

BUREAU

- GALIC**
IT-98-29 ■ “DECISION ON GALIC’S APPLICATION PURSUANT TO RULE 15(B)”
28 MARCH 20032
- BLAGOJEVIC ET AL.**
IT-02-60 ■ “DECISION ON BLAGOJEVIC’S APPLICATION PURSUANT TO
RULE 15(B)”
19 MARCH 20033

APPEALS CHAMBER

- BLAGOJEVIC ET AL.**
IT-02-60 ■ “DECISION ON PROVISIONAL RELEASE APPLICATION BY
BLAGOJEVIC”
17 FEBRUARY 20035
- GALIC**
IT-98-29 ■ “DECISION ON APPEAL FROM REFUSAL OF APPLICATION FOR
DISQUALIFICATION AND WITHDRAWAL OF JUDGE”
13 MARCH 20036
- KVOCKA ET AL.**
IT-98-30 ■ “DECISION ON REVIEW OF REGISTRAR’S DECISION TO WITHDRAW
LEGAL AID FROM ZORAN ZIGIC”
7 FEBRUARY 20037

TRIAL CHAMBERS

- SIMIC ET AL.**
IT-95-9 ■ “REASONS FOR DECISION ON PROSECUTION’S MOTION TO USE
TELEPHONE INTERVIEWS”
11 MARCH 200310
- BRDJANIN**
IT-99-36 ■ “DECISION ON DEFENCE MOTION FOR ADJOURNMENT”
10 MARCH 200311
- KRAJISNIK**
IT-00-39 ■ “DECISION ON PROSECUTION’S MOTION FOR JUDICIAL NOTICE OF
ADJUDICATED FACTS AND FOR ADMISSION OF WRITTEN
STATEMENTS OF WITNESSES PURSUANT TO RULE 92BIS”
28 FEBRUARY 200311
- PLAVSIC**
IT-00-39&40 ■ “SENTENCING JUDGMENT”
27 FEBRUARY 200312
- BLAGOJEVIC ET AL.**
IT-02-60 ■ “DECISION ON VIDOJE BLAGOJEVIC’S MOTION FOR
DISQUALIFICATION OF THE TRIAL CHAMBER AND
CONCOMITANT REQUEST FOR CERTIFICATION TO APPEAL”
31 MARCH 200315

This Judicial Supplement of the International Criminal Tribunal for the former Yugoslavia (ICTY)

has been prepared, reviewed and edited by the Public Information Services on behalf of the ICTY’s Registry which has sole responsibility for the publication thereof.

It is issued solely for informational purposes, is intended for use only for such purposes and is without legal or precedential effect.

The contents thereof are not official, and the Tribunal’s Chambers and its Judges have not been involved in any aspect of the preparation, review or publication of this Judicial Supplement.

JUDICIAL
SUPPLEMENT

www.un.org/icty
No. ISSN 1020-7406

· COPYRIGHT ·

Nothing from this Supplement may be modified and/or reproduced without the written consent of the Editor.



United Nations
International Criminal Tribunal
for the former Yugoslavia

A Publication of the ICTY’s Registry

Editor:.....Christian Chartier
Associate Legal Officer:Vincent Sautenet
Language Editor:Robert Green/CLSS
Lay-out:Leslie Hondebrink-Hermer
Reproduction:Franklin Kereway/Phil Winton
Distribution:Zeljko Mikanovic

Review of a decision on disqualification of a Judge: latest developments

Under Rule 15 of the Rules of Procedure and Evidence, any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal (on the grounds for disqualification of a Judge see Krajisnik, Decision on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003, *Judicial Supplement* No. 39; see also pp. 2-4 of the present issue).

Once a party seeks disqualification of a Judge, the Presiding Judge of the

Chamber shall confer with the Judge in question and, if necessary, the Bureau - composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers - shall determine the matter.

The Presiding Judge may decide himself on the matter. If his Decision is challenged, it becomes necessary to refer the matter to the Bureau, as there is no appeal to the Appeals Chamber available from the Decision of the Presiding Judge (see Galic, Appeals Chamber, 13 March 2003, pp. 6-7 of the present

Judicial Supplement). In such cases the Bureau does not act as an appellate body reviewing the Presiding Judge's Decision but must consider the disqualification *de novo* (see Galic, Bureau, 28 March 2003, page 2 of the present *Judicial Supplement*).

Once the matter has been referred to the Bureau - either by the Presiding Judge in the first place or at the request of a party after the Presiding Judge has ruled on the matter - there can be no appeal to the Appeals Chamber (see Blagojevic, Trial Chamber II, 31 March 2003, page 15 of the present *Judicial Supplement*).

BUREAU

The Prosecutor v. Stanislav Galic - Case No. IT-98-29-AR54

Judges Meron [Presiding], Pocar, May, Schomburg and Liu

“DECISION ON GALIC’S APPLICATION PURSUANT TO RULE 15(B)”

28 MARCH 2003

Review of a Decision on disqualification of a Judge – Confirmation of an indictment and impartiality of the confirming Judge

Review of a Decision on disqualification of a Judge: when a disqualification motion is referred to the Bureau after a Presiding Judge has rendered a Decision on the matter, the Bureau does not act as an appellate body reviewing the Presiding Judge's Decision but must consider the disqualification *de novo*. Rule 15(B) does not speak of an “appeal” and indeed might be read as indicating that, when the challenged Judge and the Presiding Judge agree on the proper outcome (except when those are one and the same person), that is the end of the matter.

Confirmation of an indictment and impartiality of the confirming Judge: the tentative determination made in confirming an indictment is based on evidence that is very likely to be introduced at trial. It is thus an initial judgement based on relevant evidence. The making of such tentative judgements based on relevant evidence does not demonstrate bias. This conclusion is embodied in Rule 15(C), which provides that “[t]he Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61, shall not be disqualified for sitting as a member of the Trial Chamber for the trial of the Accused”. If the same Judge may, without compromising his impartiality, confirm the indictment in a case and sit on it during the trial, a fortiori a Judge can confirm an indictment in one case that may implicate an accused in another case and sit in the latter case where some of the evidence supporting confirmation of the indictment in the first case will be presented at trial in the second.

Procedural Background

- On 13 March 2003, the Appeals Chamber referred to the Bureau a motion filed by Stanislav Galic on 23 January to disqualify Judge Orić from sitting in the *Galic* case.¹

The Decision

The Bureau denied the motion.

The Reasoning

Review of a Decision on disqualification of a Judge

The Bureau reconsidered the question as to whether, when a disqualification motion is referred to it after a Presiding Judge has rendered a Decision on the matter, it must act as an appellate body reviewing the Presiding Judge's Decision or must consider the disqualification *de novo*. In keeping with the Appeals Chamber's Decision, it held that it must in such case consider the disqualification motion afresh. The Bureau noted that the text of Rule 15(B) does not speak of an “appeal” from the Presiding Judge's determination and that “the Rule might be read as indicating that, when the challenged Judge and the Presiding

¹ On the background of the case see *Galic*, IT-98-29-AR54, Decision on Appeal from Refusal of Application for Disqualification and Withdrawal of Judge (the “Appeals Chamber's Decision”), 13 March 2003, *Judicial Supplement* No. 40, pp. 6-7.

Judge agree on the proper outcome (except when those are one and the same person), that is the end of the matter”.²

Confirmation of an indictment and impartiality of the confirming Judge

The Bureau considered the merits of the application and rejected it on the same grounds as Judge Liu’s and the Appeals Chamber’s. It stated that while “the confirmation of an indictment requires a determination that, if the Prosecution’s evidence were accepted, a reasonable trier of fact *could* find that evidence sufficient to find the Accused guilty beyond a reasonable doubt”, a verdict at trial requires a “strikingly different determination, namely whether, in light of all the evidence presented by both sides, the Prosecution has in fact established the Accused’s guilt beyond a reasonable doubt”.³

Moreover, the Bureau stated that “the tentative determination made in confirming an indictment is based on

evidence that is very likely to be introduced at trial. It is thus an initial judgement based on relevant evidence. The making of such tentative judgements based on relevant evidence does not demonstrate bias”.⁴ In its view this conclusion is embodied in Rule 15(C), which provides that “[t]he Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61, shall not be disqualified for sitting as a member of the Trial Chamber for the trial of the Accused”. Therefore it held that “[i]f the same Judge may, without compromising his impartiality, confirm the indictment in a case and sit on it during the trial, *a fortiori* a Judge can confirm an indictment in one case that may implicate an accused in another case and sit in the latter case where some of the evidence supporting confirmation of the indictment in the first case will be presented at trial in the second”.⁵ ■

² Para. 7.

³ Para. 13.

⁴ *Ibid.*

⁵ *Ibid.*

The Prosecutor v. Vidoje Blagojevic *et al.* - Case No. IT-02-60-PT

Judges Meron [President], Pocar [Vice-President], May, Liu and Jorda¹

“DECISION ON BLAGOJEVIC’S APPLICATION PURSUANT TO RULE 15(B)”

19 MARCH 2003

Disqualification of Judges – Scope of Rule 15

Scope of Rule 15: narrowly construed, the terms of Rule 15(A) and 15(B) might most naturally be read as excluding disqualification motions based on the conduct of the Judge in the very case in which the disqualification is sought. Nonetheless the Appeals Chamber has not interpreted Rule 15 narrowly but has instead interpreted Rule 15 broadly as co-terminous with the statutory requirement of impartiality. In a truly extraordinary case the Bureau would not rule out entirely the possibility that decisions rendered by a Judge or a Chamber by themselves could suffice to establish actual bias. Even when a Trial Chamber disregards an Appeals Chamber’s Decision, it would take a more extended pattern of decisions uniformly favoring one party before the Bureau could find that a reasonable observer could reasonably apprehend bias against the other party.

