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No 41

APPEALS CHAMBER

TRIAL CHAMBERS

The summary of the Judgement rendered by Trial Chamber I on 31 March 2003 in the case The Prosecutor v. Naletilic and Martinovic, *IT-98-34-T, will be published in the next issue of the Judicial Supplement.*

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APPEALS CHAMBER

The Prosecutor v. Simic *et al.* - Case No. IT-95-9-AR73.6 & AR73.7

Judges Meron [Presiding], Pocar, Schomburg, Shahabuddeen and Güney

"DECISION ON PROSECUTION INTERLOCUTORY APPEALS ON THE USE OF STATEMENTS NOT ADMITTED INTO EVIDENCE PURSUANT TO RULE 92 *BIS* AS A BASIS TO CHALLENGE CREDIBILITY AND TO REFRESH MEMORY"

23 MAY 2003

***Cross-examination of a witness on a part of his statement given but not admitted under Rule 92* bis**

Cross-examination of a witness on a part of his statement given but not admitted under Rule 92 *bis*: the purpose of Rule 92 *bis* of the Rules is to determine whether a particular statement meets the requirements for admission into evidence (with or without cross-examination) as an alternative or complement to *viva voce* evidence and not to limit the scope of cross-examination or to regulate the types of statements or documents which may be referred to in cross-examination. Rule 92 *bis* does not bar the use in cross-examination of portions of statements not admitted into evidence under this Rule.

Procedural Background

The present Decision of the Appeals Chamber is concerned with two appeals closely related in terms of the procedural background and legal issues involved. It is therefore a joint decision in relation to both appeals. The issue is whether a portion of a Rule 92 *bis*[1] written statement not admitted into evidence can be used to cross-examine the witness who made the statement. The First Appeal[2] was filed by the Prosecution with regard to Trial Chamber II's oral decision of 2 April 2003 and written decision of 28 April 2003.[3] The Second Appeal[4] was filed by the Prosecution with regard to Trial Chamber II's oral decision of 15 April 2003 and written decision of 2 May 2003.[5]

The Decision

The Appeals Chamber granted both appeals and quashed the appealed decisions.

The Reasoning

The Appeals Chamber referred to its previous decision in the *Milosevic* case[6] whereby it held that:

> "To avoid any misunderstanding, however, it is perhaps necessary to add that there is nothing in the *Galic* Decision which prevents a written statement given by prospective witnesses to OTP investigators or others for the purposes of legal proceedings being received in evidence notwithstanding its non-compliance with Rule 92 *bis* - (i) where there has been no objection taken to it, or (ii) where it has otherwise become admissible - where, for example, the written statement is asserted to contain a prior statement inconsistent with the witness's evidence".[7]

According to the Appeals Chamber, it is clear from the wording of this Decision that "Rule 92 *bis* does not bar the use of such statements in cross-examination".[8] It held that "[t]he purpose of Rule 92 *bis* of the Rules is to determine whether a particular statement meets the requirements for admission into evidence (with or without cross-examination) as an alternative or complement to *viva voce* evidence and not to limit the scope of cross-examination, or to regulate the types of statements or documents which may be referred to in cross-examination".[9]

The Appeals Chamber therefore found that the Trial Chamber erred in law by holding that a party cannot cross-examine a witness on the basis of his prior statement given but not admitted pursuant to Rule 92 *bis*. It held that "the Trial Chamber should in a manner it finds appropriate give the Prosecution, should it so request, an opportunity to complete the cross-examination of these two witnesses".[10] ■

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[1] Rule 92 *bis* is entitled "Proof of Facts other than by Oral Evidence" and concerns evidence of a witness which may be admitted by the Trial Chamber in a written form in lieu of orally. For the latest developments as regards Rule 92 *bis* see *Milosevic*, IT-02-54-AR73.2, Decision on Admissibility of Prosecution's Investigator Evidence ("*Milosevic* Decision"), 30 September 2002, *Judicial Supplement* No. 37.

[2] Prosecution's Interlocutory Appeal Against the Trial Chamber's 28 April 2003 "Decision on Prosecutor's Motion for Trial Chambers Redetermination of its Decision of 2 April 2003 Relating to Cross-examination of Defence Rule 92*bis* Witnesses or Alternatively Certification Under Rule 73(B) of the Rules of Procedure and Evidence", filed 5 May 2003.

[3] Decision on Prosecutor's Motion for Trial Chambers Redetermination of its Decision of 2 April 2003 Relating to Cross-examination of Defence Rule 92*bis* Witnesses or Alternatively Certification Under Rule 73(B) of the Rules of Procedure and Evidence ("First Decision"), 28 April 2003. The Trial Chamber held that a statement which has not been admitted under Rule 92 *bis* could "not be treated as a prior representation for cross-examination purposes as they exist only for the purpose of the Rule 92 *bis* procedure and do not stand alone".

[4] Prosecution's Interlocutory Appeal Against the Trial Chamber's 2 May 2003 "Decision on Prosecutor's Motion for Redetermination of Decision of 15 April 2003 Preventing Witnesses from Refreshing Memory From a Statement Declared Pursuant to Rule 92*bis* of the Rules of Procedure and Evidence, or Alternatively Certification Under Rule 73(B) and a Variation of Time for Filing of Rule 73(B) Motion Pursuant to Rule 127", 9 May 2003.

[5] Decision on Prosecutor's Motion for Redetermination of Decision of 15 April 2003 Preventing Witnesses From Refreshing Memory from a Statement Declared Pursuant to Rule 92*bis*(B) of the Rules of Procedure and Evidence, or Alternatively Certification Under Rule 73(B) And Variation of Time for Filing of Rule 73(B) Motion Pursuant to Rule 127 ("Second Decision"), 2 May 2003. The Trial Chamber held that "the reasoning and finding of the Trial Chamber [in the First Decision] which prevent the Prosecution from referring a witness portion that has been struck out by the Trial Chamber of a statement prepared pursuant to Rule 92 *bis* of the Rules, applies to [the present Motion]".

[6] See *supra* note 1.

[7] *Milosevic* Decision, pages 10-11.

[8] Para. 15.

[9] *Ibid.*

[10] Para. 21.

The Prosecutor v. Mucic *et al.* - Case No. IT-96-21-A*bis*

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

"JUDGEMENT ON SENTENCE APPEAL"

8 APRIL 2003

The power of the Appeals Chamber to remit limited issues arising on appeal to a new Trial Chamber for determination - The right to adduce further evidence upon the hearing of a sentence appeal - Sentencing in relation to more than one offence - The power of the Appeals Chamber to reconsider its Judgement

The power of the Appeals Chamber to remit limited issues arising on appeal to a new Trial Chamber for determination: the Appeals Chamber which heard the first appeal was prevented by circumstances from conducting a further hearing, before delivering its Judgement, for the parties to make submissions as to the appropriate sentences to be imposed. It therefore had an inherent power to remit those issues to a Trial Chamber. An appeal from the Trial Chamber's determination of those limited issues does not give to the parties the opportunity to appeal against the earlier decision of the Appeals Chamber to remit those limited issues to the Trial Chamber.

The right to adduce further evidence upon the hearing of a sentence appeal: it is only where the appellant succeeds in demonstrating that the Trial Chamber made an appealable error in relation to the sentence imposed that any issue of further evidence relating to the appropriate sentence can arise. In those circumstances, it is within the discretion of the Appeals Chamber as to whether further evidence will be admitted. The exercise of that discretion is dependent mainly upon the nature of the error which has been demonstrated in the sentence appeal.

Sentencing in relation to more than one offence: the total single sentence, or the effective total sentence where several sentences are imposed, must reflect the totality of the offender's criminal conduct but it must not exceed that totality. Where several sentences are imposed, the result is that the individual sentences must either be less than they would have been had they stood alone or they must be ordered to be served either concurrently or partly concurrently.

The power of the Appeals Chamber to reconsider its Judgement: the power exists in relation to a Judgement which the Appeals Chamber has given where it is persuaded: (a) (i) that a clear error of reasoning in the previous Judgement has been demonstrated by, for example, a subsequent decision of the Appeals Chamber itself, the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction, or (ii) that the previous Judgement was given *per incuriam*; and (b) that the Judgement of the Appeals Chamber sought to be reconsidered has led to an injustice.

Procedural Background

▪ In its *Delalic et al* Judgement delivered on 20 February 2001,[1] the Appeals Chamber upheld appeals by Mucic, Delic and Landzo against:

- cumulative convictions based upon the same acts for both grave breaches of the Geneva Conventions and violations of the laws or customs of war, dismissing the charges for the violations of the laws or customs of war;
- the conviction of Delic upon one count of wilful killing; and
- an adverse reference by the original Trial Chamber to the fact that Mucic had not given evidence at the trial.

▪ All the other grounds of appeal were dismissed, including a challenge by Delic to a number of counts of wilful killing and torture (constituted by rape and repeated incidents of forcible sexual intercourse). The Appeals Chamber also upheld an appeal by the Prosecution against the inadequacy of the sentence imposed upon Mucic.

▪ The Appeals Chamber remitted to a new Trial Chamber a number of issues relating to the adjustment of the sentences which had been imposed as a result of the rulings which had been made in the Judgement on appeal. The new Trial Chamber[2] determined that:

- no adjustment should be made for the dismissal of the cumulative convictions;
- the twenty-year sentence imposed upon Delic should be reduced to eighteen years to reflect the quashing of his conviction on one count of wilful killing;
- there should be "a small reduction" given to Mucic as a result of the adverse reference by the original Trial Chamber, when sentencing him, to the fact that he had not given evidence at the trial; and
- an appropriate revised sentence for Mucic was a sentence of imprisonment for nine years.

▪ The three appellants appealed again to the Appeals Chamber against those findings. Delic also sought to have his original appeal against conviction reconsidered by the Appeals Chamber.

The Judgement

The Appeals Chamber dismissed the appeals against sentence, confirmed the sentences imposed by the Trial Chamber on 9 October 2001, and rejected Delic's application for a reconsideration of his appeal against conviction.

The Reasoning

In this Judgement, the Appeals Chamber made the following rulings:

The power of the Appeals Chamber to remit limited issues arising on appeal to a new Trial Chamber for determination

The Appeals Chamber considered its power to remit such issues at the time when it exercised that power in its Judgement in the earlier appeal. An appeal from the Trial Chamber's determination of those limited issues does not give to the parties the opportunity to appeal against the earlier decision of the Appeals Chamber to remit those limited issues to the Trial Chamber.[3] Its power to remit limited issues is clear.[4] The Appeals Chamber which heard the first appeal was prevented by circumstances from conducting a further hearing,[5] before

[1] *Delalic* et al., IT-96-21-A, 20 February 2001, *Judicial Supplement* No. 23.

[2] *Mucic* et al., IT-96-21-T *bis*-R117, Sentencing Judgement, 9 October 2001, *Judicial Supplement* No. 28.

[3] Judgement, para. 9.

[4] *Ibid.*, para. 10.

[5] The resignation of one member of the Appeals Chamber was to take effect within a short time after the Appeals Chamber Judgement was delivered and therefore the parties could not make submissions to the Appeals Chamber at the time (see para. 3).

delivering its Judgement, for the parties to make submissions as to the appropriate sentences to be imposed. It therefore had an inherent power to remit those issues to a Trial Chamber.[6]

The right to adduce further evidence upon the hearing of a sentence appeal

Sentencing appeals, as with all appeals to the Appeals Chamber from the Judgement of a Trial Chamber, are appeals *stricto sensu*. They are not trials *de novo*. This is clear from the terms of Article 25 of the Statute. The appellant must demonstrate, upon the trial record, that the Trial Chamber had made an appealable error. Evidence of post-sentence behaviour is irrelevant to whether the Trial Chamber erred in the exercise of its sentencing discretion. It is only where the appellant succeeds in demonstrating that the Trial Chamber made such an error in relation to the sentence imposed that any issue of further evidence relating to the appropriate sentence can arise. In those circumstances, it is within the discretion of the Appeals Chamber as to whether further evidence will be admitted. The exercise of that discretion is dependent mainly upon the nature of the error which has been demonstrated in the sentence appeal.[7]

Where the nature of the error demonstrated is such that the Appeals Chamber is replacing the sentence with another which, in its view, the original Trial Chamber should have imposed, further evidence will not ordinarily be admitted.[8] Evidence of co-operation *after* conviction is expressly made relevant to sentencing by Rule 101(B)(ii), and thus, in appropriate cases, admissible in a sentence appeal.[9] Where the nature of the error is such that it may be cured only by additional sentences to be imposed (or a new single sentence to cover additional convictions), the provisions of Rule 101(B) may apply to permit further relevant evidence to be adduced where that evidence is not already before the Appeals Chamber.[10]

The evidence which the appellants wished to tender at the hearing related to their conduct since the original sentences were imposed and to sentences imposed upon other accused persons. None was relevant to the limited issues remitted and the ruling of the new Trial Chamber that such evidence was effectively inadmissible was correct.[11]

No adjustment despite the dismissal of the cumulative convictions

The Appeals Chamber had emphasised in its earlier Judgement that the governing criterion in sentencing is that the sentence should reflect the totality of the offender's conduct (the "totality" principle), and that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate. The Trial Chamber in the Judgement now under appeal concluded that the totality of the criminal conduct of each of the three appellants had not been reduced by reason of the quashing of the cumulative convictions.[12]

The Appeals Chamber accepted that the cumulative convictions themselves involve an additional punishment - not only by reason of the social stigmatisation inherent in being convicted of that additional crime, but also the risk that, under the law of the State enforcing the sentence, the eligibility of a convicted person for early release will depend to some extent upon the number or nature of the convictions entered. The quashing of the cumulative convictions undoubtedly removed the punishment involved in the additional convictions themselves. The issue which the new Trial Chamber had to determine in the circumstances of the present case was whether, in determining the length of the concurrent sentences imposed, the original Trial Chamber had also added to the length of those concurrent sentences because of those additional convictions.[13]

The original Trial Chamber made it clear that its decision to make the sentences imposed concurrent was intended to avoid any prejudice to the appellants by reason of the cumulative convictions. It applied the reasoning that what is to be punished is proven criminal conduct, which does not depend upon the technicalities of pleading.[14] The conclusion by the new Trial Chamber that the sentences "clearly would have been the same without the cumulative convictions" was therefore open to it.[15]

The "small" reduction to Mucic's sentence as a result of the adverse reference by the original Trial Chamber to the fact that he had not given evidence at the trial

The new Trial Chamber held that it was not possible to ascertain the precise effect, if any, which this comment may have had on the sentence imposed, but that it was not in a position to say that it had had no effect.[16] Mucic has argued that the error of the original Trial Chamber, by ignoring the burden and standard of proof, was so basic a defect that he was entitled to a reduction as substantial as the error which had been made.[17] The Appeals Chamber held that such an approach is fundamentally defective. An appellate tribunal does not compensate an appellant for the fact that an error was made; it adjusts the sentence to remove the effect of the error which was made.[18] The Appeals Chamber was not persuaded that the new Trial Chamber's characterisation of the reduction warranted by the error made by the original Trial Chamber as "small" was erroneous.[19]

