IT-01-51-AR73
A384 - A366
18 APRIL 2002

IT-01-50-AR73
A384 - A366
18 APRIL 2002

IT-99-37-AR73
A384 - A366
18 APRIL 2002

384
to
384
to
384
to

UNITED
NATIONS

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

Cases: IT-99-37-AR73
IT-01-50-AR73
IT-01-51-AR73

Date: 18 April 2002

Original: French & English

BEFORE THE APPEALS CHAMBER

Before: Judge Claude Jorda, Presiding
Judge David Hunt
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron

Registrar: Mr Hans Holthuis

Decision of: 18 April 2002

PROSECUTOR

v

Slobodan MILOŠEVIĆ

REASONS FOR DECISION ON PROSECUTION INTERLOCUTORY APPEAL FROM REFUSAL TO ORDER JOINDER

Counsel for the Prosecutor:

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Mr Geoffrey Nice
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Mr Dirk Reyneveld

The Accused:

Mr Slobodan Milošević (unrepresented)

Amici Curiae

Mr Steven Kay
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Mr Mischa Wladimiroff

The appeal

1. Pursuant to leave granted by a Bench of the Appeals Chamber,[1] the Prosecutor ("prosecution") appealed against the decision of Trial Chamber III dismissing in part the application made to join the three indictments brought against Slobodan Milošević ("accused").[2] The Trial Chamber had ordered that two of the three indictments filed against the accused be joined, those relating to events in Croatia and Bosnia,[3] but it ordered that the first of the indictments, which related to events in Kosovo,[4] be tried separately and before the trial of the two joined indictments.[5]

2. Following an oral hearing of the interlocutory appeal,[6] the Appeals Chamber gave its formal decision by which it allowed the appeal. It ordered that there should be the one trial and that, for the purposes of that one trial, the three indictments were deemed to constitute one indictment.[7] It was stated that the Appeals Chamber's reasons for that decision would be issued in due course.[8] Those reasons are now stated.

The nature of the appeal

3. The prosecution accepts, correctly, that the decision of a Trial Chamber as to whether two or more crimes should be joined in the one indictment pursuant to Rule 49 of the Rules of Procedure and Evidence ("Rules") is a discretionary one.[9] A Trial Chamber exercises a discretion in many different situations – such as when imposing sentence,[10] in determining

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1 Decision on Prosecution Application for Leave to File an Interlocutory Appeal, 9 Jan 2002.
2 Decision on Prosecution's Motion for Joinder, 13 Dec 2001 ("Decision").
3 IT-01-50-I and IT-01-51-I, respectively.
4 IT-99-37-I.
5 Decision, par 53.
6 The hearing took place on 30 January 2002.
7 Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 1 Feb 2002 ("Formal Decision of Appeals Chamber"), p 3.
8 *Ibid*, p 4.
9 Interlocutory Appeal of the Prosecution Against "Decision on Prosecution's Motion for Joinder", 15 Jan 2002 ("Appellant's Written Submissions"), par 6. Rule 49, the full terms of which are discussed later, states: "Two or more crimes *may* be joined [...]" (the emphasis has been added).
10 *Prosecutor v Tadić*, IT-94-1-A and IT-94-1-A*bis*, Judgment in Sentencing Appeals, 26 Jan 2000 ("*Tadić* Sentencing Appeal"), par 22; *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Appeal"), par 187; *Prosecutor v Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000 ("*Furundžija* Appeal"), par 239; *Prosecutor v Delalić et al*, IT-96-21-A, Judgment 20 Feb 2001 ("*Delalić* Appeal"), pars 712, 725, 780; *Prosecutor v Kupreškić et al*, IT-96-16-A, Appeal Judgment, 23 Oct 2001 ("*Kupreškić* Appeal"), pars 408, 456-457, 460.

whether provisional release should be granted,[11] in relation to the admissibility of some types of evidence,[12] in evaluating evidence,[13] and (more frequently) in deciding points of practice or procedure.[14]

4. Where an appeal is brought from a discretionary decision of a Trial Chamber, the issue in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently. That is fundamental to any discretionary decision. It is only where an error in the exercise of the discretion has been demonstrated that the Appeals Chamber may substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber.

5. It is for the party challenging the exercise of a discretion to identify for the Appeals Chamber a "discernible" error made by the Trial Chamber.[15] It must be demonstrated that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.[16]

6. In relation to the Trial Chamber's findings of fact upon which it based its exercise of discretion, the party challenging any such finding must demonstrate that the particular finding

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[11] *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, par 22 (Leave to appeal denied: *Prosecutor v Brđanin & Talić*, IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 Sept 2000, p 3); *Prosecutor v Krajišnik & Plašvić*, IT-00-39&40-AR73.2, Decision on Interlocutory Appeal by Momčilo Krajišnik, 26 Feb 2002, pars 16, 22.

[12] *Prosecutor v Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 19; *Prosecutor v Kordić & Čerkez*, IT-95-14/2-73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, par 20; *Delalić* Appeal, pars 532-533.

[13] *Aleksovski* Appeal, par 64; *Kupreškić* Appeal, par 32.