Procedural Background

- On 22 July 2002, Trial Chamber II (Judges Schomburg [Presiding], Mumba and Agius) denied Blagojevic’s motion for provisional release.² Blagojevic (the “Accused”) appealed the Decision.
- On 3 October 2002, the Appeals Chamber held that the Trial Chamber had erred in law by finding that guarantees from the Republika Srpska were not admissible. It therefore quashed the Decision on provisional release and returned the matter to the Trial Chamber for reconsideration directing it to take into account those guarantees when determining whether the Accused would appear for trial if provisionally released.³
- On 19 November 2002, the Trial Chamber again denied the motion for provisional release.⁴ The Accused again appealed the Decision.
- On 17 February 2003, the Appeals Chamber held that the Trial Chamber had again failed to take the Republika Srpska guarantee into account and then determined for itself that, notwithstanding the validity of that guarantee, it was not satisfied that Blagojevic would appear for trial if provisionally released.

The appeal was dismissed.⁵

- On 26 February 2003, Blagojevic filed a motion to disqualify the Trial Chamber on the grounds of actual bias and unacceptable appearance of bias and requested that the matter be referred to the Bureau.⁶

The Decision

The Bureau denied the Accused’s motion.

The Reasoning

Disqualification of Judges under Rule 15(B)

The Accused’s motion was filed pursuant to Rule 15. Rule 15(A), governing disqualification of Judges, provides that “[a] Judge may not sit on a trial or appeal in a case in which the Judge has a personal interest or concerning which the Judge has had any association which might affect his or her impartiality”. Rule 15(B) authorises “[a]ny party” to apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber “upon the above grounds”. There is a possibility under Rule 15(B) that the matter be deferred to the Bureau “if necessary”, such as in the present case because the full Chamber is the subject of the motion.

¹ Judge Schomburg, as President of Trial Chamber II, normally sits, under Rule 23(A), as a member of the Bureau. Since the application under review also concerns Judge Schomburg, the Bureau decided, under Rule 23(E), to assign Judge Jorda as “the senior available Judge” in his place.

² Decision on Provisional Release of Vidoje Blagojevic’s Application for Provisional Release, IT-02-60-PT, 22 July 2002, *Judicial Supplement* No. 35.

³ Decision on Provisional Release of Vidoje Blagojevic and Dragan Obrenovic, IT-02-60-AR65 & IT-02-60-AR65.2, 3 October 2002, *Judicial Supplement* No. 37.

⁴ Decision on Vidoje Blagojevic’s Application for Provisional Release, IT-02-60-PT, 19 November 2002.

⁵ Decision on Provisional Release Application of Blagojevic, IT-02-60-AR65.4, 17 February 2003, *Judicial Supplement* No. 40.

⁶ Vidoje Blagojevic’s Motion to Disqualify the Trial Chamber (Judges Schomburg, Mumba and Agius) on the Grounds of Actual Bias and Unacceptable Appearance of Bias & Request for this Matter to be Referred to the Bureau for its Determination & Request for an Expedited Hearing, IT-02-60-PT, 26 February 2003.



In interpreting and applying the impartiality requirement, the Appeals Chamber set the following standard:

- "A. A Judge is not impartial if it is shown that actual bias exists.
- B. There is an unacceptable appearance of bias if:
- (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
 - (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias".⁷

The Accused contends that the Trial Chamber's repeated failure to follow the Decision of the Appeals Chamber concerning the significance of the Republika Srpska guarantee demonstrates both actual bias and appearance of bias. The Prosecution contends that applications under Rule 15(B) should be limited to those based on the grounds expressly mentioned in Rule 15(A), and that the application should therefore have been submitted to the Trial Chamber under Rule 73 rather than to the Bureau under Rule 15.⁸

The scope of Rule 15(B)

The Bureau acknowledged that "narrowly construed, the terms of Rule 15(A) and 15(B) might most naturally be read as excluding disqualification motions based on the conduct of the Judge in the very case in which the disqualification is sought".⁹ Nonetheless it found that the "Appeals Chamber ha[d] not interpreted Rule 15 narrowly [...] but ha[d] instead interpreted Rule 15 broadly as co-terminous with the statutory requirement of impartiality and thus as including within its scope all the possible bases for disqualification noted [in para. 189 of the *Furundzija* Appeal Judgement]".¹⁰ The Bureau also noted that the Bureau of the International Tribunal for Rwanda had not refused to adjudicate a disqualification Rule 15 application based on the conduct of the Judges in the very proceeding in which the disqualification was sought.¹¹

The Bureau held that "in a truly extraordinary case [...] the Bureau would not rule out entirely the possibility that decisions rendered by a Judge or Chamber by themselves could suffice to establish actual bias".¹² Nevertheless it found that in the present case the Accused had failed to rebut the presumption of impartiality of the Judges.¹³ It held that "[t]he Trial Chamber's apparent intransigence in the face of the Appeals Chamber's express direction on remand is unfortunate, but the Bureau does not find in the Trial Chamber's conduct evidence of bias against the Applicant".¹⁴ Having reviewed the decisions in question the

Bureau found that "the Trial Chamber's behaviour resulted from its disagreement with the Appeals Chamber on a point of law about which reasonable jurists could certainly differ – namely, the status of guarantees from Republika Srpska- and its inadequate appreciation of the binding effect of Appeals Chamber decisions on Trial Chamber".¹⁵

The Bureau addressed the alleged appearance of bias on which the Applicant based its claim by using a similar approach. It found that "a reasonable observer, properly informed, would share its conclusion that the Trial Chamber's conduct flowed not from bias against the Applicant but from disagreement with the Appeals Chamber over a legal issue and inadequate appreciation of the principle that the Appeals Chamber decisions are binding on Trial Chambers".¹⁶ It further found that "even when a Trial Chamber disregards an Appeals Chamber's Decision, it would take a more extended pattern of decisions uniformly favouring one party before the Bureau could find that a reasonable observer could reasonably apprehend bias against the other party".¹⁷ ■

⁷ *Furundzija*, IT-95-17/1-A, Judgement ("*Furundzija* Appeal Judgement"), 21 July 2000, para. 189, *Judicial Supplement* No. 18.

⁸ Under Rule 73 (Other Motions) either party may move before the Chamber dealing with the case for appropriate ruling or relief. In case of disagreement the parties must request that the same Chamber grant certification of appeal.

⁹ Para. 9. The Bureau added in footnote 18 that "this interpretation is consistent with the so-called extrajudicial source doctrine in the United States, according to which actions by a Judge in the proceeding at hand are considered insufficient by themselves, as a matter of law, to support the Judge's disqualification from that proceeding". See *Litecky v. United States*, 510 U.S. 540, 554-56 (1994).

¹⁰ Para. 10.

¹¹ *Bagosora*, ICTR-98-41-I, Determination of the Bureau pursuant to Rule 15(B), 20 February 2002. The Defence, in support of its motion, was referring to the Judges reliance on the "importance, high profile and influence" of the four Accused to base a decision they made "before the commencement of the trial, without considering any evidence in respect of the allegations against them". In the Defence's view it amounted to "a preconception that is particularly prejudicial to the Accused". The Bureau denied the motion.

¹² Para. 14.

¹³ Article 13(1) of the Statute provides that Judges of the International Tribunal "shall be persons of high moral character, impartiality and integrity". See also para. 196 of the *Furundzija* Appeal Judgement: "[i]n the view of the Appeals Chamber, there is a presumption of impartiality which attaches to a Judge".

¹⁴ Para. 14.

¹⁵ *Ibid.* On the binding effect of the Appeals Chamber decisions on Trial Chambers see *Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 13, *Judicial Supplement* No. 13: "[t]he Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers for the following reasons".

¹⁶ Para. 15. On the notion of "hypothetical fair-minded observer" see *Krajisnik*, IT-00-39-PT, Decision on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003, *Judicial Supplement* No. 39.

¹⁷ Para. 15.

APPEALS CHAMBER

The Prosecutor v. Vidoje Blagojevic *et al.* - Case No. IT-02-60-AR65.4

Judges Hunt (Presiding), Güney, Gunawardana, Pocar and Meron

“DECISION ON PROVISIONAL RELEASE APPLICATION BY BLAGOJEVIC”

17 FEBRUARY 2003

Rule 65 of the Rules of Procedure and Evidence – Provisional release – The reliability of guarantees given by an authority

If a Chamber is not satisfied on the basis of the personal guarantee of an accused person that he will appear for trial if provisionally released, the reliability of a guarantee by the relevant authority to arrest him if he does not comply with that personal guarantee must be substantial indeed before provisional release will be granted.

Procedural Background

● Trial Chamber II refused an application for provisional release by Vidoje Blagojevic,¹ in which Decision it disagreed with a ruling of the Appeals Chamber in an associated case that a guarantee provided by Republika Srpska is valid although not necessarily sufficient in every case.² The Trial Chamber asserted that it would be acting *ultra vires* should it base its decision upon such a guarantee.³ The Trial Chamber stated that it was not satisfied that Blagojevic would appear for trial, and accordingly refused provisional release.⁴

● The Appeals Chamber held that the Trial Chamber was bound to accept and to apply the *Jokic* Appeal Decision that, as a matter of law and for the purposes of the Tribunal, an undertaking given by Republika Srpska qualifies for acceptance by the Trial Chamber, whether or not it is a sovereign State as defined in public international law.⁵ The Appeals Chamber returned the matter to the Trial Chamber for reconsideration, together with a specific direction to the Trial Chamber to take the Republika Srpska guarantee into account when determining that issue.⁶

● In its second decision, the Trial Chamber made clear that, despite the ambiguity in its original decision, it had *not* taken the Republika Srpska guarantee into account in that decision. It once more refused Blagojevic provisional release,⁷ holding that it “remains not satisfied that if released, [Blagojevic] would appear for trial”.⁸ Although the Trial Chamber formally noted the direction by the Appeals Chamber that it was to take the Republika Srpska guarantee into account when determining whether Blagojevic would appear for trial,⁹ it made no further reference to the guarantee, stating that Blagojevic had not put forward any “real new facts” for its consideration.¹⁰

● When granting leave to appeal from the Trial Chamber’s second decision, a Bench of the Appeals Chamber invited the Trial Chamber to clarify the issue as to whether it had taken the guarantee into account notwithstanding the absence of any indication that it had done so.¹¹ The Trial Chamber did not respond to that invitation.¹²

The Decision

The Appeals Chamber held that the Trial Chamber had again failed to take the Republika Srpska guarantee into account, and then determined for itself that, notwithstanding the validity of that guarantee, it was *not* satisfied that Blagojevic would appear for trial if provisionally released.¹³ The appeal was dismissed.¹⁴

The Reasoning

The Appeals Chamber noted (1) that the only issue remitted to the Trial Chamber was a reconsideration of its original decision with the direction that it was to take the Republika Srpska guarantee into account when determining whether Blagojevic would appear for trial¹⁵ and (2) that, without reference to the guarantee, the Trial Chamber’s original finding that it was not satisfied that Blagojevic would appear for trial was not intended to be in issue in the reconsideration ordered.¹⁶ The only questions which arose in the appeal were the following:¹⁷

- Did the Trial Chamber comply with the direction by the Appeals Chamber to take the Republika Srpska guarantee into account when determining whether Blagojevic would appear for trial if granted provisional release?
- If the Trial Chamber did not do so, what order should now be made by the Appeals Chamber?

