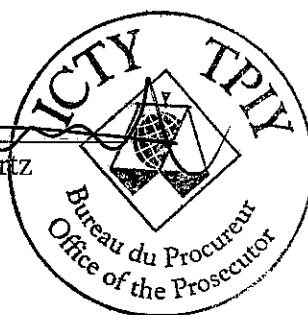
8. The second issue relates to sentencing. OSCE commented on the reduction of Rašević's sentence but highlighted that the Report does not intend to question the appropriateness of the sentence. The Prosecutor shares this view.⁹

9. As the appeals proceedings are now completed, this is the Prosecutor's last report regarding monitoring of proceedings in the *Rašević and Todović* case.

10. Attached to this report and marked as Annex A is a copy of the OSCE Report.

Word count: 909


 Serge Brammertz
 Prosecutor



Dated this twentieth day of April 2009
 At The Hague
 The Netherlands

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Report, p. 4.

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FOR THE FORMER YUGOSLAVIA

Case No. IT-97-25/1-PT

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ANNEX A
TO
PROSECUTOR'S FINAL PROGRESS REPORT



**Organization for Security and Co-operation in Europe
Mission to Bosnia and Herzegovina**

**Tenth and Final OSCE Report in the
Mitar Rašević and *Savo Todović* Case
Transferred to the State Court pursuant to Rule 11*bis***

April 2009

SUMMARY OF DEVELOPMENTS

The case of Defendants *Mitar Rašević* and *Savo Todović* (hereinafter also Defendants or Convicts) is the fifth case transferred from the ICTY to the Court of BiH pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence (RoPE). This constitutes the tenth and final report that the OSCE Mission to Bosnia and Herzegovina (BiH) submits to the ICTY Prosecutor's Office, covering the period from 1 January 2009 to 18 March 2009. After describing below the main developments during the reporting period, this Report includes a note regarding certain points of jurisprudential value observed in the Appellate verdict. These pertain to the modalities of participation in the crime and to sentencing.

It may be reiterated that last year, on 28 February 2008, the Court pronounced the first-instance verdict in this case finding Savo Todović and Mitar Rašević guilty under the theories of joint criminal enterprise (JCE) and command responsibility for Crimes against Humanity for persecution in connection with acts of murder, enslavement, deportation or forcible transfer, imprisonment, torture, enforced disappearance, and other inhumane acts.¹ The Court sentenced the Defendants to twelve and a half years' and eight and a half years' imprisonment respectively. The Court rendered the written first-instance verdict on 20 June 2008, and the Parties appealed it.

Concerning the developments during this reporting period, it can be mentioned that on 9 February 2009, the Appellate Panel of the State Court delivered a final and binding verdict in the Case of *Mitar Rašević et al.*, partially granting the defence appeals on two points. First, the Appellate Panel modified the mode of participation in the offence, explicitly vacating their conviction on command responsibility. Second, the Appellate Panel held that Mitar Rašević was not duly credited in the first instance with his acts of kindness at the KP Dom Foča, although considered a highly mitigating circumstance by the Trial Panel. Accordingly his sentence was reduced from eight and a half years' imprisonment to seven.

On 17 and 18 March 2009 respectively, Mitar Rašević and Savo Todović began serving their sentences of seven years' and twelve and a half years' imprisonment at the Penal Correctional Institution in Foča. Rašević has roughly 1 year and 8.5 months left to serve, when credited with the time he spent in custody, from 15 August 2003 to 28 November 2008. His prison term will expire approximately on 1 January 2011. Todović has about 8 years and 7.5 months of imprisonment time remaining, after consideration for his time in custody, from 15 January 2005 to 28 November 2008. His prison term will expire in November 2017.

¹ Article 172(1)(h) of the Criminal Code of Bosnia and Herzegovina (BiH CC) in conjunction with items (a), (c), (d), (e) (f), (i), and (k) of the same Article.

