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BUREAU

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

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

"DECISION ON MOTION FOR DISQUALIFICATION"

10 JUNE 2003

Rule 15(B) - Grounds for disqualification of Judges - Religion and nationality of the Judges - Application of Rule 46(C) to an Accused who represents himself

Religion and nationality of the Judges: the nationality and religion of Judges are, and must be, irrelevant to their ability to hear the cases before them impartially. The policies of the governments of the countries from which Judges of this International Tribunal come are, and must be, irrelevant to the carrying out of their judicial responsibilities.

Application of Rule 46(C) to an Accused who represents himself: when a defendant chooses to represent himself, the power given in Rule 46(C) may be exercised against the defendant himself. One sanction the Bureau may apply to such filings is to direct the Registrar to file a new application without offensive language. If the defendant were to persist, the Bureau might bar the filing of the application altogether. The Trial Chamber may well apply similar principles.

Procedural Background

On 22 May 2003, Vojislav Seselj (the "Applicant") applied, pursuant to Rule 15(B) of the Rules of Procedure and Evidence ("Rules"), to have Judges Schomburg, Mumba and Agius of Trial Chamber II disqualified from hearing his case because of actual bias.¹ The matter has been referred to the Bureau as one of the Judges concerned, Judge Schomburg, is the Presiding Judge of the Chamber.²

The Decision

The Bureau denied the Application as frivolous and an abuse of process.

The Reasoning

Grounds for disqualification of Judges: religion and nationality of Judges

The Applicant claimed that the Judges present "certain personal characteristics which completely preclude them from being impartial". The Applicant claimed that Germany, of which Judge Schomburg is a national, has "traditionally been hostile towards Serbia and the Serbian people" and explored its history, starting from the Middle Ages. In his view the fact that Germany is a member of the North Atlantic Treaty Alliance ("NATO"), whose people "committed aggression against Serbia", should prevent Judge Schomburg from hearing his case. The Applicant qualified Judges Mumba and Agius as "ardent and zealous Catholics", insisting mainly on the fact that he considers the Roman Catholic Church "contributed to the destruction of Yugoslavia".

The Bureau determined that the only basis for Seselj's Application were Judge Schomburg's German nationality and Judge Mumba and Judge Agius's religion. It held that "the nationalities and religions of Judges are, and must be, irrelevant to their ability to hear the cases before them impartially"³ and relied *inter alia* on the Statute of the Tribunal which requires Judges to be "persons of high moral character, impartiality and integrity" and on to their undertaking when they are sworn in to perform their duties "honourably, faithfully, impartially and conscientiously". As regards Germany's membership in NATO, the Bureau held that

"[t]he policies of the governments of the countries from which Judges of this International Tribunal come are, and must be, irrelevant to the carrying out of their judicial responsibilities".⁴

Application of Rule 46(C) to an accused who represents himself

The Bureau found that the Application contained "abusive and insulting" statements and qualified it as "frivolous and an abuse of process". It referred to Rule 46(C)⁵ which authorises the imposition of sanctions on a counsel who files such motions and which it found applicable to proceedings before the Bureau.⁶ It held that "when, as in this case,⁷ a defendant chooses to represent himself, the power given in the Rule may be exercised against the defendant himself".⁸ It took note of the fact that it cannot apply the sanctions envisaged in Rule 46(C) ("non-payment, in whole or in part, of fees associated with the motion and/or costs thereof"), as the Applicant is not represented by counsel. Nonetheless it found that "one sanction the Bureau may apply to such filings is to direct the Registrar to deny filing", as a consequence of which the "Applicant would [...] be required to file a new application without the offensive language". Further, "[i]f the Applicant were to persist, the Bureau might bar the filing of the application altogether", and "the Trial Chamber may well apply similar principles".⁹ Finally it warned the Applicant that he should be aware of these principles in drafting future pleadings. ■

⁴ *Ibid.*

⁵ Rule 46 ("Misconduct of Counsel")

(C) In addition to the sanctions envisaged by Rule 46, a Chamber may impose sanctions against counsel if counsel brings a motion, including a preliminary motion, that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof (emphasis added).

⁶ *Blagojevic et al.*, IT-02-60-T, Decision on Blagojevic's Motion for Clarification, 27 March 2003.

⁷ See *Seselj*, IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, 9 May 2003, *Judicial Supplement* No. 41.

⁸ Para. 5.

⁹ *Ibid.*

¹ Vojislav Seselj, Submission No. 13, 22 May 2003 (the "Application").

² Judge Schomburg, as Presiding Judge of a Trial Chamber, normally sits as a member of the Bureau (see Rule 23(A)). Since he is the object of the motion for disqualification, the Bureau decided pursuant to Rule 23(E) to replace him with Judge Jorda. For the latest developments with regard to the procedure for disqualification of Judges, see *Judicial Supplement* No. 40.

³ Para. 3.