Regarding the first issue, the Appeals Chamber stated that the contrast between the Trial Chamber’s express reference to the absence of “new” facts and its silence concerning the presence of a fact which was “new” to its consideration strongly suggested that it did *not* take those guarantees into consideration as directed.¹⁸ From the fact that the Trial Chamber had not responded to the invitation to clarify why it was unable to give any confirmation that it *had* taken the guarantee into account and from all the circumstances, the Appeals Chamber concluded that the Trial Chamber had *not* complied with the direction given.¹⁹ It then stated:²⁰

“Notwithstanding the submission made by Blagojevic that the Impugned Decision ‘seems to suggest a reluctance by the Trial Chamber to accept and apply the decision of the Appeals Chamber in *Jokic*’,²¹ it is unnecessary for the purposes of this appeal to determine why the Trial Chamber failed to comply with that direction. It is sufficient to say that the failure of the Trial Chamber to comply with the direction

¹ Decision on Vidoje Blagojevic’s Application for Provisional Release (hereinafter “Original Trial Chamber Decision”), 22 July 2002, *Judicial Supplement* No. 35.

² Decision on Request for Provisional Release of Accused Jokic, 28 March 2002 (hereinafter “*Jokic* Appeal Decision”), paras. 25, 32.

³ Original Trial Chamber Decision, paras. 34, 36 and 50.

⁴ *Ibid.*, paras. 54-55.

⁵ Decision on Provisional Release of Vidoje Blagojevic and Dragan Obrenovic (hereinafter “Original Blagojevic Appeal Decision”), 3 October 2002, para. 6, *Judicial Supplement* No. 37.

⁶ *Ibid.*, para. 8.

⁷ Decision on Vidoje Blagojevic’s Application for Provisional Release, 19 November 2002 (hereinafter “Impugned Decision”).

⁸ Impugned Decision, page 3.

⁹ *Ibid.*, page 2.

¹⁰ *Ibid.*, page 3.

¹¹ Decision on Applications by Blagojevic and Obrenovic for Leave to Appeal, 16 January 2003, para. 16.

¹² Decision on Provisional Release Application by Blagojevic, 17 February 2003 (hereinafter “Decision”), para. 14.

¹³ Decision, para. 18.

¹⁴ *Ibid.*, para. 19.

¹⁵ *Ibid.*, para. 10.

¹⁶ *Ibid.*, para. 15.

¹⁷ *Ibid.*, para. 11.

¹⁸ *Ibid.*, para. 13.

¹⁹ *Ibid.*, para. 14.

²⁰ *Ibid.*

²¹ Second Appeal from the Trial Chamber’s Impugned Decision on Vidoje Blagojevic’s Application for Provisional Release, 24 January 2003, para. 50.



has led to an unfortunate and wholly unnecessary delay in reaching a proper conclusion in relation to the liberty of Blagojevic.”

As to the second issue, the Appeals Chamber found that no purpose would be served by returning the matter to the Trial Chamber to consider the issue it had twice failed to consider, as the Appeals Chamber was now in the same position as the Trial Chamber to determine that one issue.²² It held that if Blagojevic’s own personal undertaking was insufficient to produce that satisfaction, the reliability of the guarantee must be substantial before provisional release could be granted.²³ As to the probable attitude of Republika Srpska in respect of the arrest of this particular accused if he failed to comply with his personal undertaking,²⁴ the Appeals Chamber pointed out that (i) Blagojevic is charged, *inter alia*, with genocide arising out of the

events at the Srebrenica “safe area” in Bosnia which are well known,²⁵ and (ii) is alleged to be at a high level in the hierarchy of responsibility for the crimes charged.²⁶ The Appeals Chamber concluded:²⁷

“Republika Srpska has so far failed to arrest any persons indicted by the Tribunal, and there is a substantial disincentive for it to arrest this particular accused, who must have substantially valuable information which he could disclose to the Tribunal if minded to cooperate should he be returned to custody. In the light of the finding already made that Blagojevic’s own personal undertaking is not sufficient to demonstrate that he will appear for trial, the Appeals Chamber is not satisfied that he will do so even when the valid guarantee from Republika Srpska is taken into account.” ■

²² Decision, para. 15.

²³ *Ibid.*, para. 16.

²⁴ *Mrksic*, IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002, paras. 9 and 11, *Judicial Supplement* No. 37.

²⁵ Decision, para. 17.

²⁶ *Ibid.*, para. 18.

²⁷ *Ibid.*

The Prosecutor v. Stanislav Galic - Case No. IT-98-29-AR54

Judges Meron [Presiding], Pocar, Shahabuddeen, Hunt and Gunj

“DECISION ON APPEAL FROM REFUSAL OF APPLICATION FOR DISQUALIFICATION AND WITHDRAWAL OF JUDGE”

13 MARCH 2003

Review of a decision on disqualification of a Judge

There is no appeal to the Appeals Chamber available from the decision of the Presiding Judge pursuant to Rule 15(B). Once such decision is challenged, it is “necessary” to refer the matter to the Bureau.

Procedural Background

● On 8 November 2002, Judge Orié confirmed an Indictment against Ratko Mladic. In accordance with Article 19(1) of the Tribunal’s Statute¹ he found that a *prima facie* case had been established against Mladic, i.e. that “the Prosecution’s evidence, if accepted and uncontradicted, sufficiently supports the likelihood of the Accused’s [...] being convicted by a reasonable trier of fact”.²

● On 23 January 2003, Stanislav Galic (the “Accused”) applied to the section of Trial Chamber I hearing his trial³ for the disqualification and withdrawal of Judge Orié from the Trial.⁴ According to the Accused the fact that Judge Orié considered that a case exist against Mladic for crimes related to his case means that Judge Orié also considers that a case exists against the Accused for those same crimes. In his view this amounts to a breach of the requirement that Judges be impartial.

● On 3 February 2003, Judge Liu⁵ dismissed the application on the ground that Galic had failed “to appreciate the fundamental difference between the judicial functions of a Judge who *confirms an indictment* and a Judge who *sits at trial*”.⁶ He held that “[b]y its very

nature, the confirmation of an indictment can never provide more than a presumption that the facts alleged in the indictment *may* very well have occurred, but certainly not that they *did* occur; whether this is the case or not remains a matter to be proved at trial”.⁷

● On 10 February 2003, pursuant to Rule 73(B),⁸ Galic applied for certification of an appeal against Judge Liu’s Decision, claiming that “a final decision must be made on the issue of impartiality at the earliest possible opportunity”.⁹ On 26 February 2003, Trial Chamber I in full rendered its Decision¹⁰ and referred the matter to the Appeals Chamber.

The Decision

The Appeals Chamber referred the application to the Bureau to rule on Galic’s original application namely, the “Defence Request for Withdrawal of Judge Alphons Orié, Presiding”, dated 23 January 2003.

¹ Article 19 (Review of the indictment)

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 *Mladic*, IT-95-5/18-I, Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 8 November 2002, para. 26, *Judicial Supplement* No. 38.

³ The *Galic* case has been in proceeding before a section of Trial Chamber I, comprised of Judge Alphons Orié (Presiding), Judge Amin El Madhi and Judge Rafael Nieto-Navia, since 3 December 2001.

⁴ Defence Request for Withdrawal of Judge Alphons Orié, Presiding, 23 January 2003.

⁵ The application was erroneously addressed to the section of the Trial Chamber dealing with the case, and Judge Liu—as President of Trial Chamber I—dealt with the application as if it had been correctly addressed to him.

⁶ Decision on the Defence Motion for Withdrawal of Judge Orié, 3 February 2003, para. 5. Italics by Judge Liu.

⁷ *Ibid.*, para. 6.

⁸ Rule 73 (Other Motions)

(B) Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

⁹ Request for Certification of Appeal Against Judge Liu Daqun’s Decision on the Request for Withdrawal of Judge Alphons Orié Rendered on 3 February 2003 but Delivered on 4 February 2003, 10 February 2003.

¹⁰ Decision on the Defence Request for Certification to Appeal the Presiding Judge’s Decision on Withdrawal of Judge Orié, 26 February 2003. The request had again been erroneously addressed to the section hearing the *Galic* case and the Decision did not identify the basis upon which the full Trial Chamber—rather than the Presiding Judge—dealt with the motion.

The Reasoning

The Appeals Chamber held that Rule 15(B)¹¹ makes clear that the Judge whose disqualification is sought “is to have no part in the process by which the application for that disqualification is disposed of”.¹² As regards Judge Liu’s Decision to dismiss Galic’s application, it held that it was appropriate at this stage of the procedure to confer – as Judge Liu did – with Judge Orić in order to confirm that he was not in breach of Rule 15(A)¹³ and to conclude that it was not “necessary” to refer the matter to the Bureau.

¹¹ Rule 15(B) states: “Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question, and if necessary the Bureau shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.”

¹² Para. 8.