Nine-year sentence imposed upon Mucic

The Appeals Chamber had earlier held that the original Trial Chamber, by imposing a sentence of seven years, had failed to adequately take into account (a) the influential effect of a camp commander's encouraging or promoting crimes and an atmosphere of lawlessness within the camp by his ongoing failure to exercise his duties of supervision, (b) the gravity of his offences, and specifically the gravity of the underlying crimes, and (c) the fact that both direct and superior responsibility was involved in the wilful causing of great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp.[20]

The sentence which is appropriate must reflect the inherent gravity of the criminal conduct of Mucic, and it requires a consideration of the particular circumstances of this case, as well as the form and degree of the participation of Mucic in the crimes for which he was convicted. That criminal conduct was serious. Mucic failed to persuade the Appeals Chamber that the new Trial Chamber made any errors of law or that it erred in the exercise of its discretion in imposing a sentence of nine years.[21]

Reduction of sentence for Delic following quashing of one conviction for wilful killing: sentencing in relation to more than one offence

The new Trial Chamber correctly proceeded upon an acceptance of the findings made by the original Trial Chamber (other than those relating to the count of wilful killing which the Appeals Chamber had dismissed) in order to determine the appropriate sentence to be imposed upon Delic which was also appropriate to the totality of his criminal conduct in relation to all of the convictions which remained.[22]

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[6] Judgement, paras. 3, 16.
[7] *Ibid.*, para. 11.
[8] *Ibid.*, para. 12.
[9] *Ibid.*, para. 13.
[10] *Ibid.*, para. 14.
[11] *Ibid.*, para. 15.
[12] *Ibid.*, para. 21.
[13] *Ibid.*, para. 25.
[14] *Ibid.*, para. 26.
[15] *Ibid.*, para. 27.
[16] *Ibid.*, para. 29.
[17] *Ibid.*, para. 30.
[18] *Ibid.*, para. 31.
[19] *Ibid.*, para. 32.
[20] *Ibid.*, para. 35.
[21] *Ibid.*, para. 39.
[22] *Ibid.*, paras. 41, 45 and 47.

Sentencing in relation to more than one offence involves more than just an assessment of the appropriate period of imprisonment for each offence and the addition of all such periods so assessed as a simple mathematical exercise. The total single sentence, or the effective total sentence where several sentences are imposed, must reflect the totality of the offender's criminal conduct but it must not exceed that totality. Where several sentences are imposed, the result is that the individual sentences must either be less than they would have been had they stood alone or must be ordered to be served either concurrently or partly concurrently.[23]

The offences for which Delic remains convicted are very serious. The Appeals Chamber was satisfied that his criminal conduct deserved substantial punishment. The Appeals Chamber was not persuaded that the new Trial Chamber made any errors of law or that it erred in the exercise of its discretion in imposing a sentence of eighteen years in this case.[24]

Application by Delic for reconsideration of his original appeal against conviction: the power of the Appeals Chamber to reconsider its Judgement

The Appeals Chamber has an inherent power to reconsider any decision, including a Judgement where it is necessary to do so in order to prevent an injustice. Whether or not a Chamber does reconsider its decision is itself a discretionary decision. The power exists in relation to a Judgement which the Appeals Chamber has given - where it is persuaded:

(a) (i) that a clear error of reasoning in the previous Judgement has been demonstrated by, for example, a subsequent decision of the Appeals Chamber itself, the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction, or
(ii) that the previous Judgement was given *per incuriam*;[25] and
(b) that the Judgement of the Appeals Chamber sought to be reconsidered has led to an injustice.[26]

Delic argued that there has been a "significant" change in the law relevant to the present case since the earlier Judgement of the Appeals Chamber. He claimed that, in the Judgement of the Appeals Chamber in the *Kupreskic* case, the Appeals Chamber laid down a "new test" as to the sufficiency of the evidence to support a conviction which, if it had been applied by the Appeals Chamber in its earlier Judgement, would have resulted in the quashing of his convictions in respect of Counts 3, 18 and 31 of the indictment.[27]

The Appeals Chamber was satisfied that, in considering whether the original Trial Chamber's conclusion of Delic's guilt beyond reasonable doubt upon those counts was one which no reasonable tribunal of fact could have reached, the Appeals Chamber had in its earlier Judgement applied the same test as that applied in the *Kupreskic* case, and that the claim that the Appeals Chamber had applied a "new test" in the *Kupreskic* case is misconceived. The distinction to which the Appeals Chamber had referred in that Judgement, between the reliability (or the quality) of a witness's evidence as opposed to the credibility (or truthfulness) of that witness, was directed to the issue of identification raised in that appeal in relation to the only witness who had identified the accused. The Trial Chamber in the *Kupreskic* case had acknowledged the criticisms of the credibility of that witness but had stated that those criticisms had been outweighed by the impression which the witness had made upon the Chamber when she was giving evidence. When determining whether no reasonable tribunal of fact could have accepted that witness's evidence, it was appropriate for the Appeals Chamber to refer to the uncertainty and the inherent frailties of identification evidence. That distinction is a well known one, and one which is not new to the Tribunal's jurisprudence.[28]

Separate Opinion of Judge Meron and Judge Pocar

Judge Meron and Judge Pocar stated that judicial restraint requires the Appeals Chamber to determine whether it has power to reconsider its Judgement only when, in some future case, it is necessary to do so. They reserved their position on that issue but agreed that there had been no intervening change in the governing legal standard.

Separate Opinion of Judge Shahabuddeen

In answer to the Joint Separate Opinion, Judge Shahabuddeen has stated that it was within the competence of the Appeals Chamber to pronounce on the issue of its power to reconsider its Judgement; he agreed that the Appeals Chamber possesses such a power and accepted the statement in the Judgement of the Appeals Chamber that the power may be exercised where the Appeals Chamber is persuaded that there is a clear error of reasoning in its previous Judgement or that it was given *per incuriam* and where the Judgement has led to an injustice. ■

[23] *Ibid.*, para. 46.
[24] *Ibid.*, para. 47.
[25] *Per incuriam*: [Latin] Through lack of care. A decision of a court is made *per incuriam* if it fails to apply a relevant statutory provision or ignores a binding precedent (Oxford Dictionary of Law).
[26] *Ibid.*, para. 49.
[27] *Ibid.*, para. 54.
[28] *Ibid.*, paras. 58-60.

The Prosecutor v. Milutinovic *et al.* - Case No. IT-99-37-AR72

Judges Shahabudden [Presiding], Pocar, Jorda, Hunt and Gunawardana

"DECISION ON DRAGOLJUB OJDANIC'S MOTION CHALLENGING JURISDICTION - *JOINT CRIMINAL ENTERPRISE*"

21 MAY 2003

The Tribunal's jurisdiction* ratione personae – *Joint criminal enterprise and the Tribunal's Statute – The nature of joint criminal enterprise - Joint criminal enterprise and conspiracy - Joint criminal enterprise and membership in a criminal organisation

The Tribunal's jurisdiction *ratione personae*: in order to fall within the Tribunal's jurisdiction *ratione personae*, any form of liability must satisfy four pre-conditions: (i) it must be provided for in the Statute, explicitly or implicitly; (ii) it must have existed under customary international law at the relevant time; (iii) the law providing for that form of liability must have been sufficiently foreseeable at the relevant time to anyone who acted in such a way; and (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.

Joint criminal enterprise and the Tribunal's Statute: the reference to that crime or to that form of liability does not need to be explicit to come within the purview of the Tribunal's jurisdiction. The Statute of the ICTY is not and does not purport to be a meticulously detailed code providing for every possible scenario and every solution thereto. It sets out in somewhat general terms the jurisdictional framework within which the Tribunal has been mandated to operate. The list in Article 7(1) appears to be non-exhaustive in nature as the use of the phrase "*or otherwise* aided and abetted" suggests.

The nature of joint criminal enterprise: insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated. Joint criminal enterprise is a form of "commission" pursuant to Article 7(1) of the Statute.

Joint criminal enterprise and conspiracy: joint criminal enterprise and "conspiracy" are two different forms of liability. While mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise.

Joint criminal enterprise and membership in a criminal organisation: criminal liability pursuant to joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter.

Procedural Background

▪ On 29 November 2002, Ojdanic[1] filed a Preliminary Motion before Trial Chamber III to dismiss the indictment for lack of jurisdiction in relation to charges based on his liability as a participant in a joint criminal enterprise.[2] On 13 December 2002,[3] the Prosecution responded to his Motion. On 6 January 2003, Ojdanic replied.[4]

▪ On 13 February 2003, Trial Chamber III rendered its Decision dismissing Ojdanic's Motion.[5] The Trial Chamber held that the Appeals Chamber had found that participation in a joint criminal enterprise was a mode of liability which applied to any crime within the Tribunal's jurisdiction.[6] In accordance with the *nullum crimen sine lege* principle, the Trial Chamber further stated that the Appeals Chamber had defined the constitutive elements of such a form of liability and said that the Appeals Chamber had clearly distinguished that form of liability from other forms of liability such as conspiracy and membership of a criminal organisation.[7]

▪ On 28 February 2003, Ojdanic appealed against the Impugned Decision.[8] On 10 March 2003,[9] the Prosecution responded. On 13 March 2003, Ojdanic replied.[10]

▪ On 25 March 2003, pursuant to Rule 72(B)(i) and 72(E), a Bench of the Appeals Chamber assigned by the President[11] declared that Ojdanic's Appeal had been validly filed insofar as it challenges the jurisdiction of the Tribunal in relation to his individual criminal responsibility for his alleged participation in a joint criminal enterprise charged pursuant to Article 7(1) of the Statute.[12]

The Decision

The Appeals Chamber dismissed the appeal.

The Reasoning

Joint criminal enterprise and the Tribunal's jurisdiction *ratione personae*

As regards the jurisdiction *ratione materiae* of the Tribunal (crimes falling within the jurisdiction of the Tribunal), the Appeals Chamber recalled that the Tribunal only has jurisdiction

[1] Dragoljub Ojdanic is charged, pursuant to the Third Amended Indictment of 5 September 2002 (IT-99-37-I), with deportation, other inhuman acts, persecutions and murder. He is charged both as a superior pursuant to Article 7(3) of the Statute and for planning, instigating, ordering, committing and otherwise aiding and abetting in the planning, preparation or execution of those crimes, pursuant to Article 7(1).

[2] General Dragoljub Ojdanic's Preliminary Motion to Dismiss for Lack of Jurisdiction: *Joint Criminal Enterprise*.

[3] Prosecution's Response to "Dragoljub Ojdanic's Preliminary Motion to Dismiss for Lack of Jurisdiction: *Joint Criminal Enterprise*" of 29 November 2002.

[4] Reply Brief: Preliminary Motion to Dismiss for Lack of Jurisdiction: *Joint Criminal Enterprise*. On 9 January, the Prosecution filed the "Prosecution's Notification in relation to Ojdanic's Reply Briefs to his Preliminary Motions to Dismiss for Lack of Jurisdiction: Kosovo and Joint Criminal Enterprise".

[5] Decision on Dragoljub Ojdanic's Preliminary Motion to Dismiss for Lack of Jurisdiction: *Joint Criminal Enterprise* ("Impugned Decision").

[6] *Ibid.*, page 6. The Trial Chamber referred to the following decisions of the Appeals Chamber: *Tadic*, IT-94-1-A, , Judgement ("*Tadic* Appeals Judgement"), 15 July 1999, paras. 185 ff., *Judicial Supplement* No. 6; *Furundzija*, IT-95-17/1, Judgement, 21 July 2000, paras. 118-120, *Judicial Supplement* No. 18; *Delalic* et al., IT-96-21-A, Judgement, 20 February 2001, paras. 365-366, *Judicial Supplement* No. 23.

[7] Impugned Decision, pp. 6-7.

[8] General Ojdanic's Appeal from Denial of Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise ("Ojdanic's Appeal").

[9] Prosecution's Response to "General Ojdanic's Appeal from Denial of Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise".

[10] Reply Brief: "General Ojdanic's Appeal from Denial of Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise".

[11] Order of the President Assigning Judges to the Appeals Chamber, 6 March 2003.

[12] Decision Pursuant to Rule 72(E) as to Validity of Appeal.

over a crime listed in the Statute if that crime was recognised as such under customary international law at the time it was allegedly committed.[13] Turning to its jurisdiction *ratione personae* (forms of liability falling within the jurisdiction of the Tribunal), it held that "in order to come within the Tribunal's jurisdiction *ratione personae*, any form of liability must satisfy four pre-conditions: (i) it must be provided for in the Statute, explicitly or implicitly; (ii) it must have existed under customary international law at the relevant time; (iii) the law providing for that form of liability must have been sufficiently foreseeable at the relevant time to anyone who acted in such a way; and (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended".[14]

Joint criminal enterprise and the Tribunal's Statute

The Defence contended that Article 7(1), pursuant to which joint criminal enterprise is charged, does not provide for such form of liability.[15] The Appeals Chamber recognised that this provision does not contain an explicit reference to "joint criminal enterprise" but recalled that the Appeals Chamber already dealt with this matter in other cases.[16] Indeed in the *Tadic* case it found that such form of liability is provided for in the Statute and existed under customary international law at the relevant time.[17] It held that the Appellant had advanced no cogent reason as to why the Appeals Chamber should come to a different conclusion than the one reached in *Tadic*. The fact that such form of liability is not expressly mentioned as such in the Statute does not mean that it is not included: ""[t]he reference to that crime or to that form of liability does not need [...] to be explicit to come within the purview of the Tribunal's jurisdiction".[18] The Appeals Chamber found that "[t]he Statute of the ICTY is not and does not purport to be, unlike the Rome Statute of the International Criminal Court, a meticulously detailed code providing for every possible scenario and every solution thereto. It sets out in somewhat general terms the jurisdictional framework within which the Tribunal has been mandated to operate".[19] It held that "the list in Article 7(1) appears to be non-exhaustive in nature as the use of the phrase '*or otherwise* aided and abetted' suggests".[20]

The nature of joint criminal enterprise

The Prosecution submitted in the Indictment that by using the word "committed" it did not intend to suggest that any of the Accused physically perpetrated any of the crimes charged and that the word referred solely to their participation in a joint criminal enterprise. The Prosecution charges co-perpetration in a joint criminal enterprise as a form of "commission" pursuant to Article 7(1) rather than as a form of accomplice liability. The Appeals Chamber found the Prosecution's approach correct to the extent that "insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated".[21] It held that "the Appeals Chamber therefore regards joint criminal enterprise as a form of 'commission' pursuant to Article 7(1) of the Statute".[22] Since the Defence argued that joint criminal enterprise was not clearly defined and could be assimilated to conspiracy or membership in a criminal organisation, the Appeals Chamber clarified those issues.