APPEALS CHAMBER

The Prosecutor v. Dragan Nikolic - Case No. IT-94-2-AR73

Judges Meron [Presiding], Pocar, Shahabuddeen, Güney and El Madhi

“DECISION ON INTERLOCUTORY APPEAL CONCERNING LEGALITY OF ARREST”

5 JUNE 2003

The impact of a breach of a State's sovereignty on the exercise of jurisdiction - The impact of a violation of an accused's human rights on the exercise of jurisdiction

The impact of a breach of a State's sovereignty on the exercise of jurisdiction: accountability for Universally Condemned Offences is a necessary condition for the achievement of international justice, which plays a critical role in the reconciliation and rebuilding based on the rule of law of countries and societies torn apart by international and internecine conflicts. The damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation. In cases of Universally Condemned Offences, jurisdiction should not be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organisation involved.

The impact of a violation of an accused's human rights on the exercise of jurisdiction: certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. Apart from such exceptional cases the remedy of setting aside jurisdiction will usually be disproportionate. The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.

Procedural Background

- On 9 October 2002, Trial Chamber II rendered its decision on the legality of the arrest of Dragan Nikolic (the “Accused”).¹
- On 7 November 2003, Nikolic's Defence filed a notice of appeal against the Impugned Decision pursuant to Rule 108 and/or Rule 72 of the Rules and Procedure and Evidence (the “Rules”).² The Prosecution responded on 18 November 2002.³
- On 9 January 2003, the Appeals Chamber dismissed the Notice of Appeal on the grounds that the Defence should have filed its Notice of Appeal under Rule 73.⁴
- On 14 January 2003, the Appellant sought certification for leave to appeal from the Trial Chamber.⁵ The Prosecution responded on 17 January 2003.⁶ The Defence replied on 20 January 2003.⁷ On 17 January 2003, the Trial Chamber granted certification.⁸

- On 27 January 2003, Nikolic's Defence filed the “Appellant's Brief on Appeal Against a Decision of the Trial Chamber Dated 9 October 2002” (the “Appeal”).

The Decision

The Appeals Chamber dismissed the Appeal.

The Reasoning

The question before the Appeals Chamber was whether the International Tribunal can exercise jurisdiction over the Appellant notwithstanding the alleged violations of Serbia and Montenegro's sovereignty⁹ and of the Accused's human rights committed by SFOR and, by extension, the Office of the Prosecutor (“OTP”), acting in collusion with the unknown individuals who abducted the Accused from Serbia and Montenegro.

The impact of a breach of a State's sovereignty in the exercise of jurisdiction

As noted by the Appeals Chamber, this is a novel issue for the International Tribunal. There is no case-law on the point and the Statute and the Rules do not offer much guidance. The Appeals Chamber had therefore to rely on national case-law.¹⁰ After a review of the relevant cases, it admitted that it is “difficult to identify a clear pattern in this case-law” and noted that “caution is needed when generalising”. Nevertheless it identified two principles that seem to have support in State Practice as evidenced by the practice of their courts:

“First, in cases of crimes such as genocide, crimes against humanity and war crimes which are universally recognised and condemned as such (“Universally Condemned Offences”), courts seem to find in the special character of

¹ *Nikolic*, IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002 (the “Impugned Decision”). Nikolic was arrested by unknown individuals, handed over to the Stabilisation Force (“SFOR”) and transferred to the Tribunal. On the background of the case and the legal issues involved see the summary of the Impugned Decision, *Judicial Supplement* No. 37.

² *Nikolic*, IT-94-2-AR72, Notice of Appeal from the Judgement, pursuant to Rule 108 of the Rules of Evidence and Procedure, of Trial Chamber II dated the 9th day of October 2002 concerning the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 7 November 2002.

³ *Nikolic*, IT-94-2-AR72, Prosecution Response to the Two Defence Documents filed on 8 November 2002 purporting to be a Notice of Appeal pursuant to Rule 108 and a Motion for Extension of Time under Rule 127 Respectively, 18 November 2002.

⁴ *Nikolic*, IT-94-AR72, Decision on Notice of Appeal, 9 January 2003.

⁵ *Nikolic*, IT-94-AR72, Motion for Certification and Relief under the Provisions of Rules 73 and 127 of the Rules, 20 January 2003.

⁶ *Nikolic*, IT-94-2-PT, Prosecution's Response to the Defence Motion for Certification and Relief Under the Provisions of Rules 73 and 127 of the Rules of Procedure and Evidence, IT-94-2-PT, 17 January 2003.

⁷ *Nikolic*, IT-94-2-PT, Reply to Response of the Prosecutor, filed on the 17th January 2003 to the Defence Motion Filed on the 14th January 2003 for Certification and Relief under Rules 73 and 127 of the Rules of Procedure and Evidence, 20 January 2003.

⁸ *Nikolic*, IT-94-AR72, Decision to Grant Certification to Appeal the Trial Chamber's “Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal”, 17 January 2003.

⁹ As the name of the Federal Republic of Yugoslavia officially changed on 4 February 2003 and is now Serbia and Montenegro, the Appeals Chamber decided to refer to Serbia and Montenegro in its Decision, except when quoting portions of the Impugned Decision. The present summary follows the same logic.