Noted Points of Jurisprudential Value in the Appellate Verdict

i) Issues regarding the application of Joint Criminal Enterprise

In answering to the defence appeals, the Appellate Verdict in the Rasevic and Todovic case deals with certain matters connected to the notion of JCE, and presents one of the first attempts of the judiciary at the appellate level to clarify its application in the domestic setting and its relation to the notions of co-perpetration or other ways of participation in a crime, command responsibility, etc. In general, the Appellate Panel found that “the analysis of the Trial Panel regarding JCE was correct in its entirety with the exception for the required ‘degree of contribution’ of an Accused in a Joint Criminal Enterprise.”²

➤ The Appellate Panel agreed with the first instance verdict in stating that JCE is irrefutably an institution of customary international law which existed and was applied long before the commission of the offences in this case, and that the provisions pertaining to JCE were binding on BiH and before that on the Socialist Federal Republic of Yugoslavia (SFRY). Hence, no principle of legality was found to be violated. Moreover, it stated that although the criminal procedure codes of BiH, of the SFRY, and the ICTY Statute do not explicitly mention JCE as a form of individual criminal responsibility, the ICTY and State Court jurisprudence has recognised it.³

➤ The Appellate Panel further endeavoured to make certain distinctions in terms of the degree of participation required and the intent involved to prove the various forms of liability discussed in the first-instance verdict. Specifically, in relation to the first-instance verdict, the Appellate Panel stated that it

*“does not uphold the First Instance Panel’s view that the existence of a systemic JCE requires substantial contribution on the part of the perpetrator because in that case Article 29 of the CC BiH (co-perpetration) would be applied. However, the importance of participation of the Accused is necessary and relevant to establish that the accused shared the intent to achieve a common criminal goal”*⁴ Subsequently, it held that co-perpetration requires proving more elements than is the case with participation in a JCE.⁵

➤ Additionally, the Appellate Panel agreed with the first-instance verdict and ICTY jurisprudence, and reiterated that *“shared criminal intent to implement JCE does not require personal satisfaction or enthusiasm, or personal initiative in contributing to the joint enterprise.”*⁶ It also found important to stress in the of Defendant Rasevic’s conduct that *“the occasional offering of assistance to certain detainees was never directed at undermining the management and operation of the detention camp but rather constituted individual acts that were carried out in secrecy and they never grew to become possible attempts to change the established system or ill-treatment.”*⁷

➤ Furthermore, the Appellate Panel found that it is not possible and that it would be illogical to convict the Defendants under both the notion of joint criminal enterprise and that of command responsibility for the same acts, as the Trial Panel did. Rather, it opined that the Trial Panel should have only rendered a single conviction under the theory of responsibility that gives the most accurate account of the defendants’ conduct.⁸ Thus, the Appellate Panel vacated the conviction under command responsibility.

The Appellate Verdict’s certainly contributes to bringing more clarity as regards certain disputed issues in regards to the application of, and differences between, particularly the notion of JCE under customary international law JCE, the notion of accomplices under national law Article 29 BiH CC,

² Appellate Panel’s Verdict in Rasevic and Todovic p. 25.

³ Ibid, p. 26.

⁴ Ibid.

⁵ Ibid. It was accepted at both instances that the elements of co-perpetration had indeed been met in the case.

⁶ Ibid, p. 28.

⁷ Ibid, p. 29.

⁸ The Appellate Panel accepted though that the status of a commander can be an aggravating factor.

and the concept of command responsibility. It would be welcome and expected that future decisions bring further clarity as to which mode of liability is more appropriate depending on the alleged criminal conduct of an accused.

ii) With regard to the second issue of Rašević's reduction in sentence, the Appellate Panel held that the Trial Panel did not attach adequate importance to the relevant mitigating circumstances it identified – namely, Rašević's acts of kindness at the KP Dom Foča and his sincere remorse for the crimes committed. However, the Appellate Panel did not appear to explain in any more detail this decision, at least to a degree that future trial panels may easily derive adequate guidance on how much weight to attach to mitigating circumstances, or that future appellate judges can conclude with more certainty on which occasions to intervene in the trial panel's discretion when deciding on the sentence. Such justification may have been expected even more so, considering that the Appellate Panel modified the sentence of Rašević only by one and a half years, and in connection to a mitigating factor that had already been taken into account by the Trial Judges.

It should be highlighted that this Report does not intend to question the appropriateness of the sentences imposed at first instance or appellate levels. However, it may be observed that by not justifying in adequate detail the sentencing part of the verdict, an appellate panel's efforts to set specific sentencing standards may be limited in terms of persuasive jurisprudential value.

As noted in the Sixth Report in the Case of *Radovan Stanković*, submitted in June 2007 by the OSCE to the ICTY, appellate verdicts are useful tools in establishing sentencing policy.⁹ To do so effectively, judges must be able derive clearly from the appellate reasoning guidance on the applicability of sentencing factors and their weight, as well as on issues such as the scope of the appellate review regarding sentencing. This would include the degree to which the second instance panel can curb the trial judges' discretion in connection to the punishment imposed. This is particularly true because domestic law and its commentaries on sentencing and the review of punishment by higher jurisdictions is not well developed in this regard, thus making jurisprudence on the matter even more relevant. Furthermore, as is noted in the aforementioned Stankovic Report, a variety of standards that have been developed by the ICTY and the Council of Europe for the purposes of sentencing can prove useful in this regard in order to avoid disparities in sentencing and improve its consistency.