Joint criminal enterprise and conspiracy

The Appeals Chamber held that joint criminal enterprise and "conspiracy" are two different forms of liability and explained that "[w]hilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement".[23] It further clarified that "while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise".[24]

Joint criminal enterprise and membership in a criminal organisation

The Appeals Chamber noted that "[j]oint criminal enterprise is different from membership of a criminal enterprise which was criminalised as a separate criminal offence in Nuremberg and in subsequent trials held under Control Council Law No. 10". It further noted that "the Secretary-General made it clear that only natural persons (as opposed to juridical entities) were liable under the Tribunal's Statute, and that mere membership in a given criminal organisation would not be sufficient to establish individual criminal responsibility".[25] It held that "[c]riminal liability pursuant to joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter".[26]

Separate Opinion of Judge Shahabuddeen

Judge Shahabuddeen agreed with the Appeals Chamber's decision which in his view unanimously and correctly follows its previous ruling in *Tadic* that joint criminal enterprise forms a part of customary international law. However since he found that the reasoning could bear improvement, he expressed his view about the terms used in *Tadic* to refer to joint criminal enterprise. He also considered whether the Appeals Chamber in *Tadic* is to be understood as describing a participant in a joint criminal enterprise as one who merely aids and abets and whether the finding of the Appeals Chamber in *Tadic* that joint criminal enterprise exists in customary international law was *obiter dictum*[27] or *ratio decidendi*.[28]

Separate Opinion of Judge David Hunt

Judge Hunt was satisfied that individual criminal responsibility for participation in a joint criminal enterprise to commit a crime clearly existed as part of customary international law at the relevant time and that the challenge to the jurisdiction of the Tribunal to find such an individual criminal responsibility in relation to crimes within its jurisdiction must fail. He analysed the *Tadic* Appeal Judgement to determine whether its ruling and the definition of the elements and application of a joint criminal enterprise as a mode of individual criminal responsibility were correct and expressed his view on the notion of judicial precedent with regard to the concept of what is *obiter* and what is *ratio*. ■

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[13] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ("Secretary-General's Report"), para. 34. See also *Vasiljevic*, IT-98-32-T, Judgement, 29 November 2002, paras. 193 ff., *Judicial Supplement* No. 38.

[14] Para. 21.

[15] Ojdanic's Appeal, paras. 12-17.

[16] See *supra* note 6.

[17] *Tadic* Appeal Judgement, para. 220: "In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal".

[18] Para. 18.

[19] *Ibid.*

[20] *Ibid.*

[21] Para. 20.

[22] *Ibid.*

[23] Para. 23. The Appeals Chamber referred to *XV Law Report of Trials of War Criminals* in which the United Nations War Crimes Commission stated that "the difference between a charge of conspiracy and one of acting in pursuance of a common design is that the first would claim that an agreement to commit offences had been made while the second would allege not only the making of an agreement but the performance of acts pursuant to it" (paras. 97-98).

[24] Para. 23.

[25] Para. 25. The Appeals Chamber referred to paras. 50 and 51 of the Secretary-General's Report.

[26] Para. 26.

[27] *Obiter dictum*: [Latin: a remark in passing] Something said by a Judge while giving judgement that was not essential to the decision in the case. It does not form part of the *ratio decidendi* of the case and therefore creates no binding precedent, but may be cited as persuasive authority in later cases (Oxford Dictionary of Law).

[28] *Ratio decidendi*: [Latin: reason for deciding] The principle or principles of law on which the court reaches its decision. The *ratio* of the case has to be deduced from its facts, the reasons the court gave for reaching its decision, and the decision itself. Only the *ratio* of a case is binding on inferior courts, by reason of the doctrine of precedent (Oxford Dictionary of Law).

The Prosecutor v. Blagojevic *et al.* - Case No. IT-02-60-AR73 / AR73.2 / AR73.3

Judges Pocar [Presiding], Jorda, Shahabuddeen, Güney and Gunawardana

"DECISION"

8 APRIL 2003

Interpretation and application of the Rules – Scope of Rule 65* ter *– Exposure to materials yet to be presented in evidence

Interpretation and application of the Rules: a decision which is in conformity with the principles of justice, even though not based on a written rule, does not prejudice the interests of the party.

Scope of Rule 65 *ter*: the terms of Rule 65 *ter* may be clear but are not intended to be exhaustive. The pre-trial Judge's powers are not confined to what is specified in the rule, as long as his powers are exercised consistently with the provision of Rule 65 *ter* (B).

Exposure to materials yet to be presented in evidence: to be exposed to materials yet to be presented in evidence does not necessarily lead to pre-judgment or partiality. The professionalism of the Judges is a guarantee that the presumption of innocence will be respected.

Procedural Background

- On 21 January 2003, Trial Chamber II rendered its "Decision on Joint Defence Motions for Reconsideration of Trial Chamber's Decision to Review all Discovery Materials Provided to the Accused by the Prosecution" ("Impugned Decision"). The Impugned Decision ordered that the Prosecution deliver to the Trial Chamber copies of statements of all witnesses the Prosecution intends to call at trial and copies of all exhibits the Prosecution intends to tender at trial ("Disclosure materials"). It also requested that the disclosure materials be provided on CD-ROM in addition to paper copies "when possible".

- On 10 February 2003, on receiving motions from the three Accused to appeal the Impugned Decision,[1] the Trial Chamber granted them a certificate to appeal under Rule 73.[2]

- On 14, 17 and 18 February 2003, respectively, Nikolic, Jokic and Blagojevic filed their appeal against the Impugned Decision.[3]

- On 27 February 2003, the President of the Tribunal assigned the case to the Appeals Chamber.[4]

- On 28 February 2003, the Prosecution filed its consolidated response to the three appeals.[5]

[1] "Request of Dragan Jokic for Certification for Appeal of Decision on Joint Defence Motions for Reconsideration of Trial Chamber's Decision to Review all Discovery Materials Provided to the Accused by the Prosecution, and Motion for Immediate Stay of Order for Delivery of Documents to Trial Chamber pending Judgement of Appeals Chamber", 27 January 2003; "Vidoje Blagojevic's Request for Certification to Appeal the Trial Chamber's Decision on Joint Defence Motions for Reconsideration of Trial Chamber's Decision to Review all Discovery Materials Provided to the Accused by the Prosecution and Request for a Stay of Execution of the Decision", 28 January 2003. "Accused Nikolic's Motion to Order the Prosecution to File Copies of All Witness Statements whom the Prosecution Intends to Call for Trial and Copies of All Exhibits the Prosecution Intends to Tender at Trial", 28 January 2003.

[2] "Decision on Joint Defence Motions for Certification of Decision on Joint Defence Motions for Reconsideration of Trial Chamber's Decision to Review all Discovery Materials Provided to the Accused by the Prosecution, and Request for Stay of Execution of Decision", 10 February 2003. "Decision on Accused Nikolic's Motion to Order the Prosecution to File Copies of All Witness Statements whom the Prosecution Intends to Call for Trial and Copies of All Exhibits the Prosecution Intends to Tender at Trial", 10 February 2003.

[3] "Defendant Nikolic's Appeal of the Trial Chamber's Decision on Joint Defence Motions for Reconsideration of Trial Chamber's Decision to Review all Discovery Materials Provided to the Accused by the Prosecution", 14 February 2003; "Interlocutory Appeal of Dragan Jokic Pursuant to Certification under Rule 73 (B) and (C) against Decision on Joint Defence Motions for Reconsideration of Trial Chamber's Decision to Review all Discovery Materials Provided to the Accused by the Prosecution", 17 February 2003; "Vidoje Blagojevic's Interlocutory Appeal of Trial Chamber's Decision on Joint Defence Motions for Reconsideration of Trial Chamber's Decision to Review all Discovery Materials Provided to the Accused by the Prosecution, and Request for Stay of Execution of Decision", 18 February 2003.

[4] Order of the Presiding Assigning Judges to the Appeals Chamber, 27 February 2003.

[5] "Prosecution's Response to the Defence's Appeal of Trial Chamber's Decision to Review Trial Materials", 28 February 2003.

The Decision

The Appeals Chamber dismissed all three appeals.

The Reasoning

Nikolic's appeal

Nikolic took no position on the question of the two other Accused as to whether the Trial Chamber is entitled to receive the disclosure materials. He only submitted that those materials should be filed in both English and Bosnian/Croatian/Serbian ("BCS") and provided on paper copies and on identical CD-ROMs to the Trial Chamber and all four Accused.

The Prosecution did not object to providing a CD-ROM of the disclosure materials to Nikolic but objected to the request that paper copies be filed with the Registry as it considers that the paper copies would be too voluminous.

The Appeals Chamber held that the way how the delivery of disclosure materials should be effected is a matter within the discretion of the Trial Chamber. It found that Nikolic's Appeal did not need to be answered as his Defence had already received the said materials in paper copies and as the Prosecution had agreed to provide the requested CD-ROMs. The Appeals Chamber rejected Nikolic's argument that the disclosure materials should be filed with the Registry before they are delivered to the Trial Chamber as it found that the disclosure materials are only expected to form part of the trial record to the extent that they are subsequently given in evidence.

Jokic's and Blagojevic's Appeals

The argument that neither the Statute nor the Rules allow the Trial Chamber to receive the disclosure materials

Jokic alleged that the Impugned Decision was in error because neither the Statute nor the Rules of the International Tribunal confer any power on the Trial Chamber to require the pre-trial delivery of documents disclosed by the Prosecution to the Accused pursuant to Rules 66-68 of the Rules. In Jokic's view, since the orders of the Trial Chamber for the disclosure of the materials were made outside the ambit of the Rules, the Appeals Chamber should take the opportunity to overrule these orders.

Blagojevic argued that the Rules do not authorise the pre-trial Judge or a Trial Chamber to review the entire Prosecution case in non-testimonial form months in advance of trial. In his view, pursuant to Rule 65 *ter*(E)(ii)(b), a pre-trial Judge receives only a "summary of the facts on which each witness will testify" and not the statements of witnesses. In Blagojevic's view, the fundamental question is whether a Trial Chamber is duty-bound to follow the Rules or whether it can, on an *ad hoc* basis and as it considers fit, interpret the Rules beyond their plain and ordinary meaning.

The Prosecution expressed its view that by reviewing the disclosure materials, the Trial Chamber will be better prepared to manage the case.

Interpretation and application of the Rules[6]

The Appeals Chamber observed that the Rules are not exhaustive as to the detailed steps or measures that Chambers may take in fulfilling the mandate of the Tribunal. It held that "the fundamental principles of justice set out in the Statute and international law [...] set the parameters for the interpretation and application of the Rules" and, in the words of the Appeals Chamber in *Aleksovski*, that "[t]he purpose of the Rules is to promote a fair and expeditious trial,[7] and Trial Chambers must have the flexibility to achieve this goal".[8] It noted that "it is plain from the successive amendments of the Rules[9] that the Rules have been refined over the years through the practice of the Chambers in applying them", provided that such new practice "serves the mandate of the Tribunal and conforms to internationally recognised standards". The Appeals Chamber held that "[t]o claim that the power to order the delivery of the Disclosure materials is non-existent because neither the Statute nor the Rules expressly provide for it, is not sufficient to establish that there was an error in the Impugned Decision" and that an error is something that "will prejudice the interests of a party to the case". In other words, it held that "[a] decision which is in conformity with the principles of justice, even though not based on a written rule, does not prejudice the interests of the party". Indeed it found that the Impugned Decision was "aimed at ensuring a fair and expeditious trial, [...] a right of the Accused as recognised in Article 20(1) and Article 21(4)(c) of the Statute" and, in keeping with the finding of the Trial Chamber, that the disclosure materials will "assist 1) the pre-trial Judge in fulfilling his obligations under Rule 65 *ter*, 2) the Trial Chamber in fulfilling its obligations under Rule 73 *bis* (such as shortening the length of examination-in-chief, deciding on the number of witnesses the Prosecution may call, and determining the amount of time available to the Prosecution to present evidence), 3) the Trial Chamber in fulfilling its obligations under Rule 71 to order depositions, and 4) the Trial Chamber in determining whether to apply Rule 98 in ordering the production of additional evidence by the parties".

The scope of Article 65 *ter* [10]

The Appeals Chamber found that, by alleging that Rule 65*ter* allows a pre-trial Judge only to receive a summary of the facts on which each witness will testify and not the statements of witnesses, the Appellant has overlooked Rule 65 *ter* (B), which provides that "the pre-trial Judge shall ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial". It held that "the terms of Rule 65 *ter* may be clear but not intended to be exhaustive" and that the "pre-trial Judge's powers are not confined to what is specified in the rule, as long as his powers are exercised consistently with the provision of Rule 65 *ter* (B)".[11] As to the necessary character of the measures the pre-trial Judge shall take under Rule 65 *ter* (B), the Appeals Chamber held that "[w]hether the Disclosure materials are 'necessary' to the Trial Chamber in fulfilling its function under the Statute and the Rules is a matter within the discretion of the Trial Chamber".[12]

The argument that the Trial Chamber improperly assumed the investigative role of the Prosecution

Jokic argued that the Trial Chamber improperly assumed an investigative role not provided for in the Statute by searching for the truth in the pre-trial phase of the case. Blagojevic shared the same concerns and argued that the Trial Chamber's reference to Rule 54[13] and 85(B)[14] implies that it could assume the task of filling the gaps in the Prosecution's case and that the Trial Chamber would be sharing the burden of proof with the Prosecution. The Prosecution argued that there was no suggestion to support this assertion which is no more than speculation.

The Appeals Chamber referred to the 19 July 2002 Status Conference, during which the pre-trial Judge reminded the parties that "the general concept of this Tribunal [...] is the necessity to come as close as possible to the truth" and referred to the mandate of the Judges to "find the truth or to search for the truth".[15] The Appeals Chamber held that "nothing in this statement visualised that it was the duty of the Chamber to engage in the prosecutorial investigation of the case" and that the pre-trial Judge was "correctly concerned with the duty of the Chamber to discover the truth but only from the evidence as presented to the Chamber".[16] The Appeals Chamber clarified the role of Trial Chambers, which are in nature both triers of fact and arbiters of questions of law, authorised to make factual findings on the basis of the evidence presented by the parties, and rely on the factual findings to determine the guilt or innocence of the accused. It held that it "does not, however, follow that the Trial Chamber, by assessing evidence presented by the parties, will be discharging some of the prosecutorial responsibilities".[17]

The argument that by reviewing the disclosure materials, the Trial Chamber improperly considered the merits of the case

Jokic submitted that the Trial Chamber improperly considered the merits of the case privately and before trial, in violation of an accused's right to a public hearing guaranteed by Article 21(2) of the Statute and the right to be tried in his presence guaranteed by Article 21(4)(d) of the Statute. Blagojevic similarly submitted that exposure to material as requested by the Trial Chamber may influence the Judges and improperly affect the impartiality of the Trial Chamber, *i.e.* that by reviewing the disclosure materials prior to the trial, the Trial Chamber will foster a perception of bias against the accused.