¹⁰ Paras. 21-23.

these offences and, arguably, in their seriousness, a good reason for not setting aside jurisdiction. Second, absent a complaint by the State whose sovereignty has been breached or in the event of a diplomatic resolution of the breach, it is easier for courts to assert their jurisdiction".¹¹

The Appeals Chamber observed that Universally Condemned Offences are a matter of concern to the international community as a whole. It found that there is "a legitimate expectation that those accused of these crimes will be brought to justice swiftly" and that "[a]ccountability for these crimes is a necessary condition for the achievement of international justice, which plays a critical role in the reconciliation and rebuilding based on the rule of law of countries and societies torn apart by international and internecine conflicts".¹² The Appeals Chamber considered that "the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation".¹³ It held that "in cases of Universally Condemned Offences, jurisdiction should [not] be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organisation involved".¹⁴

The Appeals Chamber found that this is all the more so in cases where the State has not lodged any complaint, thus accepting *de facto* the Tribunal's jurisdiction. It held that *a fortiori*

¹¹ Para. 24.

¹² Para. 25.

¹³ Para. 26.

¹⁴ *Ibid.*

this holds all the more so when such abductions do not violate State sovereignty. It therefore held that even if the conduct of the Accused's captors is to be attributed to SFOR in violation of Serbia and Montenegro's sovereignty, there will still be a basis for jurisdiction.

The impact of a violation of an accused's human rights in the exercise of jurisdiction

The Trial Chamber had found in the Impugned Decision that the treatment of the Appellant was not of such an "egregious" nature as to impede the exercise of jurisdiction without excluding that jurisdiction could be excluded in cases where an accused is very seriously mistreated. The Appeals Chamber upheld the approach of the Trial Chamber. It stated that "certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined".¹⁵

However it held that "[a]part from such exceptional cases [...] the remedy of setting aside jurisdiction will [...] usually be disproportionate"¹⁶ and that "[t]he correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law".¹⁷

In the present case, the Appeals Chamber did not find that the rights of the Accused had been "egregiously" violated and therefore did not find that the Tribunal should be impeded from exercising jurisdiction even if the conduct of the Accused's captors was to be attributed to SFOR. ■

¹⁵ Para. 30.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

TRIAL CHAMBERS

The Prosecutor v. Naletilic & Martinovic - Case No. IT-98-34-T

Trial Chamber I (Judges Liu [Presiding], Clark and Diarra)

"JUDGEMENT"

31 MARCH 2003

"Occupation" in international humanitarian law and the "actual authority test" - Unlawful labour under Article 3 of the Statute - Unlawful transfer as a grave breach of the Geneva Conventions of 1949

"Occupation" in international humanitarian law and the "actual authority test": to determine whether the authority of the occupying power has been actually established, the following guidelines provide some assistance: the occupying power must be in a position to substitute its own authority for that of the occupied authorities which must have been rendered incapable of functioning publicly; the enemy's forces have surrendered, been defeated or withdrawn (in this respect, battle areas may not be considered as occupied territory and sporadic local resistance, even successful, does not affect the reality of occupation); the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt; a temporary administration has been established over the territory; the occupying power has issued and enforced directions to the civilian population. Different legal tests will be used to determine whether the law of occupation applies, depending on whether the Chamber is dealing with individuals or with property and other matters.

Unlawful transfer and unlawful labour are prohibited from the moment civilians fall into the hands of the opposing power, regardless of the stage of the hostilities: there is no need to establish an actual state of occupation as defined in Article 42 of the Hague Regulations. With regard to destruction of property, however, actual authority is required. The "actual authority test" has to be fulfilled.

Unlawful labour under Article 3 of the Statute: the offence of unlawful labour against prisoners of war may be defined as an intentional act or omission by which a prisoner of war is forced to perform labour prohibited under Articles 49, 50, 51 or 52 of Geneva Convention III. To determine whether a person was not in a position to make a "real choice", a Trial Chamber may consider the following criteria: (a) the substantially uncompensated aspect of the labour performed; (b) the vulnerable position in which the detainees found themselves; (c) the allegations that detainees who were unable or unwilling to work were either forced to do so or put in solitary confinement; (d) claims of longer term consequences of the labour; (e) the fact and the conditions of detention; and (f) the physical consequences of the work on the health of the internees. To establish the mens rea for this crime, the Prosecution must prove that the perpetrator had the intent that the victim would be performing prohibited work and that the intent can be demonstrated by direct explicit evidence, or, in the absence of such evidence, can be inferred from the circumstances in which the labour was performed.

Unlawful transfer as a grave breach of the Geneva Conventions of 1949: forcible transfer is the movement of individuals under duress from where they reside to a place that is not their own choosing. Transfers motivated by an individual's own genuine wish to leave are lawful. Coercion may be physical or moral, direct or indirect, obvious or hidden. In order for a Chamber to be satisfied that a violation of Article 2(g) of the Statute has occurred, proof of the following is required: i) the general requirements of Article 2 of the Statute are fulfilled; ii) the occurrence of an act or omission, not motivated by the security of the population or imperative military reasons, leading to the transfer of a person from occupied territory or within occupied territory; iii) the intent of the perpetrator to transfer a person.