[14] For example, granting leave to amend an indictment: *Prosecutor v Galić*, IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 Nov 2001, par 17; determining the limits to be imposed upon the length of time available to the prosecution for presenting evidence: *Prosecutor v Galić*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 Dec 2001, par 7.

[15] *Tadić* Sentencing Appeal, par 22; *Aleksovski* Appeal, par 187; *Furundžija* Appeal, par 239; *Delalić* Appeal, par 725; *Kupreškić* Appeal, par 408.

[16] *Tadić* Sentencing Appeal, par 20; *Furundžija* Appeal, par 239; *Delalić* Appeal, pars 725, 780; *Kupreškić* Appeal, par 408. *See* also *Serushago v Prosecutor*, ICTR-98-39-A, Reasons for Judgment, 6 Apr 2000, par 23.

IT-01-51-AR73 IT-01-50-AR73 IT-99-37-AR73

was one which no reasonable tribunal of fact could have reached,[17] or that it was invalidated by an error of law. Both in determining whether the Trial Chamber incorrectly exercised its discretion and (in the event that it becomes necessary to do so) in the exercise of its own discretion, the Appeals Chamber is in the same position as was the Trial Chamber to decide the correct principle to be applied or any other issue of law which is relevant to the exercise of the discretion. Even if the precise nature of the error made in the exercise of the discretion may not be apparent on the face of the impugned decision, the result may nevertheless be so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[18] Once the Appeals Chamber is satisfied that the error in the exercise of the Trial Chamber's discretion has prejudiced the party which complains of the exercise, it will review the order made and, if appropriate and without fetter, substitute its own exercise of discretion for that of the Trial Chamber.[19]

The basis of the Trial Chamber's decision

7. The prosecution's argument before the Trial Chamber was that, although it had presented three separate indictments against the accused, the crimes charged in all three indictments should nevertheless be tried together because:

(i) they could all have been pleaded in the one indictment, because the acts upon which they are based were committed by the same accused,[20] and they formed part of the same transaction;

(ii) one trial would be the most fair and expeditious way of dealing with all the crimes charged;

(iii) the public interest in the efficient administration of international justice would best be served in having one trial;

(iv) the victims and witnesses would best be protected if they were required to give evidence only once; and

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[17] *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999 ("*Tadić* Conviction Appeal"), par 64; *Aleksovski* Appeal, par 63; *Furundžija* Appeal, par 37; *Delalić* Appeal, pars 434-435, 459, 491, 595; *Kupreškić* Appeal, par 30.

[18] *Aleksovski* Appeal, par 186.

[19] *cf* Tribunal's Statute, Article 25.2.

[20] Although the accused is charged with four other persons in the Kosovo indictment, and alone in the other two indictments, his four co-accused in the Kosovo indictment have not yet been arrested.

(v) inconsistent verdicts and sentences and multiple appeals would be avoided.[21]

8. The principal issue in dispute before the Trial Chamber was whether the events to which all three indictments related formed part of the same transaction. The prosecution's argument that they did so required an acceptance that the allegations made in the three indictments were all part of a common scheme, strategy or plan on the part of the accused to create a "Greater Serbia", a centralised Serbian state encompassing the Serb-populated areas of Croatia and Bosnia and all of Kosovo, and that this plan was to be achieved by forcibly removing non-Serbs from large geographical areas through the commission of the crimes charged in the indictments. Although the events in Kosovo were separated from those in Croatia and Bosnia by more than three years, they were, the prosecution claimed, no more than a continuation of that plan,[22] and they could only be understood completely by reference to what had happened in Croatia and Bosnia.[23] The events in Kosovo, it was said, amounted to a crime waiting to happen but which had been delayed by pressure from the international community.[24] The prosecution also argued that, were the Kosovo indictment to be heard separately, evidence of the accused's role in the events of Croatia and Bosnia would be admissible in that trial.[25]

9. The Trial Chamber described the "essence of the test" to be applied for joinder to be permitted as being –

> [...] to determine whether there were a series of acts committed which together formed the same transaction, *ie* part of a common scheme, strategy or plan. However, the reference to a "series" and the use of the phrase "committed together" in Rule 49 indicates that the acts must be connected in the same way that common law and civil law jurisdictions require. There is no power to join unconnected acts on the ground that they form part of the same plan. As Judge Shahabuddeen explained, the plan must be such that the counts represent interrelated parts of a particular criminal episode.[26] If

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21 Prosecutor's Motion for Joinder, 27 Nov 2001 ("Motion"), pars 7, 8.

22 Oral hearing of the Motion, 11 Dec 2001 ("Trial Chamber Hearing"), IT-01-51 Transcript p 77. References throughout this Decision are to the transcript taken in the Bosnia trial.

23 Trial Chamber Hearing, IT-01-51 Transcript p 77.

24 *Ibid*, pp 77-78.

25 This is described in the Motion as similar fact evidence (par 30), but during the Trial Chamber Hearing it was said, more relevantly (but still not very clearly), that the evidence of the actions and thoughts of the accused in relation to Kosovo would be incomplete without the evidence of what happened in Croatia and Bosnia (Transcript, pp 51-52).