Exposure to materials yet to be presented in evidence

The Appeals Chamber found no basis for suggesting that the Trial Chamber would consider the merits of the case without a public hearing of evidence and noted that "the Impugned Decision clearly states that the Disclosure materials are not evidence unless and until submitted and admitted in the course of trial in accordance with the Rules".[18] It referred to Rule 98 *ter* (C) which requires that a judgement be accompanied by a reasoned opinion in writing, which will explain the factual findings with reference to admitted evidence. In its opinion "a consideration of the merits of the case to the detriment of the Accused was simply not on the mind of the Judges of the Trial Chamber". The Appeals Chamber found that "to be exposed to materials yet to be presented in evidence does not necessarily lead to pre-judgment or partiality" and that "[t]he professionalism of the Judges is a

[6] Para. 15.
[7] Art. 20(1) of the Tribunal's Statute.
[8] *Aleksovski*, IT-95-14/1-AR73, Decision of Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, Appeals Chamber, para. 19, *Judicial Supplement* No. 2.
[9] Pursuant to Article 15 of the Statute, the Judges of the International Tribunal have the power to adopt and amend the Rules of Procedure and Evidence.
[10] The Appeals Chamber noted that the Impugned Decision was not issued pursuant to Rule 65 *ter* but pursuant to Rules 54, 73 *bis*, 85(B) and 89(C), in addition to Article 20(1) and 21(4)(C) of the Statute.
[11] Para. 17.
[12] Para. 18.
[13] Rule 54 (General Rule)
At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.
[14] Rule 85 (Presentation of Evidence)
(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.
[15] Status Conference, 19 July 2002, Transcripts 6.
[16] Para. 21.
[17] Para. 22.
[18] Para. 28, referring to page 4 of the Impugned Decision.

guarantee that the presumption of innocence will be respected".[19] It held that the parties failed to show that there is an appearance of partiality or that actual partiality exists in terms of the *Furundzija* test.[20]

The argument that the Impugned Decision deprives the Accused of certain rights in violation of Article 21(3) and (4) of the Statute

Jokic alleged that the Impugned Decision would deprive the Accused of basic rights guaranteed by Article 21(3) and (4) of the Statute, namely, the right to be considered innocent until proven guilty, the right to counsel, the right to examine or have examined the witnesses against him, and the right to defend himself, including the right to object to the authenticity, relevance and admissibility of evidence. Blagojevic's appeal contains similar submissions. The Prosecution argued that the timing of the review by the Trial Chamber of the disclosure materials does not affect the rights of the accused and indeed will promote efficiency and expeditiousness in the conduct of the trial proceedings.

The Appeals Chamber held that "[t]he review of the Disclosure materials by the Trial Chamber is to be distinguished from the presentation of evidence at the trial" and recalled that the Trial Chamber made clear that the Disclosure materials are not evidence until submitted and admitted in the course of trial.[21] It noted that in fact "the disclosure materials are not formally filed with the Registry as part of the trial record" and that "it would be incorrect to suggest that the Judges will reach a verdict on the basis of those materials without even hearing the witnesses or having the exhibits tested by the parties, and without hearing the Defence case".[22] It found that the review of the Disclosure materials does not affect either party in this case and does not impair the rights conferred on the Accused by Article 21(3) and (4). ■

[19] Para. 29.
[20] *Furundzija*, IT-95-17/1-A, Judgment, 21 July 2000, para. 189, *Judicial Supplement* No. 18. On further developments on the impartiality of Judges, see *Judicial Supplement* No. 40.
[21] Para. 33.
[22] Ibid.

TRIAL CHAMBERS

The Prosecutor v. Mile Mrksic - Case No. IT-95-13/1-PT

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

"DECISION ON DEFENCE MOTION REQUESTING THE DETERMINATION OF RULES FOR COMMUNICATING WITH POTENTIAL WITNESSES OF THE OPPOSING PARTY"

7 MAY 2003

Interview of a witness at the pre-trial stage

The fact that a potential witness has given a statement to a party to proceedings does not preclude the other party from seeking to interview him or her at the stage of pre-trial proceedings.
If a potential witness refuses to grant an interview to the Defence, or refuses to respond to a Prosecution summons, that party's relief lies with the Trial Chamber's power pursuant to Rule 54.

Procedural Background

- On 31 March 2003, Mile Mrksic's Defence filed the "Defence Motion Requesting Determination of Rules of Communication with Potential Witnesses of the Opposite Party" and Confidential Annex thereto ("Motion"). The Defence required that the pre-trial Judge "establish an unambiguous and precise method of communication between each of the opposing parties to these proceedings and the respective potential witnesses of the opposite side".[1]

- On 11 April 2003, the Prosecution filed the "Prosecution's Opposition to Defence Motion Requesting the Determination of Rules of Communication with Potential Witnesses of the Opposite Party" and Confidential Annex thereto ("Response").

- On 14 April 2003, the Defence requested leave to file a reply[2] which was granted by the Trial Chamber on 15 April.[3]

- On 22 April 2003, the Defence filed its reply to the Prosecution's Response.[4]

The Decision

The Trial Chamber dismissed the Defence Motion.[5]

The Reasoning

The Trial Chamber recalled that a witness may be called to testify in one case and by the Prosecution in another[6] and emphasised that "the fact that a potential witness has given a statement to a party to proceedings does not preclude the other party from seeking to interview him or her at this stage of pre-trial proceedings". It considered that "if a potential witness refuses to grant an interview to the Defence, or refuses to respond to a Prosecution summons, that party's relief lies with the Trial Chamber's power pursuant to Rule 54[7]".

The Trial Chamber did not find necessary to establish the requested guidelines and dismissed the Defence Motion. Should this be necessary, it held that at the appropriate stage it will see to it that the appropriate guidelines are in place. ■

[1] Motion, paras. 7 and 15.
[2] Defence Motion Seeking Leave to Reply to "Prosecution's Opposition to Defence Motion Requesting the Determination of Rules of Communication with Potential Witnesses of the Opposite Party", 14 April 2003.
[3] Decision on Defence Request for Leave to File a Reply, 15 April 2003 ("Decision to Grant Leave"), 15 April 2003.
[4] Defence Reply to "Prosecution's Opposition to Defence Motion Requesting the Determination of Rules of Communication with Potential Witnesses of the Opposite Party" ("Reply"), 22 April 2003.
[5] On 29 May 2003, Trial Chamber II granted the Prosecution leave to appeal the present Decision pursuant to Rule 73(B) of the Rules. The appeal is pending before the Appeals Chamber.
[6] *Stakic*, IT-97-24, trial transcript, 20 February 2003, page 12475.
[7] Rule 54 (General Rule)
At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

The Prosecutor v. Milutinovic *et al.* - Case No. IT-99-37-PT

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

"DECISION ON MOTION CHALLENGING JURISDICTION"

6 MAY 2003

FRY membership in the United Nations between 1992 and 2000 – The authority of the Security Council under Chapter VII of the United Nations Charter

FRY membership in the United Nations between 1992 and 2000: resolution 47/1 did not deprive the FRY of all attributes of United Nations membership. The only practical consequence was its inability to participate in the work of the General Assembly, its subsidiary organs, conferences or meetings convened by it. The resolution left untouched the relationship of the FRY to the Security Council and consequently, the application of the regime of Security Council resolutions to it. The FRY retained sufficient indicia of United Nations membership to make it amenable to the regime of the Chapter VII Security Council resolutions adopted for the maintenance of peace and security. In relation to the application of the Security Council resolution establishing the Statute of the International Tribunal, the FRY was in fact a member of the United Nations both at the time of the adoption of the Statute in 1993 and at the time of the commission of the alleged offences in 1999.

The authority of the Security Council under Chapter VII of the United Nations Charter: Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993 establishing the Tribunal were a response to a conflict that took place in the territory of the former SFRY and it is with that conflict which was essentially related to that territory that it sought to deal, and not with a conflict in the respective Republics. In doing so resolution 827 (1993) was both retrospective and prospective in that it related to crimes committed after 1991, and thus covered the period before and after the adoption in 1993 of the Statute establishing the Tribunal. It is inarguable that the Security Council, in the exercise of its responsibility for the maintenance of international peace and security, had the power in 1993 to deal with a conflict that started in the territory of the former Yugoslavia in 1991, in relation to which it had already taken a number of measures between 1991 and 1993, which was taking place in that territory at the time of the adoption of the Statute, and showed all likelihood of continuing thereafter. The constitutional character of the Charter, its near universal membership, the critical importance to the international community of the goal of the maintenance of international peace and security, are all factors that combine to render the Chapter VII resolution establishing the Tribunal applicable to any country that was a part of the former SFRY, irrespective of its United Nations membership at the time of the adoption of that resolution or at the time of the commission of the offences.

Procedural Background

- On 29 November 2002, the Defence of General Dragoljub Ojdanic filed "General Ojdanic's Preliminary Motion to Dismiss for Lack of Jurisdiction/Kosovo" ("Defence Motion").

- On 13 December 2002, the Prosecution filed the "Prosecution's Response to General Ojdanic's Preliminary Motion to Dismiss for Lack of Jurisdiction: Kosovo" ("Prosecution's Response").

- On 6 January 2003, the Defence filed the "Reply Brief: Preliminary Motion to Dismiss for Lack of Jurisdiction: Kosovo" ("Defence Reply Brief").

- On 9 January 2003, the Prosecution filed the "Prosecution's Notification in relation to Ojdanic's Reply Briefs to his Preliminary Motions to Dismiss for Lack of Jurisdiction: Kosovo and Joint Criminal Enterprise" ("Prosecution Notification") and observed that both Defence Reply Briefs had been filed out of time.

- On 16 January 2003, the Defence filed "General Ojdani? Motion for Leave for Late Filing of the Reply Briefs" ("Defence Leave Request").

The Decision

The Trial Chamber dismissed the Defence Motion.[1]

The Arguments of the Parties

The Defence

The Defence argued that the Tribunal does not have jurisdiction over crimes committed in the territory of Kosovo, a constituent part of the Federal Republic of Yugoslavia ("FRY"). Its submission contained two arguments:

1. At the time of adoption of the Statute of the Tribunal in 1993[2] and at the time of the events charged in the Third Amended Indictment in 1999,[3] the FRY was not a member of the United Nations. The Organisation in general and the Security Council in particular did not have the power to impose Chapter VII measures on a non-member State such as the RFY.
2. The "universal jurisdiction" principle is not part of customary international law and in any case "universal jurisdiction" cannot justify the jurisdiction of an international criminal court.

The Prosecution

The Prosecution submitted that the Defence Motion should be dismissed for the following reasons:

1. The Tribunal's territorial and personal jurisdiction is set forth in Articles 6 and 8 of the Statute,[4] the scope and nature of which was already conclusively decided by the Appeals Chamber in the *Tadic* Jurisdiction Decision,[5] and therefore notions of statehood and United Nations membership and citizenship are irrelevant.
2. On 27 April 1992, the two remaining Socialist Federal Republic of Yugoslavia ("SFRY") republics, Serbia and

[1] On 13 May 2003, General Ojdanic appealed from the Decision (General Ojdanic' Appeal from Decision on Motion Challenging Juridisction and Motion for Extension of Time to File Opening Brief). On 14 May, the President of the Tribunal Theodore Meron assigned the case to the Appeals Chamber (Order Assigning Judges to a Case Before the Appeals Chamber). The case is pending before the Appeals Chamber.

[2] The Statute of the Tribunal was adopted on 25 May 1993 pursuant to resolution 827 of the Security Council. UN SC Res. 827, 25 May 1993, UN doc. S/Res/827 (1993).

[3] Third Amended Indictment, 5 September 2002.

[4] Article 6 (Personal jurisdiction)
The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.
Article 8 (Territorial and temporal jurisdiction)
The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

[5] *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ("*Tadic* Jurisdiction Decision"), IT-94-1-AR72, 2 October 1995.

Montenegro, declared that they were legal successors to the SFRY and that the FRY's membership of the United Nations was a continuation of the SFRY's membership.

3. The Security Council itself has issued a number of resolutions under Chapter VII of the United Nations Charter in response to the situation in Kosovo, several of which make express reference to the work of the Tribunal with regard to the FRY; since June 1999 Kosovo has been governed under a United Nations interim administration established under a Chapter VII resolution which demonstrated the scope of the Security Council's Chapter VII powers.
4. The ability of the Security Council to respond expeditiously and effectively to Chapter VII threats is dependent upon its having universal – or as near-universal as possible – reach and cannot be dependent upon conflicting claims of statehood or United Nations membership of newly created States or entities.

The Reasoning

Background

In order to have a clear understanding of certain events and decisions in the period between 1992 and 2000, the Trial Chamber conducted an analysis of the historical background starting from the break-up of the SFRY to its admission to membership in the United Nations on 1 November 2000.[6]

The break-up of the former SFRY

Prior to its fragmentation, the SFRY consisted of six republics: Serbia, Croatia, Bosnia-Herzegovina, Macedonia, Slovenia, and Montenegro. On 25 June 1991, Croatia and Slovenia both declared independence, followed by the former Yugoslav Republic of Macedonia on 17 September 1991, and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Croatia, Slovenia and Bosnia-Herzegovina were admitted as members of the United Nations.[7] The "Former Yugoslav Republic of Macedonia" was admitted to membership in the United Nations on 8 April 1993.[8] The Trial Chamber thus held that "at the time of the adoption of the Statute of the International Tribunal on 25 May 1993, all the republics that formerly constituted the SFRY, with the exception of Serbia and Montenegro, had been admitted as members of the United Nations".[9]

The FRY (Serbia and Montenegro) came into being on 27 April 1992. On that date, a joint session of the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro proclaimed a new constitution for the "Federal Republic of Yugoslavia" and also adopted a Declaration.[10] The preamble of the Declaration reflects the common will of the citizens of Serbia and Montenegro "to stay in the common state of Yugoslavia", and also provides that the RFY "shall abide by all the commitments that the [SFRY] assumed internationally"[11] and remains bound by "all obligations to international organisations and institutions whose member it is [...] particularly the United Nations and its specialised agencies".[12]

The Declaration was brought to the attention of the United Nations by a Note of the same date informing the Secretary-General that the FRY was strictly respecting the continuity of the international personality of Yugoslavia and that the Federal Republic of Yugoslavia shall continue to fulfil all rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organisations and participation in international treaties ratified or acceded to by Yugoslavia".[13]

United Nations resolutions and treaty practice

The Trial Chamber reviewed a number of resolutions adopted by the Security Council under Chapter VII prior to the establishment of the Tribunal. It referred *inter alia* to resolution 777 (1992) of 19 September 1992 which considered that the SFRY had ceased to exist and recommended to the General Assembly that it decide that the FRY should apply for membership in the United Nations and not participate in the work of the General Assembly.[14] On 22 September 1992, pursuant to the recommendation of the Security Council, the General Assembly adopted resolution 47/1 whereby it confirmed that the FRY should apply for membership.[15] On 25 September 1992, Croatia and Bosnia-Herzegovina requested the Secretary General to provide a legal opinion of the FRY's status in the United Nations.[16] On 29 September 1992, the United Nations Under-Secretary-General for Legal Affairs addressed a letter to the Permanent Representatives of Croatia and Bosnia-Herzegovina, in which he exposed the "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1". According to this legal opinion "the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly [and that] the resolution neither terminates nor suspends Yugoslav's *membership* in the Organisation".[17]

The Trial Chamber referred to the resolutions surrounding the establishment of the Tribunal, starting with resolution 808 of 22 February 1993 in which the Security Council determined that the events occurring in the territory of the former Yugoslavia constituted a threat to international peace and security and that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991".[18] The Trial Chamber referred to a number of subsequent General Assembly resolutions reaffirming resolution 47/1 of 22 September 1992[19] and to other United Nations documents listing Yugoslavia as a member of the United Nations after September 1992. It found that "Yugoslavia" had maintained other attributes of membership in the Organisation including its flag, seat and nameplate in the General Assembly.