¹³ Rule 15(A) states: “A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.”

Once Galic challenged the Decision however, the Appeals Chamber stated that it “*did* become ‘necessary’ to refer the matter to the Bureau”, as “[t]here is no appeal to the Appeals Chamber available from the decision of the Presiding Judge pursuant to Rule 15(B)”.¹⁴

The Appeals Chamber found that the Presiding Judge should have referred the matter to the Bureau. It nevertheless decided to deal with the application as if it had been addressed to Judge Liu. In place of Judge Liu, it addressed the matter directly to the Bureau, as “the most expeditious way of resolving the procedural problem which has arisen”.¹⁵

¹⁴ Para. 8.

¹⁵ Para. 9.

The Prosecutor v. Miroslav Kvočka *et al.* - Case No. IT-98-30/1-A

Judges Shahabuddeen (Presiding), Hunt, Guný, Gunawardana and Meron

“DECISION ON REVIEW OF REGISTRAR’S DECISION TO WITHDRAW LEGAL AID FROM ZORAN ZIGIC”

7 FEBRUARY 2003

Article 21(4)(d) of the Statute – Directive on Assignment of Counsel – Assignment and withdrawal of legal aid – Inquiry into the means of the Accused – Judicial review of the Registrar’s decision- Onus of persuasion – Right to be heard - Admissibility of the material relied upon - Adequacy of the Registrar’s reasons

Inquiry by the Registrar into the means of the Accused: the inquiry which the Registrar conducts into the means of an Accused is an administrative fact-finding procedure. It is in not in any sense a trial. The burden of proof upon the Accused in the first instance to establish that he lacks means to remunerate Counsel, and upon the Registrar in the second instance to establish that the Accused does have the means to do so, is not satisfaction beyond reasonable doubt, as in a criminal trial, but merely satisfaction that, more probably than not, what is asserted is true, or (as is sometimes described) satisfaction on the balance of probabilities.

Judicial review of the Registrar’s decision: a judicial review of such an administrative decision is not a rehearing nor an appeal, or in any way similar to the review which a Chamber may undertake of its own Judgment in accordance with Rule 119 of the Rules of Procedure and Evidence. Such a judicial review is concerned initially with the propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it.

Onus of persuasion: in the review, the Accused bears the onus of persuasion. He must persuade the Chamber conducting the review (a) that an error of the nature described¹ has occurred and (b) that such error has significantly affected the Registrar’s decision to his detriment. If the Accused fails to persuade the Chamber of either of these matters, the Registrar’s decision will be confirmed. If the Accused has

persuaded the Chamber of both matters, the Registrar’s decision may be quashed and, if appropriate, the Chamber may also rule that legal aid should be granted or, where it is satisfied that the Accused has the means to remunerate Counsel partially, refer the matter again to the Registrar for him to determine the portion of the cost of having Counsel for which the Accused does not have the means to pay.

Right to be heard: the Directive does not impose upon the Registrar an obligation to hold a formal hearing, and the nature of the inquiry to be conducted in accordance with the Directive does not attract such an obligation. However, where action pursuant to the Directive detrimental to an Accused is contemplated, procedural fairness dictates that the Accused be afforded the right to be heard. Bearing in mind that the withdrawal of legal aid may well impact negatively upon the Accused’s ability to conduct his Defence in the relevant criminal proceedings in the Tribunal, such a right entitles the Accused to be given (a) notice of the allegations against him, (b) notice in reasonable detail of the nature of the material upon which the contemplated action is to be based, and (c) the opportunity to respond to that material.

Admissibility of the material relied upon: Article 10 of the Directive requires the Registrar to act upon information. How that information is given is for the Registrar to determine. There is no requirement that the information be in the form of evidence which is admissible at trial.

Adequacy of the Registrar’s reasons: the imposition by the Directive of an obligation upon the Registrar to give a reasoned decision when withdrawing legal aid should not be interpreted in the same way as the obligation upon a Chamber of the Tribunal to give reasons for its decision. What is necessary in relation to the Registrar’s decision is that it makes apparent in its reasons that he has considered the issue raised by the Accused and it reveals the evidence upon which he has based his conclusion.

¹ See *infra* under “The judicial review of the Registrar’s decision”.

Procedural Background

- On 16 April 1998, Zoran Zigic was transferred to the United

Nations Detention Unit in The Hague. The same day he submitted a declaration of means in which he stated that he was not employed, that he did not receive any family allowances or

social benefits and that he did not own any movable or immovable property.²

- On 28 April 1998, the Registrar determined that Zigic had fulfilled the requirements for granting legal aid as provided by the Directive on Assignment of Defence Counsel ("Directive"),³ and appointed Mr Tosic as his Counsel.⁴

- On 2 November 2001, Zigic was found guilty of persecution as a crime against humanity and of murder, torture and cruel treatment as violations of the laws or customs of war, and he was sentenced to twenty-five years' imprisonment.⁵ On 21 May 2002, he appealed against his conviction and sentence.⁶ The appeal is pending.

- On 8 July 2002, the Registrar withdrew legal aid from Zigic on the basis that, since the decision to grant legal aid, Zigic had acquired sufficient means to pay for the cost of his defence for the remainder of his appeal against conviction ("Impugned Decision").⁷

- On 30 September 2002, Zigic requested a review of the Impugned Decision by the Appeals Chamber.⁸ On 30 October 2002, the Registrar filed his Response to the Request for Review of Zoran Zigic.⁹ On 11 December 2002 Zigic filed his reply to the Registrar's Response.¹⁰

The Decision

The Appeals Chamber found a number of errors in calculations and evaluations which did not however affect the Impugned Decision of the Registrar. Accordingly the Registrar's Decision to withdraw legal aid from Zigic was confirmed.

The Reasoning

The legal framework

Under Article 21(4)(d) of the Statute of the Tribunal, an Accused has the right to "have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it". The Directive on Assignment of Counsel identifies the circumstances under which an Accused is entitled to have legal aid assigned, and possibly withdrawn.¹¹

Under the Directive, the Accused who requests the assignment of Counsel must produce evidence that he is unable to remunerate Counsel,¹² and the Registrar is permitted to enquire into his means,¹³ comprised of the Accused's own means, those of his spouse and of those with whom he habitually resides, the apparent lifestyle of the Accused and his enjoyment of any property.¹⁴

Once legal aid has been granted, the Registrar establishes that the Accused has come into means which would have caused the Registrar not to grant legal aid, had they been available at the time of the request, or if information is obtained which establishes that the Accused has sufficient means to pay for his Defence, assignment of Counsel or partial remuneration of Counsel may be withdrawn.¹⁵ Increase in the Accused's means since the time of request is described in the present decision as "enrichment" of those means.

The inquiry by the Registrar into the means of the Accused

The Appeals Chamber found that the Registrar had correctly described the inquiry which he conducts into the means of an Accused as an "administrative fact-finding procedure".¹⁶ It held that it is "not in any sense a trial" and attached legal consequences to its finding: "[t]he burden of proof upon the Accused in the first instance to establish that he lacks means to remunerate Counsel, and upon the Registrar in the second instance to establish that the Accused does have the means to do so, is not satisfaction beyond reasonable doubt, as in a criminal trial, but merely satisfaction that, more probably than not, what is asserted is true, or (as is sometimes described) satisfaction on the balance of probabilities".¹⁷ The criterion is therefore "satisfaction that what is asserted is more probably true than not", which criteria "will in turn depend on the nature and the consequences of the matters to be proved",¹⁸ in the sense that "[t]he more serious the matter asserted, or the more serious the consequences flowing from a particular finding, the more difficult it will be to satisfy the relevant tribunal that what is asserted is more probably true than not".¹⁹

Using this approach, the Appeals Chamber held that "the Registrar had to be satisfied that, more probably than not, Zigic now has the means to remunerate Counsel for the remainder of his appeal against conviction, bearing in mind the serious consequences to Zigic if his legal aid is withdrawn".²⁰

The judicial review of the Registrar's decision²¹

The Appeals Chamber made clear that "[a] judicial review of such an administrative decision is not a rehearing [nor] an appeal, or in any way similar to the review which a Chamber may undertake of its own Judgment in accordance with Rule 119²² of the Rules of Procedure and Evidence". In its view, a judicial review of an administrative decision of the Registrar regarding legal aid is "concerned initially with the propriety of the procedure by which Registrar reached the particular decision and the manner in which he reached it". The administrative decision "will be quashed if the Registrar has failed to comply with the legal requirements of the Directive".

The Appeals Chamber referred to matters which may lead it

¹⁵ Directive, Article 18.

¹⁶ Following Zigic's request to the Registrar in letters dated 8, 13 and 15 August 2002 that he be assigned Counsel to represent him for the purpose of the review of the Impugned Decision, the Registrar held on 21 August that the investigation conducted by the Registry into the means of an Accused was an "administrative fact-finding procedure", and that the interest of justice did not in that context require legal aid to be assigned to an Accused to contest the factual findings of the Registrar. Zigic was nevertheless provided with an English speaking legal assistant/investigator to assist him in the preparation and presentation of his Request for Review.

¹⁷ Para. 12.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Para. 13.

²¹ *Ibid.*

²² Rule 119 (Request for Review)

(A) Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the Defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place.

(B) Any brief in response to a request for review shall be filed within forty days of the filing of the request.

(C) Any brief in reply shall be filed within fifteen days after the filing of the response.

² The declaration of means is Annex 1 of the Registrar's Decision Withdrawing Legal Aid, 8 July 2002 ("Impugned Decision").

³ IT/73. The Directive has been amended on a number of occasions since Zigic entered custody, but not in any of its provisions relevant to these proceedings.

⁴ Mr Tosic was subsequently replaced by Mr Slobodan Stojanovic as lead Counsel, and Mr Tosic became Co-counsel, before being replaced by Mr Miodrag Deretic. Since 28 April 1998, the Registrar has granted legal aid to pay for a total of eight persons at different times as Counsel, legal assistants or investigators to Zigic's Defence team, with subsequent travel costs, for a total of USD 1,425,683.37.