26 Reference is made to *Prosecutor v Kovačević*, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, Separate Opinion of Judge Mohamed Shahabuddeen, pp 2-3: "Joinder of offences is of course possible, within limits. Additional charges must bear a reasonable relationship to the matrix of facts involved in the original charge. [...] the question is whether all the counts, old and new, represent interrelated parts of a particular criminal episode. [...] It is not necessary for all the facts to be identical. It is enough if the new charges cannot be alleged but for the facts which give rise to the old." That was said by Judge Shahabuddeen in an appeal from the refusal of a Trial Chamber to permit the

[footnote continued next page]

there was no such series of acts and no plan, any application for joinder must fail. Where there is no similarity in time and in place, the conclusion that the counts represent interrelated parts of a particular criminal episode will be more difficult, albeit not impossible, to draw.[27]

10. When the Trial Chamber came to apply that test, it drew attention to the gap of more than three years between the last events in Bosnia and the first events in Kosovo,[28] to the facts that the conflicts in Croatia and Bosnia took place in neighbouring States to the Federal Republic of Yugoslavia ("FRY"), whereas those in Kosovo took place in the FRY itself,[29] and that the accused is alleged to have acted indirectly in relation to Croatia and Bosnia but directly (as the Supreme Commander of the Armed Forces of the FRY) in relation to Kosovo,[30] and to the circumstances that there is no reference to a "Greater Serbia" plan in the Kosovo indictment and the only reference to it in the Croatia and Bosnia indictments is in relation to other individuals.[31] The Trial Chamber concluded that such a nexus was –

> [...] too nebulous to point to the existence of "a common scheme, strategy or plan" required for the "same transaction" under Rule 49. As noted *supra*, there is a distinction in time and place between the Kosovo and the other Indictments and also a distinction in the way in which the accused is alleged to have acted. Consequently, the Trial Chamber does not consider that the acts alleged in the three Indictments form the same transaction for the purposes of Rule 49.[32]

On the other hand, the Trial Chamber concluded, the Croatia and Bosnia indictments "exhibit a close proximity in time, type of conflict and responsibility of the accused", and contained:

> [...] allegations of a series of acts which together formed the same transaction, *ie*, a plan to take over the areas with a substantial Serbian population in two neighbouring States.[33]

The Trial Chamber also relied upon a number of other matters affecting its discretion, to which reference will be made later.

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prosecution to add 14 counts (alleging breaches of the crimes falling within Articles 2, 3 and 5 of the Tribunal's Statute) to the original, sole, count of complicity in genocide (which falls under Article 4). The factual allegations in the original indictment were expanded for this purpose, but it is unclear from either the Decision or the Separate Opinion to what extent they went beyond the specific incidents pleaded in the original indictment. No point had been taken before the Trial Chamber that Rule 49 did not permit the joinder of the additional counts. Nor was any argument addressed to the Appeals Chamber to that effect. The Joint Decision made no reference to Rule 49.

27 Decision, par 36.
28 *Ibid*, par 42.
29 *Ibid*, pars 43-44.
30 *Ibid*, pars 43-44.
31 *Ibid*, par 45.
32 *Ibid*, par 45.
33 *Ibid*, par 46.

11. It is clear from these statements that the Trial Chamber's finding of fact for the purposes of Rule 49 – that the events in Kosovo did not form part of the same transaction as the events in Croatia and Bosnia – depended upon its interpretation of Rule 49 as requiring the acts to be "committed together" [« *commis ensemble* »]. The proper interpretation of Rule 49 was a question of law. If the Trial Chamber erred in relation to that question of law, its finding of fact was necessarily invalidated, and its discretion was wrongly exercised.

12. The issue of law upon which the Trial Chamber's finding of fact depended, therefore, was whether the prosecution had to establish that the events in Kosovo were "committed together" with the events in Croatia and Bosnia. To that issue, the Appeals Chamber now turns.

The relevant Rules, and their proper interpretation

13. Rule 49 ("Joinder of Crimes") has necessarily to be considered in conjunction with Rule 48 ("Joinder of Accused"), as each is based upon events which must form "the same transaction". That phrase is defined in Rule 2. As reference will be made to what could be a discrepancy between the English and French versions of Rule 49, and for convenience, the text of all three rules (Rule 2 so far as here relevant) is set out below in both languages.

Rule 48 **Joinder of Accused**	**Article 48** **Jonction d'instances**
Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.	Des personnes accusées d'une même infraction ou d'infractions différentes commises à l'occasion de la même opération peuvent être mises en accusation et jugées ensemble.
Rule 49 **Joinder of Crimes**	**Article 49** **Jonction de chefs d'accusation**
Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.	Plusieurs infractions peuvent faire l'objet d'un seul et même acte d'accusation si les actes incriminés ont été commis à l'occasion de la même opération et par le même accusé.
Rule 2 **Definitions**	**Article 2** **Définitions**
(A)In the Rules, unless the context otherwise requires, the following terms shall mean: […] Transaction: A number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan;	A) Sauf incompatibilité tenant au contexte, les expressions suivantes signifient : […] Opération: un certain nombre d'actions ou d'omissions survenant à l'occasion d'un seul événement ou de plusieurs, en un seul endroit ou en plusieurs, et faisant partie d'un plan, d'une stratégie ou d'un dessein commun ;