On 27 October 2000, newly elected President Kostunica addressed a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations.[20] On 31 October 2000, the Security Council, "*having examined* the application of the Federal Republic of Yugoslavia for admission to the United Nations", recommended admission.[21] The following day, the General Assembly admitted the FRY to membership.[22]

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[6] UN GA Res. 55/12, 1 November 2000, UN doc. A/Res/55/12 (2000). See developments *infra*.
[7] Croatia, UN GA Res. 46/238, 22 May 1992, UN doc. A/Res/46/238 (1992); Slovenia, UN GA Res. 46/236, 22 May 1992, UN doc. A/Res/46/236 (1992); Bosnia-Herzegovina, UN GA Res. 46/237, 22 May 1992, UN doc. A/Res/46/237 (1992).
[8] Former Yugoslav Republic of Macedonia, UN GA Res. 47/225, 8 April 1993, UN doc. A/Res/47/255 (1993).
[9] Para. 5.
[10] Declaration of the Joint Session of the SFRY, Republic of Serbia and Republic of Montenegro Assemblies, 27 April 1992, UN doc. S/23877, Annex (1992) ("Declaration"), reprinted in M. Weller (ed.) *International Documents and Analysis* I (1999), p. 63.
[11] *Ibid.*, para. 1.
[12] *Ibid.*, para. 3.
[13] Note dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General, UN doc. A/46/915 (Annex I).
[14] UN doc. S/Res/777 (1992).
[15] UN doc. A/Res/47/1 (1992).
[16] Letter dated 25 September 1992 from the Permanent Representatives of Bosnia and Herzegovina and Croatia to the UN addressed to the Secretary-General, UN doc. A/47/474 (1992).
[17] Letter dated 29 September 1992 addressed to the Permanent Representative of the Bosnia and Herzegovina and Croatia to the United Nations, UN doc. A/47/485, Annex (1992), (emphasis in the original).
[18] UN doc. S/Res/808 (1993).
[19] Resolution 47/229 of 29 April 1993, UN doc. A/Res/47/229 (1993). Resolution 48/88 of 20 December 1993, UN doc. A/Res/48/88 (1993).
[20] Letter dated 27 October 2000 from the President of the Federal Republic of Yugoslavia to the Secretary-General, A/55/528 – S/2000/1043, Annex.
[21] UN doc. S/Res/1326 (2000).
[22] UN GA Res. 55/12, 1 November 2000, UN doc. A/Res/55/12 (2000).

Judgements of the International Court of Justice

NATO Bombing Cases: Legality of Use of Force[23]

On 29 April 1999 the Federal Republic of Yugoslavia instituted proceedings before the International Court of Justice ("ICJ") against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States of America, accusing those States of bombing Yugoslav territory in violation of their obligation not to use force against another State. On the same day, the FRY submitted a request for the indication of provisional measures asking the Court to order defendant States to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

Belgium argued *inter alia* that the Court's jurisdiction could not be based on Article 36, paragraph 2, of the ICJ Statute since under this provision only "States parties to the [...] Statute" may subscribe to the optional clause for compulsory jurisdiction contained therein. Belgium referred *inter alia* to United Nations Security Council resolution 777 (1992) of 19 September 1992 and to United Nations General Assembly resolutions 47/1 of 22 September 1992 to contend that "the Federal Republic of Yugoslavia is not the continuator State of the former Socialist Federal Republic of Yugoslavia as regards membership of the United Nations" and that, not having duly acceded to the Organisation, it was in consequence not a party to the Statute of the Court and could not appear before the latter.

Referring to the position of the Secretariat expressed in a letter dated 29 September 1992 from the Legal Counsel of the Organisation and to the latter's subsequent practice, Yugoslavia contended that General Assembly resolution 47/1 "neither terminate[d] nor suspend[ed] Yugoslavia's membership in the Organisation" and that the said resolution did not take away from Yugoslavia "its right to participate in the work of organs other than Assembly bodies".

The Court found that it had "no *prima facie* jurisdiction to entertain Yugoslavia's Application", on the basis of Article 36, paragraph 2 but did not address the question of the Yugoslav membership in the United Nations.[24]

Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide[25]

On 20 March 1993, the Government of Bosnia and Herzegovina instituted proceedings against the FRY in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide. By an Order of 8 April 1993, the Court indicated certain provisional measures following the request of the Applicant. The Court refrained from deciding the issue of the FRY membership in the United Nations:

> "*Whereas*, while the solution adopted [by the United Nations Legal Affairs Office] is not free from legal difficulties, the question whether or not Yugoslavia is a member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings".[26]

In its Judgement of 11 July 1996 on Preliminary Objections, the Court dealt incidentally with the question of jurisdiction *ratione personae* although the parties had not raised the matter. Referring to the Declaration of 27 April 1992, the Court observed:

> "The intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary–General. The Court observes, furthermore, that it has not been contested that Yugoslavia was a party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, on 20 March 1993".[27]

On 24 April 2001, the FRY filed an application for revision of the Judgement delivered by the ICJ on 11 July 1996.[28] Yugoslavia based its application for revision of 24 April 2001 on Article 61 of the Statute of the Court.[29] In its application, the FRY contended that a revision of the 11 July 1996 Judgement was necessary since it was clear that it had never continued the legal personality of the SFRY. The FRY submitted that at the time of the reading of the Judgement (1996), it was not a member of the United Nations, an Organisation it joined on 1 November 2000. The FRY was therefore not a State party to the Statute of the Court and was also not a State party to the Genocide Convention. Yugoslavia requested the Court to declare that "there [was] a new fact of such a character as to lay the case open to revision under Article 61 of the Statute of the Court".

The Court rendered its Judgement on the application for revision on 3 February 2003.[30] After recalling the background to the application, the Court noted that between the adoption of General Assembly resolution 47/1 of 22 September 1992 and the admission of the FRY to the United Nations on 1 November 2000, the legal position of the FRY remained complex.[31] With regard to the FRY membership in the United Nations, the Court stated, *inter alia*, the following:

> " [...] the difficulties which arose regarding the FRY's status between the adoption of that resolution and its admission to the United Nations on 1 November 2000 resulted from the fact that, although the FRY's claim to continue the international legal personality of the Former Yugoslavia was not "generally accepted" (see Security Council resolution 777 of 19 September 1992), the precise consequences of this situation were determined on a case-by-case basis (for example, non-participation in the work of the General Assembly and ECOSOC). Resolution 47/1 did not *inter alia* affect the FRY's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute. Nor did it affect the position of the FRY in relation to the Genocide Convention".[32]

In the Court's view, the admission of the FRY in the United Nations on 1 November 2000 "cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention".[33]

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[23] *Legality of Use of Force (Yugoslavia v. Belgium), (Yugoslavia v. Canada), (Yugoslavia v. France), (Yugoslavia v. Germany), (Yugoslavia v. Italy), (Yugoslavia v. Netherlands), (Yugoslavia v. Portugal), (Yugoslavia v. Spain), (Yugoslavia v. the United Kingdom), (Yugoslavia v. the United States of America).*

[24] *Legality of Use of Force (Yugoslavia v. Belgium)*, (Provisional Measures, Order of 2 June 1999), (1999) *ICJ Reports* 124.

[25] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, (Bosnia and Herzegovina v. Yugoslavia)*, (Judgement of 11 July 1996) ("*Genocide Case* [Preliminary Objections]"), (1996) *ICJ Reports* 595.

[26] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro]),* (Order of 8 April 1993) (1993) *ICJ Reports* 3 ("*Genocide Case* [Provisional Measures]"), p. 14.

[27] *Genocide Case* (Preliminary Objections), para. 17.

[28] *Ibid.*

[29] Article 61 of the ICJ Statute provides that: "An application for revision of a judgement may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence …".

[30] Application for Revision of the Judgement of 11 July 1996 in the Case Concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Yugoslavia),* Preliminary Objections, *(Yugoslavia v. Bosnia and Herzegovina)*, Judgement of 3 February 2003 ("*Genocide Case* [Application for Revision]"), 3 February 2003.

[31] *Ibid*, para. 33.

[32] *Ibid*, para. 70.

[33] *Ibid*, para. 71.

Applicability of the *Tadic* Jurisdiction Decision

In the *Tadic* Jurisdiction Decision, the authority of the Security Council to establish the Tribunal under Chapter VII was at issue. The Appeals Chamber dismissed the Motion holding that although the power of the Security Council to establish a judicial body was not expressly provided for in Chapter VII of the Charter, the Council had wide discretionary powers[34] under Articles 39 and 41 of the Charter to adopt measures in the exercise of its responsibility for the maintenance of international peace and security.[35] These powers included the establishment of an international criminal tribunal "as a measure contributing to the restoration and maintenance of peace in former Yugoslavia".[36] The Decision did not cover the issue of the authority of the Security Council to establish a Tribunal which would have jurisdiction in respect of a crime committed by a national of a country not a member of the United Nations either at the adoption of the Statute or at the time of the commission of the alleged crime. The Trial Chamber held that "although the decision in *Tadic* is relevant to some of the jurisdictional issues raised in this Motion, it is distinguishable from this case".[37] It found that the *ratio decidendi* of the Decision was "simply that the Security Council had the power, under Chapter VIII of the United Nations Charter, to establish a judicial body in the exercise of its responsibility for the maintenance of international peace and security" and that the Trial Chamber did not take into account the nationality of *Tadic* or the United Nations membership of Bosnia and Herzegovina, the country in which the crimes were committed.[38]

FRY membership in the United Nations between 1992 and 2000

The Trial Chamber agreed with the analysis of the Legal Counsel that resolution 47/1 did not deprive the FRY of all attributes of United Nations membership and that the only practical consequence was its inability to participate in the work of the General Assembly, its subsidiary organs, conferences or meetings convened by it.[39] It held that "the resolution left untouched the relationship of the FRY to the Security Council, and consequently, the application of the regime of Security Council resolutions to it".[40] The Trial Chamber then turned to the facts supporting its finding that the FRY was treated as a United Nations member for certain purposes, such as the fact that the seat and nameplate under the name "Yugoslavia" remained at the General Assembly, the fact that the Yugoslav missions at the United Nations Headquarters continued to function and could receive and circulate documents, the fact that Yugoslavia retained the right to participate in the work of organs other than the General Assembly and its bodies, etc.[41] Turning to the issue of the jurisdiction of the Tribunal over the crimes alleged in the Indictment of the Accused Dragoljub Ojdanic, the Trial Chamber held that "the FRY retained sufficient indicia of United Nations membership to make it amenable to the regime of the Chapter VII Security Council resolutions adopted for the maintenance of peace and security". It concluded that "in relation to the application of the Security Council resolution establishing the Statute of the International Tribunal, the FRY was in fact a member of the United Nations both at the time of the adoption of the Statute in 1993 and at the time of the commission of the alleged offences in 1999".[42]

The Trial Chamber turned to the possible impact of the formal admission of the FRY to membership in the United Nations in 2000 and considered the decision of the International Court of Justice in the *Genocide* case. It its view, the formal admission of the RFY to membership in the United Nations did not invalidate its conclusion that the RFY retained sufficient indicia of membership in the period between 1992 and 2000 to render Security Council resolution 827 (1993) establishing the Statute of the Tribunal applicable to it. In the *Genocide* case, the FRY was seeking a revision of the ICJ 1996 Judgement on the basis that since its delivery a new fact had occurred, namely its accession to United Nations membership in 2000.[43] The Court rejected the FRY's application on the ground that the FRY was not relying on facts that existed in 1996, but was seeking revision on the basis of the legal consequences that it sought to draw from facts subsequent to the Judgement of 1996. The Court therefore did not deal with the issue of whether the FRY was a member of the United Nations between 1996 and 2000. However, in the present case, the Trial Chamber adopted the approach of the Court that the precise consequences for FRY's United Nations membership arising from General Assembly resolution 47/1 had to be determined on a case-by-case basis since there can be no *a priori* determination of this complex issue which requires a empirical, function-by-function determination. The ICJ in the *Genocide* case also held that resolution 47/1 did not affect the FRY's right to appear before the Court or to be a party before the Court, which in the view of the Trial Chamber are two rights indicative of United Nations membership.

The authority of the Security Council under Chapter VII of the United Nations Charter

The Trial Chamber considered whether or not Chapter VII of the United Nations Charter is open to the interpretation that the Security Council had authority over the FRY, even if the FRY was not a member of the United Nations at the relevant time.