⁵ *Kvacka et al.*, IT-98-30/1-T, Judgement, 2 November 2001, *Judicial Supplement* No. 29.

⁶ Appellant's Brief of Argument – Defence for the Accused Zoran Zigic, 21 May 2002.

⁷ Decision, 8 July 2002.

⁸ Appeal Against the Decision by the Registrar of the Tribunal of 8 July 2002, 30 September 2002 ("Request for Review").

⁹ Response of the Registry to the Request of Zoran Zigic to Review the Decision of the Registrar Dated 8 July 2002 ("Registrar's Response"), 30 October 2002.

¹⁰ Reply to the Response of the Registry to the Request of Zoran Zigic of 30 September 2002 ("Reply"), 11 December 2002.

¹¹ Directive, Articles 6(A) and 18 respectively.

¹² *Ibid.*, Article 8(A).

¹³ *Ibid.*, Article 10(A).

¹⁴ *Ibid.*, Article 8(B) and (C).

to quash the Registrar's decision: improper interpretation of the Directive, failure to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, consideration of irrelevant material or failure to consider relevant material, a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test).

The onus of persuasion²³

According to the Appeals Chamber, the Accused bears the onus of persuasion in the review. He must "persuade the Chamber conducting the review (a) that an error of the nature described has occurred, and (b) that such error has significantly affected the Registrar's decision to his detriment". If the Accused fails to persuade the Chamber of either of these matters, the Registrar's decision will be confirmed. If the Accused has persuaded the Chamber of both matters, the Registrar's decision "may be quashed and, if appropriate, the Chamber may also rule that legal aid should be granted or, where it is satisfied that the Accused has the means to remunerate Counsel partially, refer the matter again to the Registrar for him to determine the portion of the cost of having Counsel for which the Accused does not have the means to pay".

The Appeals Chamber also held that "in some cases, it may be appropriate for the Chamber simply to quash the decision and to direct the Registrar to reconsider his decision in light of the Chamber's decision". It asserted that "[i]t is clear, from the implicit restriction that only the Registrar may determine the extent to which the Accused has the means partially to remunerate Counsel, that the power of the Chamber to substitute its own decision for that of the Registrar is limited".

The Registrar's approach

In order to determine whether Zigic now has the means to remunerate Counsel for the remainder of his appeal against conviction, the Registrar first assessed the extent to which the means of Zigic had been enriched,²⁴ secondly applied a formula to his finding in relation to those means to determine the amount to which Zigic could contribute to the cost of his appeal, and thirdly assessed the likely cost of the remainder of Zigic's appeal against conviction. The Registrar then withdrew legal aid because the amount which Zigic could contribute to the cost of his appeal exceeded the likely cost of the remainder of the appeal.

Specific complaints by Zigic concerning the findings of the Registrar²⁵

Right to be heard²⁶

The Appeals Chamber held that "the Directive does not impose upon the Registrar an obligation to hold a formal hearing, and the nature of the inquiry to be conducted in accordance with the Directive does not attract such an obligation". It however asserted that "where action pursuant to the Directive detrimental to an Accused is contemplated, procedural fairness dictates that the Accused be afforded the right to be heard".²⁷ Bearing in mind that the withdrawal of legal aid "may well impact negatively upon the Accused's ability to conduct his Defence in the relevant criminal proceedings in the Tribunal, such a right entitles the Accused to be given (a) notice of the allegations against him, (b) notice in reasonable detail of the nature of the material upon

which the contemplated action is to be based, and (c) the opportunity to respond to that material".

The Appeals Chamber found in the present case that the minutes of the meetings with the Registrar's representative²⁸ demonstrate a sufficient compliance with that entitlement and therefore did not accept that Zigic's right to be heard had been denied.

Accuracy of the Registrar's findings

The Appeals Chamber restated that a review is not a rehearing and that in that sense Zigic should have raised arguments about the erroneous nature of the Registrar's findings at his meeting with the Registrar's representative, which he did not do and so rejected the complaint.

Admissibility of the material relied upon²⁹

Zigic alleged that several of the statements taken by the Registrar have no probative value as they are not signed. The Appeals Chamber held that the complaint was "misconceived" as Article 10 of the Directive requires the Registrar to act upon "information" and that "[h]ow that information is given is for the Registrar to determine". It asserted that "there is no requirement that the information be in the form of evidence which is admissible at trial" and rejected the complaint.

Adequacy of the Registrar's reasons³⁰

Article 18(B) of the Directive requires the Registrar to give a reasoned decision when withdrawing legal aid. The Appeals Chamber held that "[t]he imposition by the Directive of an obligation upon the Registrar to give a reasoned decision when withdrawing legal aid should not [...] be interpreted in the same way as the obligation upon a Chamber of the Tribunal to give reasons for its decision" and that "[w]hat is necessary in relation to the Registrar's decision is that it makes apparent in its reasons that he has considered the issue raised by the Accused and it reveals the evidence upon which he has based his conclusion".³¹

The Appeals Chamber found that the Impugned Decision by the Registrar was consonant with these requirements and therefore rejected the complaint.

Having rejected Zigic's complaints concerning the propriety of the procedures the Registrar adopted in the inquiry into the means of the Accused, the Appeals Chamber then considered the sufficiency of the material before the Registrar upon which he had based the factual conclusions. It found that a number of errors had been shown in the Registrar's Decision as regards the finding of facts or errors in calculations or valuations but also found that the errors of the Registrar had not affected his Decision.

Accordingly the Appeals Chamber confirmed the Registrar's Decision to withdraw legal aid from Zoran Zigic. ■

²³ Para. 14.

²⁴ See paras. 16-37 : purchase of a two-rooms apartment, of a three-rooms apartment and of an investment in a business named "Progres", renovation of the family house, purchase of three motor vehicles and three laptop computers, extensive family expenses for travels and lodging in The Hague, and expenditures in the Detention Unit.

²⁵ Only the complaints of the Accused which involve the most significant legal findings will hereinafter be considered in the present summary.

²⁶ Paras 39-40.

²⁷ See *Jelisić*, IT-95-10-A, Judgment, 5 July 2001, paras. 27-28, *Judicial Supplement* No. 26, which refer *inter alia* to the "normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made".

²⁸ Minutes of the Meetings of 13 and 18 June 2002, filed on 10 October 2002.

²⁹ Para. 43.

³⁰ Paras. 49-53.

³¹ The Appeals Chamber noted that "[b]ecause administrative functions are different in kind from judicial functions, administrative decision makers are not usually required to give reasons for their decisions in the way courts are required".

TRIAL CHAMBERS

The Prosecutor v. Blagoje Simic *et al.* - Case No. IT-95-9-T

Trial Chamber II (Judges Mumba [Presiding], Williams and Lindholm)

“REASONS FOR DECISION ON PROSECUTION’S MOTION TO USE TELEPHONE INTERVIEWS”

11 MARCH 2003

Article 21(4)(a) - Effective service of the Indictment

Effective service of the Indictment: the right of the Accused under Article 21(4)(a) of the Statute “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him” not only means that he shall be informed about the legal qualification of the charges against him, but also about the facts underlying the charge in order to prepare adequately his defence.

Procedural Background

- On 11 September 2001, the Trial Chamber denied the request of the Prosecution to admit the transcripts of three telephone interviews given by Miroslav Tadic (“the Accused”) to the Prosecution on 26 and 29 April, and 22 May 1996 (“September 2001 Decision”).¹
- On 20 February 2003, Trial Chamber II rendered an oral decision (“Oral Decision”) denying the Prosecution’s oral motion seeking leave to cross-examine the Accused as to his credibility with regard to inconsistencies contained in the above-mentioned interviews.

Reasons for the Oral Decision

The effective service of the Indictment

The main issue, as explained by the Trial Chamber in its September 2001 Decision, is that the Trial Chamber was “not satisfied that effective service of the Indictment was made prior to any of the telephone interviews, and [...] that the Accused did not fully appreciate the seriousness of the Indictment at the material time nor understand fully the nature of the Indictment and the proceedings”.²

The Trial Chamber explained that under the Statute and the Rules the Prosecution is under an obligation to validly serve the Indictment on the Accused and that there can be no derogation from this rule. The Prosecution “has to undertake every step to explain fully the Indictment to the indicted person prior to making an interview with him”.³ The Trial Chamber relied mainly on Article 21(4)(a) of the Statute according to which the Accused has “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”. The Trial Chamber held that “[t]his right not only means that he shall be informed about the legal qualification of the charge against him, but also about the facts underlying the charge, in order to prepare adequately his defence”.⁴

The Trial Chamber considered that, since the Indictment had not been served in full on the Accused prior to the said telephone interviews, his consent to conduct those interviews was not informed.

Furthermore, the Trial Chamber took into consideration that the free exercise of the right of the Accused under Rule 85(C) to appear as a witness in his Defence “would be fettered [...] if it exposed him to risk that evidence obtained prior to the oral testimony given in court and in disregard of the minimum guarantees pursuant to Article 21(4) of the Statute may be considered for impeachment purposes to undermine the credibility of the Accused’s trial testimony”.⁵ Indeed it held that impeaching the credibility of the Accused in this way would in turn “affect issues of criminal responsibility”⁶ and that this “would not be in accordance with the principles of fundamental justice”.⁷ ■

¹ Decision on Prosecutor’s Request to Add Further Exhibits to the Confidential Prosecution Exhibit List Filed on the 9th of April 2001, 11 September 2001.

² September 2001 Decision, page 3.

³ Para. 5.

⁴ Para. 6.

⁵ Para. 7.

⁶ Para. 8.

⁷ *Ibid.* Such principles include the fairness and integrity of the trial.

The Prosecutor v. Radoslav Brdjanin - Case No. IT-99-36-T

Trial Chamber II (Judges Agius [Presiding], Janu and Taya)

“DECISION ON DEFENCE MOTION FOR ADJOURNMENT”

10 MARCH 2003

Continuation of the proceedings in the absence of Lead Counsel – Role of Co-counsel

- The right of an accused to be represented by Counsel does not justify a significant delay in proceedings during the absence of Lead Counsel where there is a Co-counsel assigned to the case and available to attend trial.
- An absence of express language in the Directive mandating that Co-counsel take over the case in the absence of Lead Counsel does not preclude that this should be the case where there will otherwise be an unnecessary and significant delay in proceedings and an unjustified drain on the resources of the Tribunal.