14. The English version of Rule 49 does contain the words "committed together" in sequence and, if Rule 49 were to be read in isolation, it is a possible interpretation of that Rule that it requires the prosecution to establish that all of the offences sought to be joined were committed together.[34] Such an interpretation, however, creates an unnecessary dichotomy between the test for the joinder of offences (which would require the indictment to show that they were committed together for the purposes of Rule 49) and the test for the joinder of defendants (where Rule 48 has no such requirement). Such an interpretation may also produce a difficulty of consistency with the definition of "transaction" in Rule 2. That definition clearly contemplates a much less restrictive approach by permitting the common scheme, strategy or plan to include one or a number of events at the same or different locations. There is no logical explanation immediately apparent for a distinction to be drawn between allowing different events at different locations but not allowing different events at different times.

15. More importantly, an interpretation of Rule 49 requiring the offences to have been committed together is not available in relation to the French version of the Rule where – for the words "if the series of acts committed together form the same transaction" – the Rule reads « *si les actes incriminés ont été commis à l'occasion de la même opération* », which translates literally as "if the acts charged have been committed as part of the same transaction". Rule 7 ("Authentic Texts") provides that the English and French texts of the Rules are equally authentic. In the case of a discrepancy, the Rule requires the version which is "more consonant with the spirit of the Statute and the Rules" to prevail, but this provision would normally be applied only where the discrepancy between the two versions is intractable. The Appeals Chamber is satisfied that the apparent discrepancy in the present case is not intractable.

16. Although neither the Tribunal's Statute nor its Rules of Procedure and Evidence are, strictly speaking, treaties, the principles of treaty interpretation have been used by the Appeals Chamber as guidance in the interpretation of the Tribunal's Statute, as reflecting customary rules.[35] Such principles may also be used appropriately as guidance in the interpretation of the

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[34] It is important to emphasise (as did the Trial Chamber) that, in an application under Rule 49, the Tribunal is concerned only with what is alleged in the indictment (or proposed indictment), and not with what may be established by evidence at the trial.

[35] *Tadić* Conviction Appeal, par 282; *Delalić* Appeal, pars 67-70. *See* also *Aleksovski* Appeal, par 98; *Prosecutor v Bagosora*, ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal From the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others, 9 June 1998, par 28.

Tribunal's Rules of Procedure and Evidence. Article 33 of the 1969 Vienna Convention on the Law of Treaties ("Interpretation of treaties authenticated in two or more languages") provides that the terms of a treaty are presumed to have the same meaning in each authentic text and that (except where the treaty provides that, in the case of divergence, a particular text shall prevail), when a comparison of the authentic texts discloses a difference of meaning which the application of the provisions of the Convention does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[36] In its Commentary upon Article 75 of the Draft Convention, which did not relevantly differ in substance from Article 33 of the Convention, the International Law Commission commented that there are few plurilingual treaties containing more than one or two articles without some discrepancy between the texts, if only through "the different genius of the languages".[37] The ILC stressed that, "in law there is only one treaty – one set of terms [...] and one common intention with respect to those terms – even when two authentic texts appear to diverge",[38] and that, because of the presumption that each of the authentic texts are to have the same meaning, "every effort should be made to find a common meaning for the texts before preferring one to another".[39]

17. The words in the English version of Rule 49 already quoted may also reasonably be interpreted as "if the series of acts committed [by the accused] together [in the sense of 'considered together as a whole'] form the same transaction". Such an interpretation would be fully consistent with the French version, and there would be no discrepancy between the two versions, or inconsistency with the definition of "transaction" in Rule 2 or with Rule 48, such as is produced by the interpretation which the Trial Chamber adopted.

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[36] For examples of instances where this principle has been applied, *see*: *Mavrommatis Palestine Concessions* case, 1924, CPIJ, Series A, No 2, pp 9, 18-19; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Dantzig Territory*, 1932, CPIJ, Series A/B, No 44, p 6; *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, *Judgment*, *ICJ Reports* 1988, pp 69, 89, par 45; *Electronica Sicula SpA (ELSI)*, *ICJ Reports* 1989, pp 15, 79, par 132; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Jurisdiction and Admissibility, *Judgment*, *ICJ Reports* 1995, p 6, pars 34-40; *Germany v United States of America*, "LaGrand Case", Judgment, 27 June 2001, par 101. *See* also, *Young Loan* Arbitration (1980), 59 ILR 495, pars 548-550. In the most recent of these, the "LaGrand Case", the International Court of Justice said (at par 101): "In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law. This provision reads 'when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'."

[37] *Yearbook of the International Law Commission*, 1964, Vol II, A/CN.4/SER.A/1964/ADD.1, p 63.

[38] *Ibid*, p 63.

[39] *Ibid*, pp 63-64.