Background¹

Mladen Naletilic was born on 1 December 1946 in Siroki Brijeg, Bosnia and Herzegovina, but lived primarily in Germany. Upon his return to Siroki Brijeg in 1991, he founded and commanded a military group called the Convicts' Battalion ("KB"). Vinko Martinovic was born on 12 September 1963 in Mostar, Bosnia and Herzegovina and was raised in a part of Mostar called Rodoc. He was commander of the Vinko Skrobo Anti-Terrorist-Groups ("ATG") in the operations in Mostar relevant to the Indictment.²

The Judgement covers the period running from April 1993 to January 1994 and the conflict between the Bosnian Croats ("BH Croats") and Bosnian Muslims ("BH Muslims"), which ethnic groups had co-operated and jointly fought on the same side in 1992 against the Serb-Montenegrin forces, sometimes referred to as the Serb forces or Yugoslav People's Army ("JNA"). The Second Amended Indictment dated 16 October 2001 generally alleges that in 1993 the special unit "Kaznjenicka Bojna" (Convicts' Battalion, "KB"), along with other units of the army of the Republic of Croatia (HV) and the HVO, attacked villages

particularly in the municipalities of Jablanica and Mostar and subsequently carried out the expulsion and forcible transfer of the Bosnian Muslim civilians, arrested Bosnian Muslim adult males, destroyed Bosnian Muslim properties and the Sovici mosque. Between April 1993 and at least January 1994, Bosnian Muslim civilians and prisoners of war under the command of Naletilic and Martinovic were interned in the Heliudrom detention centre.

It is alleged that during their detention Bosnian Muslim detainees were repeatedly tortured by Naletilic and Martinovic (the "Accused") and their subordinates. Severe physical and mental suffering was intentionally inflicted on them in order to obtain information, as punishment, in retaliation for adverse developments on the front lines, to intimidate or based on ethnicity or religion. The indictment also alleges that, between May 1993 and at least January 1994, detainees were taken to the confrontation lines to be used as human shields and to perform various dangerous military support tasks benefiting the HV and HVO.

The indictment charges the Accused on the basis of individual criminal responsibility (Article 7(1) of the Statute of the Tribunal) and superior criminal responsibility (Article 7(3) of the Statute) with:

- Five counts of crimes against humanity (Article 5: persecutions on political, racial and religious grounds; inhumane acts; murder; torture),

¹ For a more detailed background of the case, see the *Naletilic and Martinovic* Case Information Sheet on the website of the International Tribunal at www.un.org/icty ("ICTY website"), under "The ICTY at a Glance".

² Paras. 160-163 of the Judgement.

- Eight counts of grave breaches of the 1949 Geneva Conventions (Article 2: inhuman treatment; wilful killing; torture; wilfully causing great suffering or serious injury to body or health; unlawful transfer of a civilian; extensive destruction of property) and
- Nine counts of violations of the laws or customs of war (Article 3: cruel treatment; unlawful labour; murder; wanton destruction not justified by military necessity; plunder of public or private property; seizure, destruction or wilful damage done to institutions dedicated to religion).

The Judgement

The Trial Chamber found Mladen Naletilic guilty on eight counts of crimes against humanity (persecutions on political, racial and religious grounds; torture), violations of the laws or customs of war (unlawful labour; wanton destruction not justified by military necessity; and plunder of public or private property) and grave breaches of the Geneva Conventions (torture; wilfully causing great suffering or serious injury to body or health; unlawful transfer of a civilian), and sentenced him to a single sentence of 20 years' imprisonment.³

The Trial Chamber found Vinko Martinovic guilty on nine counts of crimes against humanity (persecutions on political, racial and religious grounds; inhumane acts; murder), violations of the laws or customs of war (unlawful labour; plunder of public or private property) and grave breaches of the Geneva Conventions (inhuman treatment; wilfully causing great suffering or serious injury to body or health; wilful killing; unlawful transfer of a civilian), and sentenced him to a single sentence of 18 years' imprisonment.

The Reasoning

The Trial of Mladen Naletilic (aka "Tuta") and Vinko Martinovic (aka "Stela") started on 10 September 2001 and concluded on 31 October 2002. The Chamber heard a total of 84 witnesses for the Prosecution, 35 for the Naletilic Defence and 27 for the Martinovic Defence. Approximately 2750 exhibits were admitted. The Judgement considers in details the history of the conflict in the area of Mostar as developed during the proceedings as well as the position of the respective parties. It reviews the applicable law and addresses each count accordingly and enters convictions of guilt or innocence on the attached crimes. Beyond the actual crimes and the role of the Accused, the Judgement *inter alia* addresses the notion of "occupation" in international humanitarian law, sets clear the elements of unlawful labour under Article 3 of the Statute and contributes to the development of international humanitarian law by prosecuting for the first time the charge of "unlawful transfer of a civilian" under Article 2(g) of the Statute as a grave breach of the Geneva Conventions of 1949.⁴

"Occupation" in international humanitarian law and the "actual authority test"

"Occupation" is relevant to the charges of unlawful labour of civilians (Count 5), forcible transfer of a civilian (Count 18) and destruction of property (Count 19). Articles 49, 51 and 53 of Geneva Convention IV, respectively dealing with forcible transfers, labour and destruction of property fall within its Section on "Occupied Territories".⁵ The Chamber noted that the jurisprudence of the Tribunal relating to the applicable legal test

is inconsistent and determined that the overall control test submitted in the *Blaskic* Trial Judgement is not applicable to the existence of an occupation.⁶ It held that there is an essential distinction between the determination of a state of occupation and the existence of an international armed conflict: a further degree of control being required to establish occupation.