Procedural Background

● On 4 March 2003, the Defence filed a confidential “Motion for Adjournment of Trial” to request that the case be adjourned between 14 March and 14 April 2003 in the absence of Lead Counsel for medical reasons. Radoslav Brdjanin relied on his right to choose his Counsel¹ and on the fact that the Directive on Assignment of Defence Counsel (the “Directive”) does not mandate that Co-counsel take over in the absence of chosen Lead Counsel.

The Decision

The Trial Chamber rejected the arguments of the Defence but nevertheless ordered that the case be adjourned and resume on 14 April 2003.

The Reasoning

The Trial Chamber held that:

- “the right of an accused to be represented by Counsel [...]

¹ On the issue of assignment of Counsel see *inter alia* Knezevic, IT-95-4-PT, IT-95-8/1-PT, Decision on Accused’s Request for Review of Registrar’s Decision as to Assignment of Counsel, 6 September 2002, *Judicial Supplement* No. 36.

does not justify a significant delay in proceedings during the absence of Lead Counsel where there is a Co-counsel assigned to the case and available to attend trial;

- an absence of express language in the Directive mandating that Co-counsel take over the case in the absence of Lead Counsel does not preclude that this should be the case where there will otherwise be an unnecessary and significant delay in proceedings and an unjustified drain on the resources of the Tribunal.”

It therefore found that the arguments of the Defence do not justify an adjournment of the case for the requested period.

However, taking into account that a new Co-counsel may be appointed² and that such new Co-counsel “will require a minimum amount of time to familiarise him or herself with the case and its documents”, it ordered that the proceedings in the present case be adjourned following the 14 March 2003 hearing and resume on 14 April 2003 “in the interest of justice”. ■

² In a confidential decision filed on 7 March 2003, the Registrar withdrew the assignment of Mr. Trbojevic as Co-counsel and invited the Lead Counsel (Mr. Ackerman) to consider submitting a request for the assignment of a new Co-counsel.

The Prosecutor v. Momcilo Krajisnik - Case No. IT-00-39-PT

Trial Chamber I (Judges Liu [Presiding], El Madhi and Orié)

“DECISION ON THE PROSECUTION MOTIONS FOR JUDICIAL NOTICE OF ADJUDICATED FACTS AND FOR ADMISSION OF WRITTEN STATEMENTS OF WITNESSES PURSUANT TO RULE 92BIS”

10 MARCH 2003

Judicial notice – Rule 94(B) – Purpose of Rule 94 – Facts capable of admission under Rule 94(B) – Legal consequences of Rule 94(B)

Facts capable of admission under Rule 94(B): for a fact to be capable of admission under Rule 94(B), it should be truly adjudicated in previous judgements in the sense that: (i) it is distinct, concrete and identifiable; it is restricted to factual findings and does not include legal characterisations; (iii) it was contested at trial and forms part of a judgement which has either not been appealed or has been finally settled on appeal; (iv) it was contested at trial and now forms part of a judgement which is under appeal, but falls within issues which are not in dispute during the appeal; (v) it does not attest to criminal responsibility of the Accused; (vi) it is not the subject of (reasonable) dispute between the Parties in the present case; (vii) it is not based on plea agreements in previous cases; and (viii) it does not impact on the right of the Accused to a fair trial.

Legal consequences of Rule 94(B): the procedural legal impact of taking judicial notice of an adjudicated fact is not that the fact cannot be challenged or refuted at trial, but rather that the burden of proof to disqualify the fact is shifted to the disputing party.

Procedural Background

● Trial Chamber I is seized of a series of motions submitted by the Prosecutor relating to (a) the taking of judicial notice of adjudicated facts,¹ and to (b) admission of evidence in the form of witness statements under Rule 92 bis of the Tribunal’s Rules of Procedure and Evidence.²

¹ Rule 94 (Judicial Notice)

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

² Only the legal developments related to the taking of judicial notice will hereby be considered.

The Decision

The Trial Chamber allowed the motions in part following the criteria described *infra*.

The Reasoning

Judicial Notice

The purpose of Rule 94³

The Trial Chamber stated that Rule 94 “is for the purpose of achieving judicial economy in the sense that it condenses the relevant proceedings to what is essential for the case of each party without rehearing supplementary allegations already proven in past proceedings and thereby shortens the duration of the trial”. It declared that “judicial economy has been held up as one of the procedural legal principles of the International Tribunal in Articles 20(1) and 21(4)(c), i.e. the right of the Accused to an *expeditious trial* and the right to be *tried without undue delay*”. It emphasised that “its first concern is always to ensure that the Accused is offered a *fair trial*” and that “[a]s long as the principle is accomplished, the Chamber is under a duty to avoid that unnecessary time and resources are wasted on unnecessary disputes”.

Facts capable of admission under Rule 94(B)

The Trial Chamber conducted a review of the International Tribunal’s case law and thereby identified the various criteria set out in previous decisions. It found that “for a fact to be capable of admission under Rule 94(B), it should be *truly adjudicated* in previous judgements in the sense that: (i) it is *distinct, concrete and identifiable*;⁴ it is restricted to *factual findings* and does not include *legal characterisations*;⁵ (iii) it was *contested* at trial and forms part

of a judgement which has either *not been appealed* or has been *finally settled* on appeal;⁶ (iv) it was *contested* at trial and now forms part of a judgement which is under appeal, but falls within issues which are *not in dispute* during the appeal;⁷ (v) it does *not attest to criminal responsibility* of the Accused; (vi) it is *not the subject of (reasonable) dispute* between the Parties in the present case; (vii) it is *not based on plea agreements* in previous cases;⁸ and (viii) it does not impact on the *right of the Accused to a fair trial*.”⁹

Legal consequences of Rule 94(B)

The Trial Chamber noted that the facts contemplated in Rule 94(B) are “substantially different in character from the facts contemplated in Rule 94(A)”.¹⁰ While judicial notice of “facts of common knowledge” under Rule 94(A) “normally implies that such facts *cannot* be challenged during trial”, facts under Rule 94(B) are only facts for which the Chamber establishes a “well-founded presumption” of their accuracy and “therefore does not have to be proven at trial –*unless* the other party brings out new evidence and successfully challenges and disproves the fact at trial”.¹¹ In other words, the Trial Chamber held that “the procedural legal impact of taking judicial notice of an adjudicated fact is *not* that the fact cannot be challenged or refuted at trial, but rather that the *burden of proof to disqualify the fact is shifted* to the disputing party”.¹²

Consequently “[i]f, during a trial, a party wishes to dispute an adjudicated fact of which the Trial Chamber has taken judicial notice, accordingly, that party must then bring out evidence in support of its contest and request the Chamber to entertain the challenge”.¹³ “If the Chamber accepts the challenge, the other party will be provided with an opportunity to respond within a short time frame set out by the Chamber and the Chamber will then decide on the matter”.¹⁴ ■

³ Para. 11.

⁴ Kupreskic et al., IT-95-16-A, Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001, para. 12: “A request must specifically point out the paragraph(s) or parts of the judgement of which it wishes judicial notice to be taken, and refer to *facts*, as found by the Trial Chamber”. Summarised in *Judicial Supplement No. 24*.

⁵ Simic et al., IT-95-9-PT, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, 25 March 1999, page 3, *Judicial Supplement No. 3*. Sikirica et al., IT-95-8-PT, Decision on Prosecution for Judicial Notice of Adjudicated Facts, 27 September 2000, page 5.

⁶ Milosevic, IT-02-54-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts Relevant to the Municipality of Brcko, 5 June 2002, *Judicial Supplement No. 34*.

⁷ Ljubicic, IT-00-41-PT, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts (the “Ljubicic Decision”), 23 January 2003, *Judicial Supplement No. 39*.

⁸ See *supra* note .

⁹ Para. 15.

¹⁰ Para. 16.

¹¹ *Ibid.* See the Ljubicic Decision.

¹² Para. 16.

¹³ Para. 17.

¹⁴ *Ibid.*

The Prosecutor v. Biljana Plavsic - Case No. IT-00-39&40/1-S

Trial Chamber III (Judges May [Presiding], Robinson and Kwon)

“SENTENCING JUDGEMENT”

27 FEBRUARY 2003

Mitigating Factors in Sentencing - Age

Age: the Trial Chamber considers as a mitigating factor the advanced age of the Accused for two reasons. First, physical deterioration associated with advanced years makes serving the same sentence harder for an older accused. Second, an offender of advanced years may have little worthwhile life left upon release.

Procedural Background

- On 10 January 2001 Biljana Plavsic voluntarily surrendered to the International Tribunal.¹
- On 11 January 2001 the Accused made her initial appearance

¹ The Indictment against the Accused was originally confirmed by Judge Wald on 7 April 2000 and remained sealed until the surrender of the Accused. A consolidated Indictment against the Accused and Momcilo Krajisnik was confirmed on 23 February 2001 by Judge May and an amended Indictment against the two Accused was confirmed by the same Judge on 4 March 2002 (the “Indictment”).

before Trial Chamber III and pleaded not guilty to all counts (genocide, complicity in genocide, crimes against humanity – persecutions, extermination and killing, deportation and inhumane acts). She was remanded to the United Nations Detention Unit.

- On 29 August 2001 the Trial Chamber ordered that the Accused be provisionally released to live in the Republic of Serbia and she has remained on provisional since, apart from her appearance at the Sentencing Hearing.

- On 2 October 2002 the Accused pleaded guilty to Count 3,

persecutions as a crime against humanity. The Trial Chamber then entered a finding of guilt pursuant to Rule 62*bis* of the Rules.²

- On 20 December 2002 the Trial Chamber granted the Prosecution's motion to dismiss the remaining counts of the Indictment, as agreed by the parties in the Plea Agreement dated 30 September.³

- On 16-18 December 2002 a Sentencing Hearing was held at which the Parties called evidence and made submissions. At the conclusion of the hearing, the Trial Chamber adjourned the case to consider sentence.