18. The Appeals Chamber is satisfied that, properly interpreted, Rule 49 does *not* require the events in Kosovo to have been "committed together" with the events in Croatia and Bosnia. It is unfortunate that the argument put to the Appeals Chamber and based upon the inconsistency between the English and French versions of the Rule if the former were interpreted in the way suggested by the Trial Chamber was not put to the Trial Chamber for its consideration. As the Trial Chamber has been shown to have erred in relation to the proper interpretation of Rule 49 (a question of law), its finding of fact that the events in Kosovo did not form part of the same transaction as the events in Croatia and Bosnia based upon that interpretation is invalidated, and its discretion must be found to have been wrongly exercised as a result of that error of law.

The same transaction?

19. It therefore becomes necessary now for the Appeals Chamber to determine for itself whether all these events formed part of the same transaction – as being part of a common scheme, strategy or plan. Although this Chamber is not for that purpose bound by the particular matters which led to the Trial Chamber's decision that the events in Kosovo did not form part of the same transaction as the events in Croatia and Bosnia, it is nevertheless appropriate to consider them – particularly in the present case where there is, effectively, no contradictor to the prosecution's appeal. As already indicated,[40] those matters were the gap of more than three years between the last events in Bosnia and the first events in Kosovo, the facts that the conflicts in Croatia and Bosnia took place in neighbouring States to the Federal Republic of Yugoslavia ("FRY"), whereas those in Kosovo took place in the FRY itself, and that the accused is alleged to have acted indirectly in relation to Croatia and Bosnia but directly (as the Supreme Commander of the Armed Forces of the FRY) in relation to Kosovo, and the circumstances that there is no reference to a "Greater Serbia" plan in the Kosovo indictment and the only reference to it in the Croatia and Bosnia indictments is in relation to other individuals.

20. Each of those matters is a relevant consideration, but none is decisive. Nor are they in combination an answer to the prosecution's application when, as the Appeals Chamber has now held, it is unnecessary for the prosecution to establish that the events in Kosovo were "committed

[40] Paragraph 10, *supra*.

IT-01-51-AR73 IT-01-50-AR73 ~~IT-99-37-AR73~~ 374 374 374

together" with the events in Croatia and Bosnia. The wording of the indictments could certainly have been better expressed to bring out the overall nature of the prosecution case but, when taken as a whole, the three indictments make it sufficiently clear that the purpose behind the events in each of the three areas for which the accused is alleged to be criminally responsible was the forcible removal of the majority of the non-Serb civilian population from areas which the Serb authorities wished to establish or to maintain as Serbian-controlled areas by the commission of the crimes charged.[41] The fact that some events occurred within a province of Serbia and others within neighbouring states does not alter the fact that, in each case, the accused is alleged to have acted in order to establish or maintain Serbian control over areas which were or were once part of the former Yugoslavia. The fact that the accused is alleged to have acted directly in the province but indirectly in the neighbouring states merely reflects the available means by which the accused is alleged to have sought to achieve the same result.

21. On the other hand, the delay of three years between the last events in Bosnia and the first events in Kosovo is emphasised by the allegation in the Kosovo indictment that the joint criminal enterprise is pleaded as having come into existence "no later than October 1998",[42] rather than at a time when the joint criminal enterprise relating to the events in Croatia and Bosnia came into existence. Nevertheless, the Appeals Chamber does not interpret Rule 49 (together with the definition of "transaction" in Rule 2) as requiring the transaction in question to maintain exactly the same parameters at all times. A common scheme, strategy or plan may include the achievement of a long term aim. Here, that long term aim is alleged to have been to establish or to maintain control by the Serb authorities over particular areas which were or were once part of the former Yugoslavia. Each of the stages of the conflict in the Balkans has been marked by conflict breaking out in different places at different times, either as a result of or as requiring

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[41] In relation to the events in *Croatia*, Indictment IT-01-50 pleads (at par 6) that the purpose of the joint criminal enterprise of which the accused is alleged to have been a member was:

> [...] the forcible removal of the majority of the Croat and other non-Serb population from the approximately one-third of the territory of the Republic of Croatia that he planned to become part of a new Serb-dominated state through the commission of crimes in violation of Articles 2, 3, and 5 of the Statute of the Tribunal.

In relation to the events in *Bosnia*, Indictment IT-01-51 pleads (at par 6) that the purpose of the joint criminal enterprise of which the accused is alleged to have been a member was:

> [...] the forcible and permanent removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats, from large areas of the Republic of Bosnia and Herzegovina [...], through the commission of crimes which are in violation of Articles 2, 3, 4 and 5 of the Statute of the Tribunal.

In relation to the events in *Kosovo*, Indictment IT-99-37 pleads (at par 16) that the purpose of the joint criminal enterprise of which the accused is alleged to have been a member was:

> [...] *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province.

[42] Indictment IT-99-37, par 17. This allegation is repeated in the Pre-Trial Brief, par 113.

action by the Serb authorities (so the prosecution case would have it) to ensure their domination of those areas. A joint criminal enterprise to remove forcibly the majority of the non-Serb population from areas which the Serb authorities wished to establish or to maintain as Serbian controlled areas by the commission of the crimes charged remains the same transaction notwithstanding the fact that it is put into effect from time to time and over a long period of time as required. Despite the misleading allegation in the Kosovo indictment, therefore, the Appeals Chamber is satisfied that the events alleged in all three indictments do form part of the same transaction.