The Trial Chamber endorsed the definition in Article 42 of the Hague Regulations:⁷

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.⁸

It held that "to determine whether the authority of the occupying power has been actually established, the following guidelines provide some assistance:

- the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;⁹
- the enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;¹⁰
- the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;¹¹
- a temporary administration has been established over the territory;¹²
- the occupying power has issued and enforced directions to the civilian population".¹³

Within the framework of Article 42 of the Hague Regulations, the Trial Chamber found that what it must determine on a case by case basis is whether the occupying power

⁶ *Blaskic*, IT-95-14-T, Judgement ("*Blaskic* Trial Judgement"), 3 March 2000, *Judicial Supplement* No. 13. Paragraph 149 reads: "by using the same reasoning which applies to establish the international nature of the conflict, the overall control exercised by Croatia over the HVO means that at the time of its destruction, the property of the Bosnian Muslims was under the control of Croatia and was in occupied territory".

⁷ Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV of 18 October 1907 ("*Hague Regulations*").

⁸ See also *Kordic & Cerkez*, IT-95-14/2-T, Judgement ("*Kordic* Trial Judgement"), 26 February 2001, para. 149, *Judicial Supplement* No. 23.

⁹ *Rajic*, IT-95-12-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 September 1996, paras. 41-42, quoting Adam Roberts, What is a Military Occupation?, vol. 53, *British Yearbook of International Law*, pages 249 and 300 (1984). See also "Manual of Military Law of War on Land", United Kingdom, Part III, 1958, para. 503; "The Law of Land Warfare", Field Manual No. 27-10, US Department of the Army, 18 July 1956, chapter 6, para. 355; "Interim Law of Armed Conflict Manual", New Zealand Defence Force, 26 November 1992, para. 1302.4.

¹⁰ See "Manual of Military Law of War on Land", United Kingdom, Part III, 1958, paras. 502, 506 and 509; "The Law of Land Warfare", Field Manual No. 27-10, US Department of the Army, 18 July 1956, chapter 6, paras. 356 and 360; "Interim Law of Armed Conflict Manual", New Zealand Defence Force, 26 November 1992, at paras. 1302.2 and 1302.5. See also, "Humanitarian Law in Armed Conflicts, Manual", edited by the Federal Ministry of Defence of the Federal Republic of Germany, August 1992, para. 528.

¹¹ See "Manual of Military Law of War on Land", United Kingdom, Part III, 1958, paras. 502, 506; "The Law of Land Warfare", Field Manual No. 27-10, US Department of the Army, 18 July 1956, chapter 6, para. 356; "Interim Law of Armed Conflict Manual", New Zealand Defence Force, 26 November 1992, paras. 1302.2, 1302.3 and 1302.5.

¹² See "Manual of Military Law of War on Land", United Kingdom, Part III, 1958, para. 501. See also, Lauterpacht, in "Oppenheim's International Law", 7th ed. Vol. II, 1952, para. 167.

¹³ See Article 43 of the Hague Regulations, according to which "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country"; "Humanitarian Law in Armed Conflicts, Manual", edited by the Federal Ministry of Defence of the Federal Republic of Germany, August 1992, para. 527; Dieter Fleck, "The Handbook of Humanitarian Law in Armed Conflicts", Oxford University Press, 1999, para. 525.2.

³ The full text of the Judgement is available on the ICTY website on the Judgement page in both HTML and PDF formats. The full text of the Statement read in Court as well as Press Release No. 742e of 31 March 2003 are also provided. The Judgement contains 292 pages, including its annexes (Indictment, Procedural Background, and Glossary).

⁴ Article 2 (Grave breaches of the Geneva Conventions of 1949)

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(g) unlawful deportation or transfer or unlawful confinement of a civilian; (...).

⁵ Convention IV relative to the Protection of Civilian Persons in Time of War (1949) ("*Geneva Convention IV*").

exercises an actual authority over the occupied area.¹⁴ Following the commentary to Geneva Convention IV,¹⁵ the Trial Chamber however drew a distinction between the regime of Article 42 of the Hague Regulations which requires an actual state of authority (actual control) and the applicability of the law of occupation to civilians protected by Geneva Convention IV which requires only that the civilians be in the hands of the occupying power.¹⁶ As a consequence it applied a different legal test to determine whether the law of occupation applies, depending on whether it is dealing with individuals or with property and other matters. It held that forcible transfer and unlawful labour are prohibited from the moment civilians fall into the hands of the opposing power, regardless of the stage of the hostilities, and that there is no need to establish an actual state of occupation as defined in Article 42 of the Hague Regulations. With regard to destruction of property, however, the Trial Chamber held that actual authority is required and that the "actual authority test"¹⁷ as defined above must be fulfilled.