In its view, Security Council resolutions 808 (1993) of 22 February 1993[44] and 827 (1993) of 25 May 1993[45] establishing the Tribunal were "a response to a conflict that took place in the territory of the former SFRY, and it is with that conflict which was essentially related to that territory that it sought to deal, and not with a conflict in the respective Republics. In doing so resolution 827 (1993) was both retrospective and prospective in that it related to crimes committed after 1991, and thus covered the period before and after the adoption in 1993 of the Statute establishing the Tribunal".[46] The Trial Chamber noted the significance of Article 1 of the Statute ("Competence of the International Tribunal") which vests the Tribunal power to prosecute persons responsible for serious violations of international humanitarian law committed "not in Bosnia and Herzegovina, Slovenia, Croatia, Macedonia or Serbia and Montenegro, but rather in the territory of the former Yugoslavia".[47] It also noted the more specific wording of Article 8 of the Statute ("Territorial and Temporal Jurisdiction") which provides that the territorial jurisdiction of the Tribunal extends to the territory of the former SFRY. It held that "[i]t is inarguable that the Security Council, in the exercise of its responsibility for the maintenance of international peace and security, had the power in 1993 to deal with a conflict that started in the territory of the former Yugoslavia in 1991, in relation to which it had already taken a number of measures between 1991 and 1993, which was taking place in that territory at the time of the adoption of the Statute, and showed all likelihood of continuing thereafter" and that "[i]f it were otherwise, the Security Council would have been frustrated in the discharge of its responsibility under Chapter VII in relation to a situation that it had already determined to be a threat to international peace and security".[48]

More specifically the Trial Chamber held that "Chapter VII of the Charter may be interpreted purposively as empowering the Security Council to continue to deal with a situation which it has determined to be a threat to international peace and security even

[34] *Tadic* Jurisdiction Decision, para. 31.
[35] *Ibid.*, para. 37-38.
[36] *Ibid.*
[37] Para. 35.
[38] Para. 36.
[39] See *supra* note 17 and text accompanying note.
[40] Para. 37.
[41] *Ibid.*
[42] Paras. 38-39.
[43] See *supra* note 29 and text accompanying note.
[44] See *supra* note 18.
[45] See *supra* note 2.
[46] Para. 46.
[47] Para. 47.
[48] *Ibid.*

if the country concerned ceases to be a member of the United Nations".[49] To support its finding, the Trial Chamber relied on the principle of institutional effectiveness elaborated by the ICJ in the *Reparation* case[50] and the case of *Certain Expenses*.[51] The Trial Chamber concluded that "[t]he constitutional character of the Charter, its near universal membership, the critical importance to the international community of the goal of the maintenance of international peace and security, are all factors that combine to render the Chapter VII resolution establishing the Tribunal applicable to any country that was a part of the former SFRY, irrespective of its United Nations membership at the time of the adoption of that resolution, or at the time of the commission of the offences".[52]

Although the Trial Chamber considered that the questions may be relevant to the issues raised in the Motion, in light of its conclusions with regard to the FRY membership in the United Nations between 1992 and 2000 and the authority of the Security Council under Chapter VII of the United Nations Charter, the Trial Chamber did not consider it necessary to make a determination of the question of the exercise of universal jurisdiction in respect of the crimes with which the Accused is charged and the issue of the FRY's right and obligations as a predecessor or successor State in the period 1992 to 2000.

Separate opinion of Judge Patrick Robinson

Judge Robinson considered whether the Tribunal would have had jurisdiction on the basis that the crimes with which the Accused is charged – crimes against humanity and war crimes- attract universal jurisdiction, if the FRY had not been a member of the United Nations either at the time of the adoption of the Statute or at the time of the commission of the offences in Kosovo. He examined the concept of the universal jurisdiction principle, notably in light of the Judgement of the ICJ in the *Case Concerning the Arrest Warrant of 11 April 2001* (*Democratic Republic of Congo v. Belgium*), 14 February 2002. His opinion also analysed the crimes that attract universal jurisdiction and the applicability of the principle to international criminal courts. He concluded that the jurisdiction of the Tribunal is territorial and not universal, although it may be said that there is a universal element in ICTY's jurisdiction to the extent that it has the power to prosecute any person, irrespective of its nationality, for crimes committed in the territory of the former Yugoslavia and questioned the relevance and applicability of universal jurisdiction to the issues raised in the Motion. ▪

[49] Para. 48.

[50] *Reparation for Injuries Suffered in the Service of the United Nations*, (Advisory Opinion of 11 April 1949) *("Reparation Case")*, (1949) *ICJ Reports*, p. 174. In this case the ICJ held that "under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties".

[51] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, (Advisory Opinion of 20 July 1962) *("Certain Expenses")*, (1962) *ICJ Reports* p. 151. In this case the ICJ held that "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization".

[52] Para. 62. In paragraph 58 the Trial Chamber held, in respect of the point in the Motion concerning the nationality of Dragoljub Ojdanic, that "[a] crime committed by any person, whatever his nationality, in a country that is part of the former SFRY, is triable by the Tribunal".

The Prosecutor v. Slobodan Milosevic - Case No. IT-02-54-T

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

"DECISION ON PROSECUTION MOTION FOR PROTECTIVE MEASURES (CONCERNING A HUMANITARIAN ORGANISATION), PUBLIC VERSION OF A CONFIDENTIAL DECISION FILED ON 13 MARCH 2003"

1 APRIL 2003

Rule 75 – Measures of protection to persons related to or associated with a victim or witness

Measures of protection to persons related to or associated with a victim or witness: whilst Rule 75 contemplates the extension of protection to "persons related to or associated with a victim or witness", such an association and risk contemplated must be sufficiently proximate to the witness to warrant protective measures, particularly the extraordinary protective measure of closed session testimony.

Procedural Background

▪ On 10 June 2002, the Prosecution filed a confidential motion[1] to seek protective measures for three proposed witnesses who are former employees of a humanitarian organisation[2] as a precondition for the organisation's consent to allow their testimony pursuant to Rule 70(B).[3] It requested that the testimony be given in closed session and with pseudonyms.

▪ On 27 June 2002, the *Amici Curiae* submitted that the information provided by the Prosecution did not establish any basis to determine that there were risks to the witness concerned.[4] They observed that the measures sought were not specific enough regarding the persons they seek to protect and, in this sense, amounted to a blanket protection for all witnesses and non-witnesses connected with the humanitarian organisation.

▪ At the 25 February 2003, oral hearing on this matter, the Prosecution, the *Amici Curiae* and representatives of the humanitarian organisation made their submissions.

The Decision

The Trial Chamber denied the Motion.[5]

[1] Prosecution's Motion for Protective Measures (the "Motion"), 10 June 2002.

[2] At the oral hearing on this matter the Prosecution stated that it intended to call only one of those three witnesses. Transcript of 25 February 2003, T. 16769-16770.

[3] Rule 70 (Matters not Subject to Disclosure)

(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

[4] Observations by Amici Curiae on the Prosecution's Motion for Protective Measures, 27 June 2002.

[5] On 20 March 2003 the Prosecution requested the Trial Chamber to reconsider the present Decision or alternatively to grant it certification to appeal under Rule 73(B). On 4 April 2003 the Trial Chamber considered that there was no legitimate basis for a reconsideration of its Decision and considered that the Prosecution had failed to satisfy the cumulative requirements for certification pursuant to Rule 73(B) that (1) the issue would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial, and (2) an immediate resolution of the issue may, in the opinion of the Trial Chamber, materially advance the proceedings. It denied the Motion.

The Reasoning

The applicable law

The Trial Chamber considered that the fact that the Prosecution's Motion was presented under Rule 70 was "only noteworthy [...] insofar as it is stated that the protective measures are necessary to obtain the consent of the humanitarian organisation, as an information provider, for the witness to testify in this trial". It considered the relevant provisions to be Articles 21 and 22 of the Statute, and Rule 75 of the Rules of Procedure and Evidence. Article 21 of the Statute provides that the accused shall be entitled to a "fair and public hearing", subject to Article 22 of the Statute which ensures the protection of victims and witnesses. Such balancing test is enshrined in Rule 75(A) of the Rules of Procedure and Evidence which provides that the granting of measures of protection for witnesses must be "consistent with the rights of the accused". Such protective measures may include, as requested by the Prosecution, closed sessions pursuant to Rule 79.

Closed sessions and the right of the Accused to a fair and public hearing

The Trial Chamber recalled the "great care" it has exercised in granting closed session testimony, due to its respect for the rights of the accused pursuant to Article 21 of the Statute, and accordingly to the "very limited circumstances" under which it has had recourse to such a protective measure, including "where extraordinary risks attach to the witness's own safety or that of his or her family".[6]

The protection sought in the Motion

In support of its application, the Prosecution relied on the *Blaskic* decision,[7] whereby Trial Chamber I had granted protection for two witnesses who would have been "seriously threatened should their identity be disclosed to the public and the media". The Trial Chamber found that the present application was "distinguishable from that underpinning the decision in the *Blaskic* case" because in the *Blaskic* decision it is stated "there was a real threat attaching to the witnesses for whom protection was in fact sought". It considered that the Prosecution's Motion was not submitted because the witness himself objected to testifying in open session nor because there were personal security concerns for the witness but in order to obtain the consent of the humanitarian organisation for the testimony of the witness. According to the Trial Chamber, the Motion was put forward because of "security concerns" for the current and future personnel of the humanitarian organisation that arise if its mandate is perceived to be compromised.[8]

The approach of the Trial Chamber

The Trial Chamber acknowledged that "the work of the humanitarian organisation and protection of its current and future personnel are important interests which warrant consideration" and agreed that personnel of the humanitarian organisation have been the target of attacks and intimidations both in Bosnia and elsewhere, but did not rule that such elements amounted to interests that may be protected in the present case under Rule 70.[9] It considered rather that extension of protection can be provided under Rule 75 for "persons related to or associated with a victim or witness".[10] Nevertheless it held that such association and risk contemplated must be "sufficiently proximate to the witness to warrant protective measures, particularly the extraordinary protective measure of closed session testimony" and in the present case, in respect of the witness, found that the interests sought to be protected were "too remote" and "did not outweigh the Accused's right to a fair and public hearing".[11]

The Trial Chamber refused to grant the requested closed session and, considering the position of the Prosecution and the humanitarian organisation that nothing less than a closed session testimony would protect the interests of the organisation, did not then discuss the granting of other protective measures. ■

[6] The Trial Chamber referred *inter alia* to its "Confidential Decision on Prosecution Motion for Protective Measures for Sensitive Source Witness Testifying During the Croatia Phase of the Trial", 17 September 2002, para. 15; and, in respect of K21, a ruling in which it reconsidered an order granting closed session for the testimony of a witness on the basis that the grounds for the protection were too remote, both with respect to threats made and to the fears expressed by that witness for family members.

[7] *Blaskic*, IT-95-14-T, Decision of Trial Chamber I on the Prosecutor's Motion for Video Deposition and Protective Measures, 13 November 1997.

[8] The Trial Chamber relied on the letter from the humanitarian organisation attached to the Motion, on clarifications of its representatives, and on submissions of the Prosecution.

[9] On the interpretation and application of Rule 70, see *Milosevic*, IT-02-54-AR108 *bis* & AR73.3, Public Version of the Confidential Decision on Interpretation and Application of Rule 70, 23 October 2002, *Judicial Supplement* No. 37.

[10] Rule 75 (Measures for the Protection of Victims and Witnesses)

(A) A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Chamber may hold an in camera proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as:

(a) expunging names and identifying information from the Tribunal's public records;

(b) non-disclosure to the public of any records identifying the victim;

(c) giving of testimony through image - or voice - altering devices or closed circuit television; and

(d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

[11] In this respect the Trial Chamber noted the submission made by one of the *Amici Curiae* with regard to the protection of the witness: "It's not personal to him, and those associated or related are so remote from the issue, they're not sufficiently proximate to the issue to have put their safety in any way at risk and require protective measures. In our submission, 75(B) is dealing with a more proximate kind of situation with each witness or victim, persons related or associated with them, in a tangible form. To say that someone in [the humanitarian organisation] in Namibia or Togo or elsewhere would hereby be threatened as a result of this witness giving evidence publicly, in our submission that is too remote from him to require the injunction of this Court. It's not specific to the case and these proceedings" (T. 16793).

The Prosecutor v. Slobodan Milosevic - Case No. IT-02-54-T

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

"REASONS FOR DECISION ON THE PROSECUTION MOTION CONCERNING ASSIGNMENT OF COUNSEL"

4 APRIL 2003

Interpretation of Article 21(4)(d) of the Statute – Right to self-representation in common law systems – Limits to the right to self-representation – Rule 80(B) of the Rules – Article 20 of the Statute - Obligation to ensure a "fair and expeditious trial" and the rights of the accused

Interpretation of Article 21(4)(d) of the Statute: a plain reading of this provision indicates that there is a right to defend oneself in person. This interpretation is supported by the essentially adversarial nature of the proceedings at the International Tribunal. The imposition of a Defence Counsel upon an accused who does not want one is a feature of inquisitorial systems, but not of adversarial systems.

Right to self-representation in common law systems: while it may be appropriate in civil law systems to appoint Defence Counsel for an accused who wishes to represent himself, as in such systems the court is fulfilling a more investigative role in an attempt to establish the truth, the imposition of Defence Counsel on a unwilling accused in an adversarial system would effectively deprive that accused of putting forward a defence, as in adversarial systems it is the responsibility of the parties to put forward the case and not for the court, whose function is to judge.

Limits to the right to self-representation: the right to defend oneself in person is not absolute. There may be circumstances where it is in the interests of justice to appoint counsel. Clearly, an accused whose behaviour has resulted in his removal from the courtroom pursuant to Rule 80(B) of the Rules, has also relinquished his right to defend himself in person.

Obligation to ensure a "fair and expeditious" trial and the rights of the accused: while ensuring that the trial is fair and expeditious, a Trial Chamber must also ensure that the rights of the accused, as set out in Article 21 of the Statute, are not infringed.

Procedural Background

- On 3 July 2001, the Accused informed the Trial Chamber in writing and during his initial appearance for the Kosovo indictment that he did not want to be represented by a lawyer for the purposes of the court proceedings.[1]

- On 30 August 2001, during the first Status Conference, the Trial Chamber noted that the Accused was entitled to represent himself. In order to ensure him a fair trial and to ensure that his rights are fully respected, the Trial Chamber decided to invite the Registrar to appoint *Amici Curiae* to assist it in the proper determination of the case.[2] The Trial Chamber rejected the Prosecution's suggestion that it should assign a Defence Counsel for the Accused, stating that in accordance with the Statute and the Rules of the International Tribunal "the Accused has a right to counsel, but he also has a right not to have counsel".[3]

- On 1 February 2002, the Appeals Chamber joined the Kosovo indictment with the Croatia and Bosnia indictments.[4] The trial on the three joined indictments against the Accused began on 12 February 2002.

- On 10 April 2002, during a hearing, the Accused identified Mr. Zdenko Tomanovic and Mr. Dragoslav Ognjanovic (both lawyers) as associates with whom he wished to communicate.[5] On 16 April 2002, the Trial Chamber granted the Accused privileged communication with Mr. Tomanovic and Mr. Ognjanovic (as "Legal Associates"). It considered that it would be in the interest of a fair trial for the Accused to meet with and be able to communicate freely with persons for legal advice and to be able to discuss and supply them with copies of documents subject to Trial Chamber Orders imposing non-disclosure to third parties.[6]

- On 24 April 2003, the Trial Chamber found that, in accordance with Article 21 of the Statute, the Accused had adequate time and facilities for the preparation of his defence and that it was satisfied that "all possible efforts [were] being made to assist him".[7]

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[1] *Milosevic*, IT-99-37-I, Written Note by the Accused, 3 July 2001, Registry pages 3371-72; and Initial Appearance, 3 July 2001, Transcript pages ("T.") 1-2.