Discretionary considerations

22. Having determined that the requirements of Rule 49 have been satisfied by the prosecution, the Appeals Chamber must next determine whether it should nevertheless exercise the discretion given by that Rule to refuse the joinder sought notwithstanding that all the crimes charged in the indictments concern the same transaction. Again, although the Appeals Chamber is not bound by the particular matters which led the Trial Chamber to decide that it would in any event have refused the joinder in the exercise of its discretion,[43] it is nevertheless appropriate for the reason expressed earlier to consider them in the present case.[44] Those matters were (i) the prejudice seen to the accused's rights under Article 21 of the Tribunal's Statute to a fair and speedy trial which would be caused by the lack of readiness on the part of the prosecution to proceed with a trial which included the events in Croatia and Bosnia,[45] (ii) the interests of justice, in that the length of a single trial would make it less manageable than two separate trials,[46] (iii) the onerous nature of such a trial for the accused personally,[47] and (iv) the possible prejudice to him in relation to evidence relevant to Croatia and Bosnia but not relevant to Kosovo.[48]

23. The prosecution gave different estimates to the Appeals Chamber as to when it would be ready for a trial of the Croatia and Bosnia indictments to those which it gave to the Trial

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[43] As the Trial Chamber had determined that the requirements of Rule 49 had not been satisfied by the prosecution, it was unnecessary for it to exercise its discretion under the Rule, but it was not inappropriate for the Trial Chamber to have done so as an alternative to its principal determination.
[44] Paragraph 18, *supra*.
[45] Decision, pars 38, 49, 52.
[46] *Ibid*, pars 39, 47.
[47] *Ibid*, par 50.
[48] *Ibid*, par 50.

IT-01-51-AR73 IT-01-50-AR73 IT-99-37-AR73

Chamber. Even though those shorter estimates given to the Appeals Chamber may prove to be unduly optimistic, the Appeals Chamber nevertheless determined in its formal decision allowing the prosecution's appeal that, unless the Trial Chamber otherwise decided, the trial of the joined three indictments should commence on 12 February 2002, the date fixed by the Trial Chamber for the commencement of the trial of the Kosovo indictment. That order was made subject to the condition that evidence relevant only to the Kosovo events would be adduced until the material relating to the Croatia and Bosnia indictments (including that which must be disclosed pursuant to Rules 66 and 68) has been made available to the accused and until his rights pursuant to Article 21 of the Tribunal's Statute in relation to that material had been complied with.[49]

24. On appeal, the prosecution criticised the finding of the Trial Chamber that the length of a single trial in this case would make it less manageable than two separate trials, upon the basis that it had failed to elaborate in its Decision what those difficulties would be.[50] Such difficulties are obvious. The sheer number of different events which the prosecution has to establish to prove its case in relation to all three indictments, the usual (and understandable) inability of the parties to concentrate the production of their evidence in relation to each event, the time which necessarily elapses between hearing the evidence and the final submissions and writing the judgment, and the likelihood that counsel, too, will (understandably) for the same reasons be less able to assist the Trial Chamber because of the size of the trial are all so obvious that they did not need to be stated. It is important that the Trial Chamber described a single trial as being *less* manageable than two separate trials; it did not state that a single trial would be unmanageable. What the Trial Chamber said was no more than common sense.

25. That a single trial will indeed be long and complex is inevitable once the nature of the overall purpose which the prosecution seeks to establish in a trial of the joined charges is recognised. The prosecution will bear a heavy responsibility to ensure that the single trial which it wanted does not become unmanageable by overloading the Trial Chamber and the Defence with unnecessary material. The prosecution must ensure that only essential evidence to prove its case is presented, and that inessential evidence is discarded. If it sees that evidence which it leads in relation to a particular event is not relevantly and meaningfully challenged in cross-examination, it should not continue to call evidence in relation to that event. Subject to the

[49] Formal Decision of Appeals Chamber, p 3.
[50] Appellant's Written Submissions, par 70.

rulings of the Trial Chamber, substantial reliance should be placed upon the provisions of Rule 92*bis*, which permits evidence of a witness to be given in the form of a written statement in lieu of oral testimony of matters other than "the acts and conduct of the accused as charged" in the indictments, with the witnesses being called for cross-examination if the Trial Chamber so decides.

26. If the prosecution fails to discharge this responsibility, the Trial Chamber has sufficient powers under the Rules of Procedure and Evidence to order the prosecution to reduce its list of witnesses to ensure that the trial remains as manageable as possible. Finally, if with the benefit of hindsight it becomes apparent to the Trial Chamber that the trial has developed in such a way as to become unmanageable – especially if, for example, the prosecution is either incapable or unwilling to exercise the responsibility which it bears to exercise restraint in relation to the evidence it produces – it will still be open to the Trial Chamber at that stage to order a severance of the charges arising out of one or more of the three areas of the former Yugoslavia. Nothing in the present Decision or in these reasons will prevent it from doing so.