For instance, the ICTY has determined that a trial chamber has considerable discretion in deciding how aggravating and mitigating factors are applied in a particular case and what weight is given to them.¹⁰ Additionally, it has placed limitations on the appellate review as regards sentencing, requiring that such review should take place not when there is a mere disagreement with the result reached by the trial court in the exercise of its discretion, but rather when the latter committed a discernible, in the sense of serious, error which violated an applicable legal principle.¹¹ This principle would dovetail with the understanding that, absent a rehearing of the entire case at second-instance, it is the trial panel that has the direct contact with the actors in the case. Also in the words of a foreign court: "It must always be remembered that sentencing is an art rather than a science; [and] that the trial judge is particularly well placed to assess the weight to be given to various competing considerations."¹²

⁹ See OSCE Sixth Report in the Case of convicted person Radovan Stankovic, June 2007, p. 9.

¹⁰ See Prosecutor v. Blaskic, Case No. IT-95-14-A (Appeals Chamber), 29 July 2004, paras 685 and 696.

¹¹ See the OSCE Sixth Report in the *Stankovic* Case, page 6, and footnotes 13-16, which refer to the relevant ICTY judgements and Judges' opinions. Of particular relevance is the mentioned therein Separate Opinion of Judge Shahabuddeen in the Appellate Judgement in *Prosecutor v. Stanislav Galic*, T-98-29-A, 30 November 2006, para 13, which reads: "the test of appellate intervention is not mere disagreement with the result reached by the trial court in the exercise of its discretion, but whether the trial court committed an error in exercising its discretion in that it violated an applicable legal principle. Consequently, the mere fact that the Appeals Chamber considers that the sentence was lenient does not warrant intervention; a 'discernible error' would have to be shown."

¹² See Attorney General's Reference No. 4 1989, 11 Cr. App. R. (S.) 517, 521 (Lane, C.J.), quoted in Judge Meron's Separate and Dissenting Opinion in *Galic*, *ibid*, para. 4 footnote 7.

In light of the above and for the sake of clarifying as much as possible sentencing policy, it is worth reiterating the recommendations made in the Sixth Stankovic Report, namely for courts to justify as precisely as possible the factors that they take into account when meting out punishments. Also appellate courts should consider their role in shaping sentencing policy in BiH, and, thus, justify their decisions in more detail. In this manner, their judgements can serve as guidelines for first-instance panels, as well as to assist in clarifying problems of when and how to intervene in the discretion of trial panels in passing sentences.

LIST OF RELEVANT HEARINGS - SUBMISSIONS - DECISIONS

1. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 19 December 2008.
2. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 22 December 2008.
3. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 26 December 2008.
4. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 05 January 2009.
5. ICTY OTP Request to Court to receive written reports by the Public Security Station Foča on the regular reporting of Mitar Rašević and Savo Todović, dated 07 January 2009.
6. Response of Defence Counsel of Savo Todović declaring that no identification documents have been issued by the Republike Srbije in the name of Savo Todović, dated 08 January 2009.
7. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 12 January 2009.
8. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 16 January 2009.
9. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 19 January 2009.
10. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 23 January 2009.
11. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 26 January 2009.
12. Decision of the Appellate Panel continuing restrictive measures, dated 28 January 2009.
13. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 30 January 2009.
14. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 02 February 2009.
15. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 06 February 2009.
16. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 09 February 2009.
17. Decision of the Appellate Panel granting in part the Defence Counsel appeals to the first-instance verdict, dated 09 February 2009.
18. Presiding Judge's Order to execute punishment imprisonment for the Defendants, dated 09 February 2009.
19. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 13 February 2009.
20. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 16 February 2009.
21. Court order to Mitar Rašević to begin serving his sentence of imprisonment on 17 March 2009 at the Penal Correctional Institution Foča, dated 17 February 2009.
22. Court order to Savo Todović to begin serving his sentence of imprisonment on 17 March 2009 at the Penal Correctional Institution Foča, dated 17 February 2009.

23. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 20 February 2009.
24. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 23 February 2009.
25. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 27 February 2009.
26. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 02 March 2009.
27. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 06 March 2009.
28. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 09 March 2009.
29. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 13 March 2009.
30. Information of Public Security Station Foča on reporting of Mitar Rašević and Savo Todović, dated 16 March 2009.