Count 5: unlawful labour under Article 3 of the Statute

Mladen Naletilic and Vinko Martinovic were both found guilty of unlawful labour as a violation of the laws or customs of war under Article 3 of the Statute. This charge was brought under Article 51 of Geneva Convention IV and Articles 49, 50 and 52 of Geneva Convention III. The Trial Chamber recalled that the Geneva Conventions had as a whole previously been recognised as part of customary international law.¹⁸ It found that requirements additional to the existence of an armed conflict arise out of the application of the specific regime of labour as enshrined in the Geneva Conventions.

The Trial Chamber considered the scope of Article 51 of Geneva Convention IV (labour of civilians) and of Articles 49, 50 and 52 of Geneva Convention III (labour of prisoners of war) and applied the regime of Geneva Convention III in relation to forced labour, as it deemed that this regime was more favourable to the Accused. It analysed the relevant articles, their commentary, and the case-law of the Tribunal and found that "the offence of unlawful labour against prisoners of war may be defined as an intentional act or omission by which a prisoner of war is forced to perform labour prohibited under Articles 49, 50, 51 or 52 of Geneva Convention III".¹⁹ In accordance with the previous jurisprudence of the Tribunal, it determined whether a person was not in a position to make a "real choice",²⁰ a Trial Chamber may consider the following criteria: "(a) the substantially uncompensated aspect of the labour performed; (b) the vulnerable position in which the detainees found themselves; (c) the allegations that detainees who were unable or unwilling to work were either forced to do so or put in solitary confinement; (d) claims of longer term consequences of the labour; (e) the fact and the conditions of detention; and (f) the physical consequences of the work on the health of the internees".²¹

The Trial Chamber added that, in order to establish the *mens rea* for this crime, the Prosecution "must prove that the perpetrator had the intent that the victim would be performing

prohibited work" and that the intent "can be demonstrated by direct explicit evidence, or, in the absence of such evidence, can be inferred from the circumstances in which the labour was performed".²²

Count 18: unlawful transfer as a grave breach of the Geneva Conventions of 1949

The Accused were found guilty of unlawful transfer as a grave breach of the Geneva Conventions of 1949 under Article 2(g) of the Statute. As noted by the Trial Chamber, the present Judgement is the first to deal with this charge under this heading. The Trial Chamber considered Article 147 of Geneva Convention IV which envisages unlawful deportation and transfer as a "grave breach", the commentary of which refers to breaches of Articles 45 and 49 of the same convention.

The Trial Chamber determined that Article 49 was the relevant article in the present case. It states that "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territories to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive". As noted by the Trial Chamber, Article 49 applies to persons in the hands of the occupying power,²³ prohibits transfers from occupied territory and within occupied territory, but does not prohibit evacuations as transfers motivated by the security of the population or imperative military reasons. It found that "transfers motivated by an individual's own genuine wish to leave are lawful".²⁴ To determine whether a transfer is based on an individual's "own wish", the Trial Chamber found assistance in Article 31 of Geneva Convention IV which prohibits "physical or moral²⁵ coercion" against protected persons, being "direct or indirect, obvious or hidden".²⁶ It defined "forcible transfer" as "the movement of individuals under duress from where they reside to a place (...) not of their own choosing".²⁷ It held that in order for the Chamber to be satisfied that a violation of Article 2(g) of the Statute has occurred, "proof of the following is required:

- the general requirements of Article 2 of the Statute are fulfilled;
- the occurrence of an act or omission, not motivated by the security of the population or imperative military reasons, leading to the transfer of a person from occupied territory or within occupied territory;
- the intent of the perpetrator to transfer a person".²⁸

¹⁴ The Trial Chamber added that there is no requirement that an entire territory be occupied (referring to L.C. Green, "The Contemporary Law of Armed Conflicts", Manchester University Press, 2nd ed., 2000, Chapter 15; and to "Manual of Military Law of War on Land", United Kingdom, Part III, 1958, para. 502").

¹⁵ Commentary to Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (1949), International Committee of the Red Cross, 1958 ("Commentary to Geneva Convention IV"), page 60.

¹⁶ Otherwise the civilians would be left, in between the invasion phase and the actual and stable regime of occupation, with less protection than that attached to them once occupation is established.

¹⁷ Para. 222 of the Judgement.

¹⁸ *Delalic et al.*, IT-96-21-A, Judgement, 20 February 2001, paras. 112 and 113, *Judicial Supplement No. 23*.

¹⁹ Para. 261 of the Judgement.

²⁰ *Krnjelac*, IT-95-25-T, Judgement ("Krnjelac Trial Judgement"), 15 March 2002, para. 372, *Judicial Supplement No. 31 bis*.

²¹ Para. 259 of the Judgement, referring to paras. 373 and 378 of the *Krnjelac* Trial Judgement.

²² Para. 260 of the Judgement.

²³ See *supra*.

²⁴ Para. 519 of the Judgement.

²⁵ The moral coercion had previously been admitted as a form of coercion in the International Tribunal case-law. See *inter alia Krnjelac* Trial Judgement, para. 475; *Krstic*, IT-98-33T, Judgement, 2 August 2001, para. 529, *Judicial Supplement No. 27*, *Kunarac* Trial Judgement, para. 542.

²⁶ Commentary to Article 31 of Geneva Convention IV, page 220.

²⁷ Para. 519 of the Judgement

²⁸ Para. 521 of the Judgement.