27. The third matter which the Trial Chamber took into account in the exercise of its discretion to refuse the application was the onerous nature of such a trial for the accused personally. That is a relevant matter, but there must be taken into account also the onerous nature of two successive trials which in total would inevitably take even longer than a single trial. As has been shown to be necessary in all long trials before this Tribunal, the Trial Chamber will from time to time have to take a break in the hearing of evidence to enable the parties to marshal their forces and, if need be, for the unrepresented accused to rest from the work involved. The responsibility for the accused's decision not to avail himself of defence counsel, however, cannot be shifted to the Tribunal. When asked his view by the Trial Chamber, the accused merely criticised the prosecution's reliance upon reasons of "judicial economy" by saying that the prosecution "certainly don't care whether I will be fatigued or not".[51] He was similarly asked by the Appeals Chamber to state whether he would prefer to defend himself in a single trial, and he replied:[52]

> [...] how you are going to conduct your proceedings, that's up to you. I will give you no suggestions regarding that.

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[51] Trial Chamber Hearing, IT-01-51 Transcript p 134.

[52] Oral Hearing of the Interlocutory Appeal, 30 Jan 2002 ("Appeals Chamber Hearing"), IT-01-51 Transcript p 352. References throughout this Decision are to the transcript taken in the Bosnia trial.

However, two of the *amici curiae* addressed the Trial Chamber to support the prosecution application for a joinder upon the basis that a single trial would be less burdensome for the accused than multiple trials,[53] a view which was reiterated before the Appeals Chamber.[54]

28. The last of the matters which the Trial Chamber is said to have taken into account in the exercise of its discretion to refuse the application was the possible prejudice to the accused in relation to evidence admissible in relation to Kosovo but not admissible in relation to Croatia and Bosnia. The Trial Chamber said this:[55]

> The Prosecution also argued that the accused would receive a fairer and more expeditious trial in the case of a single trial. However, in the Trial Chamber's view, the fact that the accused would have to defend himself on the contents of three Indictments together would be onerous and prejudicial, particularly in the case of the Kosovo Indictment and its different circumstances. The Trial Chamber, comprised as it is of professional judges, should not to [*sic*] be influenced by prejudicial evidence in one trial affecting another. However, if there is such a risk, the evidence must be excluded.

On appeal, the prosecution has argued that this statement has "raised the spectre of excluding evidence even in separate trials if the Trial Chamber would not be able to keep the matters separate", and that this would unnecessarily prejudice the prosecution.[56]

29. It must be said that the Trial Chamber perhaps did not make its meaning entirely clear in the passage quoted, but the interpretation placed upon it by the prosecution would necessarily create a contradiction between the last two sentences. A far more likely interpretation of the passage quoted – one which creates no such contradiction between the two sentences – is that, if evidence were to be admitted in the Kosovo trial which would be prejudicial to the accused in the Croatia and Bosnia trial, the members of the Trial Chamber as professional judges would be able to exclude that prejudicial evidence from their minds when they came to determine the issues in the Croatia and Bosnia trial. That is a task which is commonplace in domestic jurisdictions when, for example, a judge has to deal with two co-accused who have fought "cut throat" defences of blaming each other. It would be quite wrong to attribute an unreasonable interpretation to the Trial Chamber when such a reasonable one is the more likely. The Appeals Chamber does not accept that the Trial Chamber treated the issue as one which affected its discretion to refuse the joinder sought.

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[53] Mr Kay, purporting to express the views of all three *amici curiae*: Trial Chamber Hearing, IT-01-51 Transcript pp 118-119; Mr Wladimiroff: *Ibid*, p 111.
[54] Mr Tapušković: Appeals Chamber Hearing, IT-01-51 Transcript p 364; Mr Kay: *Ibid*, p 366.
[55] Decision, par 50.
[56] Appellant's Written Submissions, par 57.

IT-01-51-AR73 ~~IT-01-50-AR73~~ ~~IT-01-37-AR73~~ 367 367 367

30. The Appeals Chamber does not accept that any of these matters compels it to exercise its discretion to refuse the joinder sought. In the view of the Appeals Chamber, any possible prejudice to the accused in facing one trial (and it sees none of any significance) is completely outweighed by the fact that a substantial body of evidence relevant to the issue of the acts and conduct of the accused himself in the Croatia and Bosnia trial is also relevant to that issue in the Kosovo trial. If there were to be two separate trials, there would necessarily be a large amount of evidence which would have to be repeated in each.[57] In order to establish that the accused participated in a joint criminal enterprise (stated in general terms) to remove forcibly the majority of the non-Serb population from areas which the Serb authorities wished to establish or to maintain as Serbian controlled areas by the commission of the crimes charged, the prosecution must establish that he intended that those crimes be committed for that purpose.[58]

31. A person's state of mind is no different to any other fact concerning that person which is not usually visible or audible to others. It may be established by way of inference from other facts in evidence. Where, as here, the state of mind to be established is an essential ingredient of the basis of criminal responsibility charged, the inference must be established beyond reasonable doubt. If there is any other inference reasonably open from the evidence which is consistent with the innocence of the accused, the required inference will not have been established to the necessary standard of proof. Any words of or conduct by the accused which point to or identify a particular state of mind on his part is relevant to the existence of that state of mind. It does not matter whether such words or conduct precede the time of the crime charged, or succeed it. Provided that such evidence has some probative value, the remoteness of those words or conduct to the time of the crime charged goes to the weight to be afforded to the evidence, not its admissibility. The prosecution would therefore be entitled to prove in the Kosovo trial what is in effect its case in the Croatia and Bosnia trial. To have to do so twice would be a grave waste of the scarce resources available, for no discernible benefit.