- Biljana Plavsic returned to the Detention Unit on the eve of the Judgement hearing and is remanded since then.

The Sentence

The Trial Chamber sentenced Biljana Plavsic to 11 years' imprisonment.⁴

The Reasoning

The factual basis agreed⁵

Count 3 of the Indictment, to which the Accused pleaded guilty, alleges that between 1 July 1991 and 30 December 1992 the Accused, acting individually and in concert with others in a joint criminal enterprise, planned, instigated, ordered and aided and abetted persecutions of the Bosnian Muslim, Bosnian Croat and other non-Serb populations of 37 municipalities in Bosnia and Herzegovina ("BH").

A written Factual Basis for the crime described above and for participation of the Accused was filed with the Plea Agreement. The Factual Basis was agreed by the Accused and forms the basis upon which the Trial Chamber passed sentence. It deals with the career of the Accused, the background, the events of 1992 and the roles of the leaders.

The Sentencing Factors

Pursuant to Article 24 of the Statute⁶ and Rule 101 of the Rules,⁷ in determining sentence, the Trial Chamber took into

² Rule 62*bis* (Guilty Pleas)

If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:

- (i) the guilty plea has been made voluntarily;
 - (ii) the guilty plea is informed;
 - (iii) the guilty plea is not equivocal; and
 - (iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case,
- the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.

³ Decision Granting the Prosecution's Motion to Dismiss Counts 1, 2, 4, 5, 6, 7, and 8 of the Amended Consolidated Indictment, 20 December 2002.

⁴ Biljana Plavsic is entitled to the credit for the time served since her surrender (245 days).

⁵ Factual Basis for Plea of Guilty ("Factual Basis"), 30 September 2002.

⁶ Article 24 (Penalties)

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

⁷ Rule 101 (Penalties)

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

- (i) any aggravating circumstances;
- (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

account the following factors: "the gravity of the crime; any aggravating circumstances; any mitigating circumstances; the general practice regarding prison sentences in the courts of the former Yugoslavia".⁸

The Gravity of the Crime

The Trial Chamber described the crime as "a crime of utmost gravity, involving as it does a campaign of ethnic separation which resulted in the death of thousands and the expulsion of thousands more in circumstances of great brutality".⁹ For the Trial Chamber, the gravity of the crime is illustrated by: "the massive scope and extent of the persecutions; the numbers killed, deported and forcibly expelled; the grossly inhuman treatments of detainees; and the scope of the wanton destruction of property and religious buildings".¹⁰

Aggravating circumstances

The Prosecution identified three aggravating factors: the leadership position of the Accused;¹¹ the vulnerability of the victims; the depravity of the crimes to which the victims were subjected. The Defence accepted that the scope of the crimes and the manner in which they were committed may be taken into account as an aggravating factor and accepted other factors such as the scale and planning of the offence, the number of victims or the violence associated with the crimes. The Defence did not however accept that the high rank of the Accused should by itself result in a harsher sentence, submitting – in light of the *Krstic* Trial Judgement – that while the direct participation of a high level superior is an aggravating circumstance, the extent of such aggravation depends on the level of authority and the form of participation of the accused.¹²

The Trial Chamber held that the superior position of the Accused is an aggravating factor in the present case. It found that the Accused had a "lesser role" in the execution of the plan than others but that, by her participation in the Presidency and her pronouncements, she encouraged and supported that plan. The Trial Chamber accepted that "the vulnerability of the victims and the depravity of the crimes are capable of amounting to aggravating factors" but considered that, in the present case, these factors are "essentially subsumed in the overall gravity of the offence". The Trial Chamber did not treat them as aggravating factors separately.¹³ It disagreed with the Prosecution's statement at the Sentencing Hearing that in the absence of a guilty plea a sentence of life imprisonment would have been appropriate but also found that "misplaced leniency would not be fitting and that a substantial sentence of imprisonment is called for".

Mitigating Circumstances

The Trial Chamber attached great weight to Mrs. Plavsic's guilty plea (and to her remorse and call for reconciliation) and post-conflict conduct. It also attached weight to her voluntary surrender and age.

- (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
- (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

⁸ Para. 21.

⁹ Para. 52.

¹⁰ *Ibid.*

¹¹ Biljana Plavsic was elected as Serbian Representative to the Presidency of the Socialist Republic of BH on 11 November 1990 until December 1992. From 28 February to 12 May 1992 she was acting co-President of the Republic of BH and of the Serbian Republic of BH and from May until December 1992 was a member of the collective and expanded Presidencies of Republika Srpska.

¹² *Krstic*, IT-98-33-T, Judgement, 2 August 2001, paras. 708-709, *Judicial Supplement No. 27*. The Trial Chamber in *Krstic* found that "the direct participation of a high level superior in a crime is an aggravating circumstance, although to what degree depends on the actual level of authority and the form of direct participation".

¹³ Para. 58.



The guilty plea (together with remorse and reconciliation)

The Trial Chamber found that “the significance of the plea of guilty in this case was highlighted in the evidence of Professor Elie Wiesel¹⁴ [who] said that whereas others similarly accused deny the truth about their crimes and thereby assist those who want to falsify history, Mrs. Plavsic, who once moved in the highest circles of power, has made an example by freely and wholly admitting her role in the crime”.¹⁵ The Accused indeed stated that “[b]y accepting responsibility and expressing her remorse fully and unconditionally, [she] hopes to offer some consolation to the innocent victims [...] of the war in Bosnia and Herzegovina”.¹⁶ The Trial Chamber accepted her remorse and underlined the “significance circumstance to be considered, namely the role of the guilty plea of the Accused in establishing the truth in relation to the crimes and furthering reconciliation in the former Yugoslavia”.¹⁷ It concluded that “the guilty plea of Mrs. Plavsic and her acknowledgement of responsibility, particularly in the light of her former position as President of Republika Srpska, should promote reconciliation in Bosnia and Herzegovina and the region as a whole”.¹⁸

The post-conflict conduct

The Trial Chamber accepted that, as President of Republika Srpska, the Accused “demonstrated considerable support for the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (“Dayton Agreement”) after the cessation of hostilities in Bosnia and Herzegovina”.¹⁹ It took into account the testimony of witnesses who underscored her support for the Dayton Agreement,²⁰ as well as the submissions of the parties. It concluded that it was “satisfied that Mrs. Plavsic was instrumental in ensuring that the Dayton Agreement was accepted and implemented in Republika Srpska [and that] [a]s such, she made a considerable contribution to the peace in the region and is entitled to pray it in aid in mitigation of sentence”.²¹

Age

The Defence asserted that age is a mitigating factor in sentencing and that any prison term imposed on the Accused must take into account her age, life expectancy and general health. It alleged that any sentence in excess of 8.2 years²² is tantamount to life imprisonment and would constitute inhumane or degrading punishment. It referred to the General Report on the Treatment of Long-Term Prisoners prepared by Sub Committee No. XXV of the European Committee on Crime Problems in 1975, according to which “it is inhuman to imprison a person for life without any hope of release”.

The Trial Chamber noted that “there is no authority of the International Tribunal as to the effect of advanced age on determining sentence”.²³ Indeed the sole reference to age in a Judgement is found in *Krnjelac*: “[t]he final matter to which the

Trial Chamber has had regard in sentencing is the fact that the Accused, Milorad Krnojelac, is now 62 years of age”.²⁴

It noted that nothing in the Statute or in international human rights law prevents a court from imposing a sentence or a life sentence on an offender of advanced age. The European Court of Human Rights did find that the combination of age and state of health of an accused could make his imprisonment incompatible with Article 3 of the European Convention on Human Rights (prohibition of inhumane or degrading punishment),²⁵ but the Trial Chamber in the present case did not find that the health of the Accused was at issue.²⁶

While “not persuaded [...] that a calculation of the Accused’s life expectancy is a crucial factor in determining sentence”,²⁷ the Trial Chamber did consider that it should take into account the age of the Accused and did so for two reasons: “First, physical deterioration associated with advanced years makes serving the same sentence harder for an older than a younger accused. Second, as the New South Wales Court of Appeal observed in *Holyoak*,²⁸ an offender of advanced years may have little worthwhile life left upon release”.²⁹

The Trial Chamber thus preferred the approach of the English Court of Appeal in *R. v. S.*, whereby the Court undertook to “arrive at an appropriate sentence commensurate with the seriousness of the offences having regard to the age, infirmities and the circumstances” of the appellant,³⁰ i.e. “determine[d] an appropriate sentence corresponding to the gravity of the offence, taking into account the age and the circumstances of the Accused”.³¹

Determination of sentence

The Trial Chamber considered all the factors concerning the gravity of the offence and the aggravating and mitigating circumstances. It also considered the need for retribution and deterrence and the general practice regarding prison sentences in the courts of the former Yugoslavia. It found that “the Prosecution [...] has given insufficient weight to the age of the Accused and the significant mitigating factors connected with her plea of guilty and post-conflict conduct”³² but considered that “the Defence has made no recommendation as to an appropriate sentence, submitting that since the life expectancy of the Accused is eight years, any sentence beyond that would amount to life imprisonment and would be inappropriate”.³³ The Trial Chamber held that life expectancy is irrelevant and considered that a sentence of eight years’ imprisonment “would fail to meet the gravity of this offence”.³⁴

It concluded that “[n]o sentence which the Trial Chamber passes can fully reflect the horror of what occurred or the terrible impact on thousands of victims” and sentenced Biljana Plavsic to 11 years’ imprisonment.³⁵ ■

¹⁴ Professor Elie Wiesel is the recipient of the 1986 Nobel Peace Prize and a survivor of a Second World War death camp. He offered himself as a joint witness for the parties as “somebody uniquely concerned with the fate of the victims” (para. 50).