The Prosecutor v. Vidoje Blagojevic & Dragan Jokic - Case No. IT-02-60-T

Trial Chamber I, section A (Judges Liu [Presiding], Vassylenko and Argibay)

“DECISION ON VIDOJE BLAGOJEVIC’S EXPEDITED MOTION TO COMPEL THE PROSECUTION TO DISCLOSE ITS NOTES FROM PLEA DISCUSSIONS WITH THE ACCUSED NIKOLIC & REQUEST FOR AN EXPEDITED OPEN SESSION HEARING”

13 JUNE 2003

Questioning of an accused - Purpose of Rules 43 and 63(B) - Rules 43 and 63(B) and plea discussions - Nature of the notes taken in preparation of a plea agreement

Purpose of Rules 43 and 63(B): the protection set forth in Rules 43 and 63(B) are provided for the suspects and the accused being questioned, not third persons. They were adopted to have an authentic record of the questioning of a suspect or accused in order to guarantee that the right of the suspect or accused was respected during such questioning as well as to provide a reliable record of the questioning as everything that the suspect says during the questioning can be used against him in evidence.

Rules 43 and 63(B) and plea discussions: plea discussions serve to explore the possibility of a future plea agreement and consequently, for the purposes of the discussions, nothing an accused says during the discussions will be used against him at trial should the plea negotiations fail. Rules 43 and 63(B) do not apply to plea discussions, as the protection set forth in the said Rules are not applicable.

Nature of the notes taken in preparation of a plea agreement: notes taken by the Prosecution in preparation of a plea agreement are privileged as they are internal documents made by the Prosecution in connection with the preparation of the case. They are a work product protected under Rule 70(A).

Procedural Background

- On 7 May 2003, Momir Nikolic pleaded guilty to the charge of persecution as a crime against humanity. The Trial Chamber accepted the plea and entered a conviction under that charge. That same day, the “Joint Motion for Consideration of Amended Plea Agreement between Momir Nikolic and the Office of the Prosecutor” was filed along with its annex entitled “Statement of Facts and Acceptance of Responsibility”. The Prosecution expressed its intention to call Momir Nikolic as a witness.
- By letter dated 7 May 2003, Blagojevic’s Defence requested that the Prosecution disclose all materials related to discussions between Momir Nikolic, his Defence and the Prosecution regarding the plea agreement. By letter dated 8 May 2003, the Prosecution responded that it had no audio or video recording of those discussions and that the handwritten notes (“Notes”) it has are a work product protected under Rule 70(A)¹ of the Rules of Procedure and Evidence (“Rules”). It nevertheless stated that it would review the Notes in order to comply with its obligation under Rule 68 to disclose to the Defence any exculpatory evidence.
- On 19 May 2003, Blagojevic’s Defence (the “Defence”) filed its Motion to request that the said materials be disclosed to it and that a public hearing be held “in order to fully address the issues therein, to establish a requisite and transparent record, and to determine, in addition to the remedies sought herein, whether any sanction are warranted pursuant to Rule 68 *bis*”.²

- On 30 May 2003 and on 6 June 2003, respectively, the Prosecution confidentially filed its Response and the Defence confidentially filed its Reply.³

The Decision

The Trial Chamber denied the Motion.

The Reasoning

The purpose of Rules 43 and 63(B)

Rule 63(B) states that the questioning of an accused shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43 which aims at protecting suspects or accused by *inter alia* providing them with a copy of the recordings. The Trial Chamber noted that “the protection set forth in Rules 43 and 63(B) are provided for the suspects and the accused being questioned, not third persons”. It therefore found that should the plea discussions at stake be considered as “questioning” within the scope of those Rules, Vidoje Blagojevic would still not be entitled to complain about any non-compliance with them as he is not an interested party. The Trial Chamber furthermore considered that “Rules 43 and 63(B) were adopted to have an authentic record of the questioning of a suspect or accused in order to guarantee that the right of the suspect or accused were respected during such questioning as well as to provide a reliable record of the questioning as everything that the suspect says during the questioning can be used against him in evidence”.

¹ Rule 70 (Matters not Subject to Disclosure)

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

² Vidoje Blagojevic’s Expedited Motion to Compel the Prosecution to Disclose its Notes from its Discussions with the Nikolic Defence Team and During the Negotiating & Debriefing Sessions with Accused Nikolic Resulting in the Agreed Facts in Support of the Guilty Plea Arrangement of Accused Nikolic & Request for an Expedited Open Session Hearing, filed partly confidentially on 19 May 2003 (“Motion”).

³ “Prosecution’s Response to Vidoje Blagojevic’s Expedited Motion to Compel the Prosecution to Disclose [sic] its Notes From its Discussions With the Nikolic Defence Team”, filed confidentially by the Office of the Prosecutor (“Prosecution”) on 30 May 2003 (“Response”). “Vidoje Blagojevic’s Leave to Reply & Reply to Prosecution’s Response to Vidoje Blagojevic’s Expedited Motion to Compel the Prosecution to Disclose [sic] its Notes from its Discussions with the Nikolic Defence Team”, filed confidentially on 6 June 2003 (“Reply”).