[2] The Trial Chamber stressed that the role of the *Amici Curiae* would not be to represent the Accused but to assist the court by: (a) making submissions properly open to the Accused by way of preliminary or other pre-trial motion; (b) making any submissions or objections to evidence properly open to the Accused during the trial proceedings and cross-examining witnesses as appropriate; (c) drawing to the attention of the Trial Chamber any exculpatory or mitigating evidence; and (d) acting in any other way which designated counsel considers appropriate in order to secure a fair trial. Status Conference, 30 August 2001, *Milosevic*, IT-99-37-PT, T. 6-7. See also Order Inviting Designation of *Amicus Curiae*, 30 August 2001, *Judicial Supplement* No. 26; and Order Concerning *Amicus Curiae*, 11 January 2002.

[3] Status Conference, 30 August 2001, *Milosevic*, IT-99-37-PT, T. 15-18.

[4] Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, IT-99-37-AR73, IT-01-50-AR73 and IT-01-51-AR73, 1 February 2002. On 18 April 2002, the Appeals Chamber issued its Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, *Judicial Supplement* No. 32. The new case number for the three joined Indictments against the Accused is IT-02-54.

[5] Hearing, 10 April 2002, T. 2797.

[6] Order, 16 April 2002.

[7] Oral Ruling by the Trial Chamber on 24 April 2002, T. 3737-40. The Trial Chamber relied on a Brief of the *Amici Curiae* (Brief on the Provision of Adequate Facilities to Allow the Accused to Prepare his Defence, re-filed by the *Amici Curiae* on 5 March 2002) and on a Registry Report (Registry Report on Practical Facilities Available to the Accused, 18 March 2002). With regard to the facilities at the United Nations Detention Unit ("UNDU") the Registry Report sets out that the Accused is entitled to receive and send uncensored mail and facsimile messages to his two Legal Associates on weekdays; to have unmonitored communication by telephone with his Legal Associates every day of the week; to receive scheduled visits of his two Legal Associates during weekdays (with extended visiting hours on three weekday evenings); to make use the photocopying facility of the UNDU; to review video evidence on a VCR which has been installed and connected to the TV in the Accused's cell in the UNDU; to use his own lap-top computer in his cell in the UNDU, and if he so wishes, to install a printer to it. The Registry Report also sets out that, while in court, the Accused is allowed access to a privileged phone line from the cell where he is held during the trial breaks ("holding cell") which he can useto call his Legal Associates. With the assistance of a Security Officer, the Accused is also able to send facsimiles to the Legal Associates during the trial breaks. If urgently needed and with the assistance of a Security Officer, the Accused can use the photocopying facilities during these breaks. Finally, if required, the holding cell of the Accused can be equipped with a TV/VCR set which may, during trial breaks, be used to review video evidence. *See further* Registry Report on Practical Facilities Available to the Accused, 18 March 2002.

▪ On 8 November 2002, the Prosecution filed a Motion entitled "Submission of the Office of the Prosecutor on the Future Conduct of the Case in the Light of the State of the Accused's Health and Complexity of the Case" ("Prosecution's Motion") to propose that the Trial Chamber appoint Defence Counsel for the Accused. The Accused rejected the suggestion in court on 11 November 2002 ("Accused's Submission").[8] On 18 November 2002, the *Amici Curiae* filed "Observations by the *Amici Curiae* on the Imposition of Defence Counsel on Accused ("*Amici* Observations"). On 20 November 2002, the Prosecution filed confidentially an "Addendum to the Prosecution's Response to the Confidential Observations by the *Amici Curiae* on the Health of the Accused and Future Conduct of the Trial" which also concerns the issue of imposition of Defence Counsel on the Accused.

The Decision

On 18 December 2002, the Trial Chamber rejected the Prosecution's Motion and stated that "Defence Counsel will not be imposed upon the Accused against his wishes in the present circumstances. It is not normally appropriate in adversarial proceedings such as these. The Trial Chamber will keep the position under review".[9] The "Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel", filed 4 April 2002, are summarised below.

The Submissions

The Prosecution's submissions

The Prosecution stressed that "the public interest demands a comprehensive prosecution of the indictment and that neither the international community nor the Prosecution could accept the curtailment of the case in a situation where the Accused, by declining to avail himself of the benefit of Counsel, has exacerbated his health problems".[10] It submitted that there is no norm of customary international law prohibiting the imposition of Counsel on an accused who wants to represent himself. It submitted that the Statute allows a Chamber to impose Defence Counsel on an accused and relied *inter alia* on the opinion of Judge Gunawardana in the *Barayagwiza* case in which the assignment of Counsel was envisaged "where the interests of justice so require".[11] In the Prosecution's view, Article 21(4)(d) "also envisages the assignment of Defence Counsel in the present circumstances, where the health of the Accused, the complexity of the case and the public interest in the completion of this trial combine, with the result that it is in the interest of justice to assign legal Counsel".[12] The Prosecution also submits that Article 20 of the Statute necessitates that the imposition of Defence Counsel on the Accused in order to ensure a fair and expeditious trial.[13]

The Accused's submissions

On 11 November 2002, the Accused stated that by seeking to have Counsel imposed on him, the Prosecution is trying to deprive him from his right to speak in court. He refused the proposal of the Trial Chamber to have his Legal Associates sitting in court with him.[14] Finally he relied on the judgment of the Supreme Court in *Faretta v. California*, dealt with by the Trial Chamber and summarised below.[15]

The *amici curiae*

The amici curiae relied on Article 21(4)(d) of the Statute, Article 6(3) of the European Convention on Human Rights,[16] and Article 14(3)(d) of the International Covenant on Civil and Political Rights ("ICCPR"),[17] which provisions in their view explicitly protect the Accused's right to defend himself in person. They stated that "[a]ny imposition of counsel upon the Accused against his wishes would constitute a breach of his guaranteed rights".[18]

As regards the opinion of Judge Gunawardana, the *amici curiae* noted that Barayagwiza chose not to attend his trial and, crucially, that he did not assert his right to self-representation, whereas in the present case the Accused has consistently asserted his right to represent himself.[19]

They further pointed out that the examples of mandatory provision of Defence Counsel given by the Prosecution are drawn from inquisitorial systems, where the functions of Defence Counsels are very different from those in the adversarial form of trial adopted at the International Tribunal, the latter requesting the Defence Counsel to "put the case"[20] before the court. They submitted that therefore "[n]o meaningful trial would be possible if the advocate was not instructed by the Accused".[21]

Finally the *amici curiae* submitted that in their opinion "the interests of justice do not require the assignment of Counsel, which would deprive the Accused of his right to conduct his own defence".[22]

The Reasoning

Interpretation of Article 21(4)(d) of the Statute

The Trial Chamber held that "a plain reading of [Article 21(4)(d)] indicates that there is a right to defend oneself in person".[23] It considered that "[t]his interpretation is supported by the essentially adversarial nature of the proceedings at the International Tribunal [...] shown by the role of the Prosecutor, as set out in Article 18 of the Statute, and by Rule 85 of the Rules which identifies the distinct roles for the Prosecutor and the Defence in the presentation of evidence".[24] It agreed with the *Amici Curiae* that "the imposition of a Defence Counsel upon an accused who does not want one is a feature of inquisitorial systems, but not of adversarial systems".[25]

Right to self-representation in common law systems

The Trial Chamber recalled that adversarial proceedings are part of the common law system and found the reasons for the common law rule in support of self-representation in the findings of the United States Supreme Court in *Faretta v. California*, according to which "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so".[26]

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[8] Hearing, 11 November 2002, T. 12835-35.
[9] Oral Ruling of the Trial Chamber, 18 December 2002, T. 14574.
[10] Prosecution's Motion, para. 5.
[11] *Barayagwiza*, ICTR-97-19-T, Concurring and Separate Opinion of Judge Gunawardana to the Decision on Defence Counsel Motion to Withdraw, 2 November 2000, p.10.
[12] Prosecution's Motion, para. 15.
[13] *Ibid.*, para. 20.
[14] Hearing, 11 November 2002, T. 12837.
[15] *Ibid.*, T. 12840, referring to *Faretta v. California*, 422 U.S. 806 (1975).
[16] Article 6 (3) (c) of the European Convention on Human Rights provides that everyone charged with a criminal offence has the following minimum rights: to defend himself in person or through legal assistance of his own choosing […](emphasis added).
[17] Article 14 (3) (d) of the ICCPR provides that in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; [...] (emphasis added).
[18] *Amici* Observations, paras. 7-11.
[19] *Ibid.*, paras. 12-14.
[20] The Trial Chamber defined the obligation in the proceedings of the Tribunal of "putting a case" as "putting forward the Defence version of events if it differs from that put forward by a witness", which obligation is "reflected in Rule 90(H) of the Rules" (para. 25).
[21] *Ibid.*, para. 19. For further developments on the nature of the proceedings before the International Tribunal, see *infra*.
[22] *Ibid.*, para. 12.
[23] Para. 18.
[24] Para. 19.
[25] Para. 21.
[26] *Faretta v. California*, 422 U.S. 806 (1975) at 807.

It found that while it may be appropriate in civil law systems to appoint Defence Counsel for an accused who wishes to represent himself, as in such systems the court is "fulfilling a more investigative role in an attempt to establish the truth", the imposition of Defence Counsel on a unwilling accused in an adversarial system would "effectively deprive that accused of putting forward a defence". In adversarial systems "it is the responsibility of the parties to put forward the case and not for the court, whose function is to judge".[27]

Right to self-representation in international and regional conventions

The Trial Chamber considered the international and regional conventions expressly providing for the right to self-representation in criminal proceedings: Article 14(3)(d) of the ICCPR, Article 67(1)(d) of the Statute of the International Criminal Court ("ICC"),[28] Article 8(2) of the American Convention on Human Rights, and Article 6(3)(c) of the European Convention on Human Rights.[29]

The Trial Chamber rejected the Prosecution's submission that in *Croissant v. Germany*,[30] the European Court of Human Rights ("ECHR") interpreted Article 6(3)(c) of the European Convention as allowing a Counsel to be imposed on the Accused. It noted that this case was not concerned with an accused seeking to represent himself but with an accused who was objecting to additional counsel appointed by the court. It relied however on the interpretation of Article 14(3)(d) by the Human Rights Committee in *Michael and Brian Hill v. Spain*,[31] as a case "highly relevant to the correct interpretation of Article 21(4)(d) of the Statute, especially since this provision is identical to Article 14(3)(d) of the ICCPR".[32] In this case, the Spanish courts denied one of the appellants the right to defend himself. The Committee noted that the appellant's right to self-representation had not been respected.[33]

Right to self-representation and competence to defend oneself in person[34]

The Trial Chamber held that it was satisfied that the Accused, who had "clearly and unequivocally" informed the Trial Chamber that he did not want to be represented by Defence Counsel, is "competent" to defend himself in person. It added that in words of the U.S. Supreme Court in *Faretta*, the Accused is "literate, competent, and understanding, and [he is] voluntarily exercising his informed free will".[35] Further it mentioned that the Accused has been advised by the Trial Chamber that "it would be in his best interests to accept the assistance of Defence Counsel".[36]

Limits to the right to self-representation[37]

The Trial Chamber found that "the right to defend oneself in person is not absolute". Indeed it held that "[c]learly, an accused whose behavior has resulted in his removal from the courtroom pursuant to Rule 80(B) of the Rules, has also relinquished his right to defend himself in person". It further held that "there may be circumstances [...] where it is in the interests of justice to appoint counsel". It found that no circumstances have "as yet" arisen in this trial but underlined that it will "keep the position under review".

Self-representation and the obligation to ensure a "fair and expeditious" trial

The Trial Chamber finally addressed the Prosecution's submission that Article 20 of the Statute requires the imposition of Defence Counsel on the Accused in order to ensure a "fair and expeditious" trial. The Trial Chamber acknowledged that a Trial Chamber has to ensure that a trial is fair and expeditious, especially when the health of the Accused is at issue. However it made clear that, as stated in that same article, "while ensuring that the trial is fair and expeditious, a Trial Chamber must also ensure that the rights of the accused, as set out in Article 21 of the Statute, are not infringed".[38]

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[27] Para. 24.

[28] The Trial Chamber noted that the right to self-representation under Article 67(1)(d) of the ICC Statute is subject to Article 63(2) which deals with disruptive conduct by the Accused in the courtroom and provides: "If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proven inadequate, and only for such duration as is strictly required".

[29] A the 11 November 2002 hearing, the Accused relied on the provisions of these conventions (T. 12835-35).

[30] *Croissant v. Germany*, European Court of Human Rights, Case No. 62/1001/314/385, Judgment, 25 September 1992.

[31] *Michael and Brian Hill v. Spain*, Human Rights Committee, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997.

[32] Para. 37.

[33] The Trial Chamber noted that the Secretary General in his report on the Statute (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, 3 May 1993, S/25704) stated that "the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights".

[34] Para. 39.

[35] *Faretta v. California*, 422 U.S. 806 (1975) at 835.

[36] The conditions for an accused to be entitled to ensure his own defence seem to be that he has "clearly and unequivocally" expressed his wish to do so, and is "literate, competent, and understanding". Nevertheless the Trial Chamber has not expressly set forth any criterion.

[37] Para. 40.

[38] Para. 41.

The Prosecutor v. Vojislav Seselj - Case No. IT-03-67-PT

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

"DECISION ON PROSECUTION'S MOTION FOR ORDER APPOINTING COUNSEL TO ASSIST VOJISLAV SESELJ WITH HIS DEFENCE"

9 MAY 2003

Article 21(4)(d) of the Statute – Right to self-representation- Appointment of Counsel in the interests of justice – Scope of the phrase "in the interests of justice"- The definition of "standby counsel" – The role of standby counsel

Right to self-representation: the right to self-representation is not absolute. Article 21 of the Statute and the jurisprudence of this Tribunal and the Rwanda Tribunal leave open the possibility of assigning counsel to an accused on a case by case basis in the interests of justice.

Scope of the phrase "in the interests of justice": the phrase "in the interests of justice" potentially has a broad scope. It includes the right to a fair trial, which is not only a fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy. In the context of the right to a fair trial, the length of the case, its size and complexity need to be taken into account.

The definition of standby counsel: standby counsel is not an amicus curiae but an assistant operating in the sphere of the Accused only, who will serve to safeguard a fair and expeditious trial. Counsel-client privilege applies to any correspondence and communication between the Accused and standby counsel. Standby counsel is bound in the same way as any other counsel working with the Tribunal by the obligations protecting the interests of an accused.

Procedural Background

- On 25 February 2003, the day after his surrender to the Tribunal,[1] Vojislav Seselj ("the Accused") notified the Registrar his will to conduct his own Defence.

- On 26 February 2003 at his initial appearance, the Accused made clear that his intention to defend himself was definite. He referred to the possibility that he would engage an assistant and a legal advisor but emphasised that they would never appear in court.