¹⁵ Elie Wiesel, T. 458-459.

¹⁶ Para. 71, referring to Plavsic Written Statement.

¹⁷ Para. 73. The conclusion of Plavsic Written Statement is as follows: “To achieve any reconciliation or lasting peace in BH, serious violations of humanitarian law during the war must be acknowledged by those who bear responsibility – regardless of their ethnic group. This acknowledgement is an essential first step”.

¹⁸ Para. 80.

¹⁹ Para. 85.

²⁰ Madeleine Albright, Permanent Representative of the United States of America to the United Nations 1993-1996 and Secretary of State 1997-2000; Robert Frowick, Head of Mission of the Organization for the Security and Co-operation in Europe (“OSCE”); Carl Bildt, Prime Minister of Sweden 1991-1994, Co-Chairman of the Dayton Peace Agreement and subsequently the first High Representative in BH; Mr. Milorad Dodik, the leader of a multi-ethnic political party called the Alliance of Independent Social Democrats, and Prime Minister of Republika Srpska between 1998-2001.

²¹ Para. 94.

²² 8.2 years is what the Defence considers as the life expectancy of the Accused, *inter alia* based on the 2001 edition of the Demographic Yearbook published by the Council of Europe and the World Health Organization’s Report of 2001.

²³ Para. 103.

²⁴ *Krnjelac*, IT-97-25, Judgement, 15 March 2002, para. 533, *Judicial Supplement* No. 31 bis.

²⁵ *Papon v. France*, European Court of Human Rights, Application No. 64666/01, 7 June 2001.

²⁶ It relied on Biljana Plavsic’s medical records, filed under seal and confidentiality, 14 December 2002.

²⁷ Para. 105.

²⁸ *R. v. Holyoak* (1995) 82 A Crim R 502 at 507-508. See also e.g. *R. v. Jeffrey William Spencer Rose* (2002) NSWSC 26, 22 February 2002, paras 23-27.

²⁹ Para. 105.

³⁰ *R. v. S.* (1998) 1 Cr.App.R.(S.) 261, at 264e.

³¹ Para. 106.

³² Para. 130.

³³ Para. 131.

³⁴ *Ibid.*

³⁵ Para. 132.

The Prosecutor v. Vidoje Blagojevic *et al.* - Case No. IT-02-60-PT

Trial Chamber II (Judges Schomburg [Presiding], Mumba and Agius)

**“DECISION ON VIDOJE BLAGOJEVIC’S MOTION FOR DISQUALIFICATION
OF THE TRIAL CHAMBER AND CONCOMITANT REQUEST
FOR CERTIFICATION TO APPEAL ”**

31 MARCH 2003

Review of a decision of the Bureau on disqualification of a Judge

Review of a decision of the Bureau on disqualification of a Judge: A Trial Chamber cannot address the issue of disqualification under Rule 73 (“Other Motions”) when Rule 15 operates as *lex specialis* on the issue of disqualification of Judges. As the Trial Chamber cannot rule on the Motion pursuant to Rule 73(A), the Trial Chamber cannot grant certification on the Motion pursuant to Rule 73(B).

Procedural Background

- On 19 March 2003, the Bureau denied Blagojevic’s motion for disqualification of the Judges of Trial Chamber II currently assigned to his case because of actual bias and appearance of bias.¹
- On 21 March 2003, Blagojevic sought clarification of the Bureau’s Decision.²
- On 27 March 2003, the Bureau rendered its Decision on Blagojevic’s motion for clarification.³ It found that there exists “no provision in either the Statute or the Rules for appeals from decisions of the Bureau to the Appeals Chamber” and that “because, in the Bureau’s view, Rule 73’s provisions for interlocutory appeal do not apply to its disqualification decisions, were Blagojevic to attempt, pursuant to Rule 73 of the Rules, to seek certification to appeal, the Bureau would not provide such certification”.⁴ The Bureau further declared itself not competent to resolve the issue, raised by both the Defence and the Prosecution, as to whether a decision on disqualification by the Bureau pursuant to Rule 15(B) is subject to review by the Appeals Chamber through an interlocutory appeal pursuant to Rule 73(B).⁵
- On 31 March 2003, Blagojevic seized Trial Chamber II of a motion for disqualification of the Trial Chamber pursuant to Rule 73(A)⁶ and, in the event that the Trial Chamber denies the motion, requested that the Trial Chamber grant certification for interlocutory appeal pursuant to Rule 73(B).⁷

Appeals Chamber. It found that it could not “address the issue of disqualification under Rule 73 (“Other Motions”) when Rule 15 operates as *lex specialis* on the issue of disqualification of Judges” and that “as the Trial Chamber cannot rule on the Motion pursuant to Rule 73(A), the Trial Chamber cannot grant certification on the Motion pursuant to Rule 73(B)”. ■

The Decision

The Trial Chamber denied the Motion.

The Reasoning

The Trial Chamber recalled the finding of the Bureau that there is no basis for appeals from decisions of the Bureau to the

¹ On the background of the case see Decision on Blagojevic’s Application Pursuant to Rule 15(B), 19 March 2003, *Judicial Supplement* No. 40, pp. 3-4.

² Vidoje Blagojevic’s Expedited Motion for Clarification of the Bureau’s Decision on Blagojevic’s Application to Disqualify the Trial Chamber Pursuant to Rule 15(B) Motion, 21 March 2003.

³ Decision on Blagojevic’s Motion for Clarification, 27 March 2003.

⁴ *Ibid.*, para. 4.

⁵ Rule 73 (Other Motions)

(B) Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

⁶ Rule 73 (Other Motions)

(A) After a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motions may be written or oral, at the discretion of the Trial Chamber.

⁷ Vidoje Blagojevic’s Motion for Disqualification of the Trial Chamber and Concomitant Request for Certification of Appeal (the “Motion”), 31 March 2003.

AVAILABLE DOCUMENTS

- FEBRUARY/MARCH 2003 -

Name:

Institution:

Address:

Zip Code: Country:.....

A copy of the following selected documents may be obtained by faxing this form back to:

Public Information Services:
Fax: +31 (0)70 512-86-68

DATE	CASE	NO.	DOCUMENT NAME
03/02/03	GALIC	IT-98-29-T	DECISION ON THE DEFENCE MOTION FOR WITHDRAWAL OF JUDGE ORIE
07/02/03	KVOCKA <i>ET AL</i>	IT-98-30/1-A	DECISION ON REVIEW OF REGISTRAR'S DECISION TO WITHDRAW LEGAL AID FROM ZORAN ZIGIC
13/02/03	MILUTINOVIC <i>ET AL</i>	IT-99-37-PT	DECISION ON DRAGOLIUB OJDANIC'S PRELIMINARY MOTION TO DISMISS FOR LACK OF JURISDICTION: JOINT CRIMINAL ENTERPRISE
17/02/03	BLAGOJEVIC <i>ET AL</i>	IT-02-60-AR65.4	DECISION ON PROVISIONAL RELEASE APPLICATION BY BLAGOJEVIC
19/02/03	MILUTINOVIC <i>ET AL</i>	IT-99-37-PT	DECISION ON DEFENCE REQUEST FOR REVIEW OF REGISTRAR'S DECISION
21/02/03	HADZIHASANOVIC <i>ET AL</i>	IT-01-47-AR72	DECISION PURSUANT TO RULE 72(E) AS TO VALIDITY OF APPEAL
26/02/03	GALIC	IT-98-29-T	DECISION ON THE DEFENCE REQUEST FOR CERTIFICATION TO APPEAL THE PRESIDING JUDGE'S DECISION ON WITHDRAWAL OF JUDGE ORIE
28/02/03	KRAJISNIK	IT-00-39-PT	DECISION ON PROSECUTION MOTIONS FOR JUDICIAL NOTICE OF ADJUDICATED FACTS AND FOR ADMISSION OF WRITTEN STATEMENTS OF WITNESSES PURSUANT TO RULE 92.BIS
11/03/03	SIMIC <i>ET AL</i>	IT-95-9-T	REASONS FOR DECISION ON PROSECUTION'S MOTION TO USE TELEPHONE INTERVIEWS
11/03/03	KVOCKA <i>ET AL</i>	IT-98-30/1-A	DECISION ON FURTHER REQUEST FOR REVIEW BY ZORAN ZIGIC
13/03/03	GALIC	IT-98-29-T	DECISION ON APPEAL FROM REFUSAL OF APPLICATION FOR DISQUALIFICATION AND WITHDRAWAL OF JUDGE
18/03/03	MEAKIC <i>ET AL</i>	IT-02-65-PT	DECISION ON DUSKO KNEZEVIC'S MOTION FOR PROVISIONAL RELEASE
19/03/03	BLAGOJEVIC <i>ET AL</i>	IT-02-60-PT	DECISION ON BLAGOJEVIC'S APPLICATION PURSUANT TO RULE 15(B)
25/03/03	LIMAJ <i>ET AL</i>	IT-03-66-I	DECISION TO GRANT LEAVE TO AMEND THE INDICTMENT
25/03/03	MILUTINOVIC <i>ET AL</i>	IT-99-37-PT	DECISION PURSUANT TO RULE 72(E) AS TO VALIDITY OF APPEAL
27/03/03	BLAGOJEVIC <i>ET AL</i>	IT-02-60-PT	DECISION ON BLAGOJEVIC'S MOTION FOR CLARIFICATION
27/03/03	MILOSEVIC	IT-02-54-T	DECISION ON ADMISSIBILITY OF MORTEN TORKILDSEN'S EVIDENCE
28/03/03	STANISLAV GALIC & DRAGOMIR MILOSEVIC	IT-98-29-T	DECISION ON GALIC'S APPLICATION PURSUANT TO RULE 15(B)
31/03/03	BLAGOJEVIC <i>ET AL</i>	IT-02-60-PT	DECISION ON VIDOJE BLAGOJEVIC'S MOTION FOR DISQUALIFICATION OF THE TRIAL CHAMBER AND CONCOMITANT REQUEST FOR REQUEST FOR CERTIFICATION TO APPEAL