Rules 43 and 63(B) and plea discussions

The Trial Chamber found that "plea discussions serve to explore the possibility of a future plea agreement and consequently, for the purposes of the discussions, nothing an accused says during the discussions will be used against him at trial should the plea negotiations fail". It held that Rules 43 and 63(B) do not apply to plea discussions, as the protection set forth in the said Rules is not applicable". The Trial Chamber noted that Momir Nikolic had waived his right to have the meetings related to the possibility of a plea agreement recorded and found that not recording the plea discussions was not in violation of the Rules of the Tribunal.

The nature of the notes taken in preparation of a plea agreement

The Trial Chamber considered the Prosecution notes taken in preparation of a plea agreement with Momir Nikolic "privileged, as they are internal documents made by the Prosecution in connection with the preparation of the case", and therefore as a work product protected under Rule 70(A). It further found that "it is in the public interest that plea negotiations be protected from disclosure to any third parties, as the confidentiality of any negotiations is an essential element to both their occurrence and their success".

The Trial Chamber turned to the obligation of the Prosecution under Rule 68 to disclose exculpatory evidence. It found that the Prosecution had expressly undertaken to disclose any such materials and agreed to review the Notes in order to provide the Blagojevic Defence with any information falling under that Rule. It found no indication of a failure by the Prosecution to comply with its disclosure obligations and therefore denied the Motion.

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AVAILABLE DOCUMENTS

- JUNE 2003 -

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02/06/03	MARTIC	IT-95-11-PT	DECISION ON PRELIMINARY MOTION AGAINST THE AMENDED INDICTMENT
03/06/03	MILUTINOVIC <i>ET AL.</i>	IT-99-37-PT	DECISION ON PROVISIONAL RELEASE
05/06/03	MILOSEVIC	IT-02-54-T	DECISION IN PART ON PROSECUTION MOTION FOR ORDERS PURSUANT TO RULE 54 <i>BIS</i> AGAINST SERBIA AND MONTENEGRO
05/06/03	NIKOLIC	IT-94-2-AR73	DECISION ON INTERLOCUTORY APPEAL CONCERNING LEGALITY OF ARREST
10/06/03	SESELJ	IT-03-67-PT	DECISION ON MOTION FOR DISQUALIFICATION
12/06/03	MILOSEVIC	IT-02-54-T	SECOND DECISION ON PROSECUTION MOTION FOR ORDERS PURSUANT TO RULE 54 <i>BIS</i> AGAINST SERBIA AND MONTENEGRO
13/06/03	BLAGOJEVIC <i>ET AL.</i>	IT-02-60-PT	DECISION ON VIDOJE BLAGOJEVIC'S EXPEDITED MOTION TO COMPEL THE PROSECUTION TO DISCLOSURE OF ITS NOTES FROM PLEA DISCUSSIONS WITH THE ACCUSED NIKOLIC & REQUEST FOR AN EXPEDITED OPEN SESSION HEARING
17/06/03	HADZIHASANOVIC <i>ET AL.</i>	IT-95-14-A	DECISION ON URGENT MOTION FOR <i>EX PARTE</i> ORAL HEARING ON ALLOCATION OF RESOURCES TO THE DEFENCE AND CONSEQUENCES THEREOF FOR THE RIGHTS OF THE ACCUSED TO A FAIR TRIAL
17/06/03	BLAGOJEVIC <i>ET AL.</i>	IT-02-60-PT	DECISION ON PROSECUTION'S MOTION FOR LEAVE TO FILE THIRD AMENDED INDICTMENT
18/06/03	HADZIHASANOVIC <i>ET AL.</i>	IT-95-14-A	DECISION ON MOTION FOR LEAVE TO AMEND THE AMENDED INDICTMENT
18/06/03	MILOSEVIC	IT-02-54-T	THIRD DECISION ON PROSECUTION MOTION FOR ORDERS PURSUANT TO RULE 54 <i>BIS</i> AGAINST SERBIA AND MONTENEGRO
19/06/03	MRKSIC <i>ET AL.</i>	IT-95-13/1	DECISION ON THE FORM OF THE INDICTMENT
25/06/03	MRKSIC <i>ET AL.</i>	IT-95-13/1	DECISION DISMISSING MIROSLAV RADIC'S DEFENCE PRELIMINARY MOTION
30/06/03	NIKOLIC	IT-94-2-PT	DECISION ON PROSECUTION'S MOTION FOR LEAVE TO AMEND THE SECOND AMENDED INDICTMENT
30/06/03	BLAGOJEVIC <i>ET AL.</i>	IT-02-60-PT	DECISION ON PROSECUTION'S MOTION TO ADMIT EVIDENCE UNDER RULE 92 <i>BIS</i>
30/06/03	BRDJANIN	IT-99-36-T	DECISION ON PROSECUTION'S SECOND REQUEST FOR A SUBPOENA OF RANDAL
30/06/03	MILOSEVIC	IT-02-54-T	DECISION ON PROSECUTION MOTION FOR THE ADMISSION OF TRANSCRIPTS <i>IN LIEU</i> OF <i>VIVA VOCE</i> TESTIMONY PURSUANT TO 92 <i>BIS</i> (D)