- On 28 February 2003, the Prosecution filed the "Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence ("Prosecution's Motion"). On 20 March 2003, the Accused filed his response to the Prosecution's Motion ("Accused's Response").

- On 25 March 2003 at his further appearance, the Accused was reminded of his right to counsel, in which respect he stated that "nothing will change [...] until the end of the trial".[2]

The Decision

Pursuant to Rule 54 of the Rules,[3] the Trial Chamber rejected the Prosecution's Motion insofar as it seeks an Order from the Trial Chamber "directing the Registrar to appoint legal counsel to assist the accused Seselj with the preparation and conduct of his defence" without any limitation. It decided to assign a standby Counsel to the Accused, fluent both in Bosnian/Croatian/Serbian ("BCS") and in one of the official languages of the Tribunal, and requested the Registrar to assign one from the Rule 45(B) list.

The Submissions

The Prosecution submitted that the interests of justice require that legal counsel be appointed to assist the Accused with his defence, due to the complexity of the case, the Accused's express intention to cause harm to the Tribunal and to use the proceedings as a forum for Serb national interests, the consequent possibility of a disorderly trial, the necessity to safeguard the administration of justice, and the public interest in the restoration of peace in the former Yugoslavia. The Prosecution argued that the circumstances of its present request are different from its request in the *Milosevic* case, the latter being concerned with Milosevic's health, the former being concerned with the "disruptive, obstructionist or scandalous"[4] conduct of Seselj and his remarks to the effect that he intends to use the Tribunal as a political stage and source of media attention.[5] It submitted that there might be some limited scope for the Accused to participate directly in the proceedings with the leave of the Trial Chamber so long as he does not interfere with the normal conduct of the proceedings.

The Accused refuted the legal relevance of the arguments of the Prosecution pertaining to his "well-known political attitude"[6] towards the Tribunal. He emphasised that his decision to conduct his own defence is "final and irrevocable"[7] and that he would never accept any defence counsel assigned by the Tribunal against his will. He submitted that the legal practice of the Tribunal, notably in the *Milosevic* case, support his position that "[s]uch practice cannot be changed from case to case".[8] He further argued that Article 21 of the Statute, criminal law doctrine, and international and national law guarantee the right to conduct his own defence.

[1] Vojislav Seselj voluntarily surrendered to the Tribunal on 24 February 2003.

[2] Transcripts 6.

[3] Rule 54 (General Rule)
At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

[4] Prosecution's Motion, para. 11.

[5] Prosecution's Motion, paras. 9-13, footnotes 18, 20, 23-26 and related attachments. For example, the Accused allegedly stated in 1994 in an interview for a French film "Crimes et Criminels" that: "Personally, I do not recognize this Hague Tribunal. I think it has no legal foundation, but if I am ever invited to The Hague I'll gladly go there immediately. I would never miss such a show." He is reported to have said that "he would gladly travel to The Hague to 'destroy' the war crimes tribunal in case it open[ed] a trial against him", Deutsche Presse-Agentur, 3 February 2003. At a press conference of the Serbian Radical Party on 9 February 2003 he allegedly stated that "the Tribunal in The Hague is an extraordinary ground where I could defend and protect the Serb national interests". On 4 February 2003, the Belgrade daily "Blic Politika" reported the Accused as saying that the Tribunal would be "a good training field for the protection of Serb national interests".

[6] Accused's Response, p. 1.

[7] *Ibid.*

[8] *Ibid.*, p. 3.

The Reasoning

Applicable law

The ad hoc *Tribunals*

The Trial Chamber referred to Articles 20 of the Statute, which *inter alia* provides that the Trial Chambers shall ensure that a trial is fair and expeditious, with full respect for the rights of the accused, including the right for an accused to defend himself in person, as embodied in Article 21(4)(d). It also referred to Article 20(4)(d) of the Statute of the International Criminal Tribunal for Rwanda ("ICTR"), a provision similar to Article 21(4)(d) of the ICTY Statute, and to Rule 45 *quater* of the ICTR Rules of Procedure and Evidence ("Assignment of Counsel in the Interests of Justice") which states: "The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused".

The Trial Chamber held that "[t]he wording of Article 21 of this Tribunal's Statute does not on its face exclude the possibility of offering an accused the assistance of assigned counsel where the interests of justice so require. The need may arise for unforeseeable reasons to protect an accused's interests and to ensure a fair and expeditious trial".[9] The Trial Chamber referred to the *Milosevic* Decision, in which Trial Chamber III recognised a right to defend oneself in person under Article 21(4) of the Statute and held that this right is not absolute, that there may be circumstances where it is in the interests of justice to appoint counsel, and that an accused whose behaviour has resulted in his removal from the courtroom pursuant to Rule 80(B) of the Rules has also relinquished his right to defend himself in person.[10] It found that the Trial Chamber's reasoning in the aforementioned decision had left avenues open and noted, moreover, that three *amici curiae* had been appointed to assist the court[11] as well as two legal associates appointed "in the interests of a fair trial for the Accused to meet with and be able to communicate freely with persons for legal advice, and to be able to discuss and supply them with copies of protected materials".[12]

The Trial Chamber also referred to the dissenting opinion of Judge Gunawardana in the *Barayagwiza* case, in which he considered Article 20(4)(d) of the ICTR Statute as "an enabling provision for the appointment of a 'standby counsel'".[13]

The common law system

The Trial Chamber first referred to the case law of the United Stated and other common law jurisdictions, and *inter alia* to the case of *Faretta v. California*, in which the United States Supreme Court held that forcing a lawyer upon a defendant who is literate, competent and understanding and who voluntarily exercises his informed free will by waiving his right to the assistance of counsel would be a breach of the accused's constitutional right to conduct his own defence but also that self-representation by a defendant who deliberately engages in serious misconduct may be terminated.[14] It then referred to case of *McKaskle v. Wiggins*, whereby the Supreme Court appointed a standby counsel to the Accused so as to ensure him a fair chance to present his case.[15] It also referred to Judge Reinhardt's comment in the case of *Farhad v. United States*. Judge Reinhard stated that neither the right to counsel nor the right to self-representation is an absolute right,[16] argued that permitting self-representation regardless of the consequences threatens to divert criminal trials from their clearly defined purpose of providing a fair and reliable determination of guilt or innocence,[17] and that a defendant could not waive his right to a fair trial, a right that implicates not only the interests of the accused but also the institutional interests of the judicial system.

The civil law system

The Trial Chamber noted that it is common practice in civil law systems to assign counsel mandatorily, especially in serious cases. It supported its finding by referring to Articles 274 and 317 of the French *Code de Procédure Pénale*, Article 294 of the Belgian *Code d'instruction criminelle*, Section 140 of the German Code of Criminal Procedure, and Section 731 of the Danish Administration of Justice Acts. Finally it referred to the Criminal Procedure Act of the Federal Republic of Yugoslavia as "the most relevant example".[18] Pursuant to its Article 71, an accused facing a criminal sentence of 10 years or more must have a defence counsel, even if he has the requisite legal qualifications.

Human rights norms

The Trial Chamber noted that human rights norms guarantee "both a right to self-representation and a right to legal assistance in similar terms to Article 21(4)(d) of the Statute".[19] It first referred to the case of *Michael and Brian Hills v. Spain*,[20] whereby the Human Rights Committee found that the Accused had the right to defend himself pursuant to Article 14(3)(d) of the International Covenant on Civil and Political Rights ("ICCPR").[21] It noted, however, that this decision did not address the question of mandatory defence counsel in detail, and doubted that it can be understood to imply that any rule requiring the assignment of defence counsel in the procedural codes of civil law systems is incompatible with the ICCPR. The Trial Chamber then referred to the case of *Croissant v. Germany*,[22] whereby the European Court of Human Rights found that the will of a court to ensure that the trial proceeds without interruption or adjournments is a relevant interest of justice that may well justified an appointment against the accused's wishes.[23]

Appointment of Counsel in the interests of justice

The scope of the phrase "in the interests of justice"

The Trial Chamber found that "the right to self-representation is not absolute" and that "Article 21 of the Statute, and the jurisprudence of this Tribunal and the Rwanda Tribunal, leave open the possibility of assigning counsel to an accused on a case by case basis in the interests of justice".[24] It then held that "[t]he phrase 'in the interests of justice' potentially has a broad scope [and] includes the right to a fair trial, which is not only a fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy. In the context of the right to a fair trial, the length of the case, its size and complexity need to be taken into account".[25]

The complexity of the case

The Trial Chamber found that "[t]he complex legal, evidential and procedural issues that arise in a case of this magnitude may fall outside the competence even of a legally qualified accused, especially where that accused is in detention

[9] Para. 11.
[10] *Milosevic*, IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel ("Milosevic's Decision"), 4 April 2003 (for a detailed summary of the Decision see pp. 17-19 of the present issue of the *Judicial Supplement*).
[11] *Milosevic*, IT-02-54-T, Order Inviting Designation of Amicus Curiae, 30 August 2001; and Order Concerning Amici Curiae, 11 January 2002.
[12] *Milosevic*, IT-02-54-T, Order, 16 April 2002.
[13] *Barayagwiza*, ICTR-97-29-T, Decision on Defence Counsel Motion to Withdraw, Concurring and Separate Opinion oif Judge Gunawardana, 2 November 2000.
[14] *Faretta v. California*, 422 U.S. 806 (1975).
[15] *Mc Kaskle v. Wiggins*, 465 U.S. 168 (1984).
[16] *Farhad v. United States*, 190 F.3d 1097 (9th Cir. 1999), 1101.
[17] *Ibid.*, 1106.
[18] Para. 17.
[19] Para. 18 (emphasis by the Trial Chamber).
[20] Communication No. 526/1993 (views adopted on 2 April 1997 at the fifty-ninth session of the Committee), Reports of the Human Rights Committee, vol. II, GAOR, Suppl. 40 (A/52/40).
[21] Article 21(4)(d) of the ICTY Statute is strictly identical to Article 14(3)(d) of the ICCPR.
[22] *Croissant v. Germany*, ECHR, No. 62/1991/314/385, 25 September 1992, A237-B.
[23] *Ibid.*, para. 28. The ECHR endorsed the Regional Court's argument concerning the need to ensure that the Accused was adequately represented throughout his trial, with regard to its probable length and to the size and complexity of the case.
[24] Para. 20. See also the developments under "The *ad hoc* Tribunals".
[25] Para. 21.

without access to all the facilities he may need".[26] Moreover, it held that "the Tribunal has a legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions".[27]

The conduct of the Accused

The Trial Chamber found that although the Accused expressly stated that he will use "legal arguments and hard facts"[28] to "defeat"[29] the Tribunal and that it would be premature to make any assessment as to his possible intention to harm or "destroy"[30] the Tribunal, "good cause for concern has been shown following his declared intention to attempt to use the Tribunal as a vehicle for the furtherance of his political beliefs and aspirations".[31] It held that "[i]f this tactic were resorted to, it would not only result in an abuse of the valuable judicial resources of the Tribunal but also hinder an expeditious trial".[32] Indeed it found that the Accused is "increasingly demonstrating a tendency to act in an obstructionist fashion while at the same time revealing a need for legal assistance".[33]

Based on the obstructionist conduct of the Accused, the Trial Chamber expressed its view that "at this stage of the proceedings, the best way to preserve the rights of the Accused while at the same time satisfying the interests of justice is to assign a "standby counsel" fulfilling the requirements of Rule 44(A)".[34]

The definition of "standby counsel"

The Trial Chamber emphasised that the assignment of a standby counsel does not infringe on the right of the Accused to defend himself. It held that "standby counsel is not an *amicus curiae* but an assistant operating in the sphere of the Accused only, who will serve to safeguard a fair and expeditious trial. Counsel-client privilege applies to any correspondence and communication between the Accused and standby counsel. Standby counsel is bound in the same way as any other counsel working with the Tribunal by the obligations protecting the interests of an accused".[35] Further it clarified that "[t]he right to self-representation and the appointment of standby counsel do not exclude the right of the Accused to obtain legal advice from counsel of his own choosing".[36]

The role of standby counsel

For the purposes of these proceedings, the Trial Chamber defined the role of standby counsel as follows:

"- to assist the Accused in the preparation of his case during the pre-trial phase whenever so requested by the Accused;
- to assist the Accused in the preparation and presentation of his case at trial whenever so requested by the Accused;
- to receive copies of all court documents, filings and disclosed materials that are received by or sent to the Accused;
- to be present in the courtroom during the proceedings;
- to be engaged actively in the substantive preparation of the case and to participate in the proceedings, in order always to be prepared to take over from the Accused at trial (see below);
- to address the Court whenever so requested by the Accused or the Chamber;
- to offer advice or make suggestions to the Accused as counsel sees fit, in particular on evidential and procedural issues;
- as a protective measure in the event of abusive conduct by the Accused, to put questions to witnesses, in particular sensitive or protected witnesses, on behalf of the Accused if so ordered by the Trial Chamber, without depriving the Accused of his right to control the content of the examination;[37]
- in exceptional circumstances to take over the defence from the Accused at trial should the Trial Chamber find, following a warning, that the Accused is engaging in disruptive conduct or conduct requiring his removal from the courtroom under Rule 80(B)".[38]

Pursuant to Rule 54, the Trial Chamber decided that standby counsel shall be assigned to the Accused in this case, stated that standby counsel must be fluent both in B/C/S and in one of the official languages of the Tribunal, and ordered the Registry to assign one standby counsel from the list of counsel kept by the Registrar under Rule 45(B). It further stated that its Decision is without prejudice to any subsequent decision regarding the assignment or appointment of counsel fulfilling the requirements of Rule 44(A), or investigators[39] or *amici curiae*, as the case progresses, either on application by either party or *proprio motu*. It rejected the Prosecution's Motion insofar as that Motion seeks an order from the Trial Chamber "directing the Registrar to appoint legal counsel to assist the accused Seselj with the preparation and conduct of his defence" without any limitation. ■

[26] Para. 22.
[27] *Ibid.*
[28] Accused's Response, p. 1.
[29] *Ibid.*
[30] See footnote 5.
[31] Para. 22.
[32] *Ibid.*
[33] Para. 23.
[34] Para. 27.
[35] Para. 28.
[36] Para. 29.
[37] The Trial Chamber added in footnote 56 that "[s]uch a measure would be less intrusive than the alternative option of interrupting and discontinuing the examination of the Accused himself in the interests of justice".
[38] Para. 30.
[39] The Trial Chamber added in footnote 57 that "[c]ommunication or correspondence with investigators is not to be regarded as privileged".

judicial supplement

JUNE 2003

SUMMARIES OF ICTY CASE-LAW IN APRIL/MAY 2003

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04/04/03	MILOSEVIC	IT-02-54-T	REASONS FOR DECISION ON THE PROSECUTION MOTION CONCERNING ASSIGNMENT OF COUNSEL	
08/04/03	BLAGOJEVIC *ET AL.*	IT-02-60-PT	DECISION	
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