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[57] This is not directed to the prosecution's complaint that many witnesses would have to give evidence twice (Appellant's Written Submissions, pars 54-55). It is directed to the evidence itself.

[58] *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999, par 196; *Prosecutor v Brđanin & Talić*, IT-99-36-PT, 26 June 2001, par 26.

IT-01-51-AR73 IT-01-50-AR73 IT-99-37-AR73 368 368 368

32. For all these reasons, the Appeals Chamber was satisfied that the joinder sought by the prosecution was justified and should, in the exercise of the Appeals Chamber's own discretion, be granted.

A technical submission

33. The prosecution's interlocutory appeal was heard expeditiously on the basis of the original record of the Trial Chamber, without requiring a formal record of proceedings, and without requiring the *detailed* Briefs from the parties which are otherwise required by Rules 111-113. This was done pursuant to Rule 116*bis*, which is directed to the hearing of interlocutory appeals and which permits such appeals (where appropriate) to be determined entirely on the basis of written briefs. In the present case, of course, there was an oral hearing.

34. It was submitted by Mr Tapušković (an *amicus curiae*) that, as the application for leave to appeal was filed by the prosecution pursuant to Rule 73(D) on 20 December 2001, no such procedure was then available for an expedited hearing.[59] His submission was that such a procedure only became available when Rule 116*bis* was amended to include applications for leave to appeal pursuant to Rule 73(D), the amendment becoming effective as from 28 December 2001.[60] This was, he submitted, untenable and contrary to legal principle.[61] Because of the importance of the issue raised and its delicate nature, he said, in fairness the expedited hearing procedure should not have been applied,[62] and its adoption had denied time for the *amici curiae* to file a Brief of thirty pages or so.[63]

35. These submissions are misconceived. Prior to the amendment of Rule 73 in April 2001, leave to appeal from decisions given on motions other than preliminary motions was sought and granted pursuant to Rule 73(B). At that time, Rule 116*bis* provided that an appeal under Rule 73(B) was to be heard expeditiously on the basis of the original record of the Trial Chamber and might be determined entirely on the basis of written briefs. This was the procedure adopted in most interlocutory appeals once leave had been granted.

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[59] Appeals Chamber Hearing, IT-01-51 Transcript, p 374.
[60] *Ibid*, p 354.
[61] *Ibid*, p 355.
[62] *Ibid*, p 358.
[63] *Ibid*, p 374.

36. In April 2001, Rule 73 was amended to insert new paragraphs (B) and (C), to deal with appeals from decisions rendered during the course of the trial on motions involving evidence and procedure. What had been Rule 73(B), dealing with the grant of leave for interlocutory appeals, became Rule 73(D). Rule 116*bis*, however, was not amended to conform with this change until 12 December 2001, by substituting "Rule 73" for "Rule 73(B)". This was the amendment which came into operation on 28 December 2001. It did no more than repeat the substance of the original rule, and to continue its application to interlocutory appeals from decisions given on motions other than preliminary motions. The submission that interlocutory appeals pursuant to Rule 73(D) could be heard expeditiously for the first time in December 2001, after the prosecution has sought leave to appeal, is therefore plainly wrong.

37. The complaint by Mr Tapušković concerning the denial of time to file a Brief is also misconceived. A party to the proceedings at first instance who wishes to oppose the grant of leave to appeal from an interlocutory decision of a Trial Chamber is permitted to file a response to the motion for leave within ten days of that motion.[64] Once leave has been granted, such a party may file a response to the interlocutory appeal itself within ten days.[65] Such a response may be thirty pages in length.[66] This remains the case whether the appeal is dealt with expeditiously or otherwise. The only difference between the ordinary appeal and an expeditious appeal in the present case is the absence of a formal record of the proceedings. The *amicus curiae* have therefore suffered no prejudice by the adoption of the expeditious appeal procedure.

38. The submission made by Mr Tapušković is unfounded.

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[64] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, 1 Oct 1999 (IT/155), par 5. The position is the same in par 5 of the Revised IT/155, 7 Mar 2002.

[65] *Ibid*, par 8. Again, the position is the same in par 8 of the Revised IT/155, 7 Mar 2002.

[66] Practice Direction on the length of Briefs and Motions, 19 Jan 2001 (IT/184), par 2(b)(2). The position is the same in par 2(b)(2) the Revised IT/185, 5 Mar 2002.

IT-01-51-AR73 ~~IT-01-50-AR73~~ ~~IT-99-37-AR73~~ 366 ~~366~~ 366

Done in French and English, both texts being equally authoritative.

Dated this 18th day of April 2002,
At The Hague,
The Netherlands.

Judge Claude Jorda
Presiding

[Seal of the Tribunal]