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PLENARY SESSION

IT/216

“AMENDMENT TO THE RULES OF PROCEDURE AND EVIDENCE”

24 JUNE 2003

Pursuant to Rule 6 (B), **Rule 62 (ii)** of the Rules of Procedure and Evidence (the English and French versions) is amended.

The substantive amendment has been highlighted in the text of this document.

Pursuant to Sub-rule 6 (D), this amendment shall enter into force seven days after the date of issue of this official document, i.e., on **1 July 2003**.

The full texts of the amended Rule is set out in the Annex to this document.

Richard May
Judge
Chair of the Rules Committee

Dated this twenty-fourth day of June 2003
At The Hague
The Netherlands

ANNEX

Rule 62 Initial Appearance of Accused

Upon transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber. The accused shall be brought before that Trial Chamber or a permanent Judge thereof without delay, and shall be formally charged. The Trial Chamber or the Judge shall:

- (i) satisfy itself, himself or herself that the right of the accused to counsel is respected;
- (ii) read or have the indictment read to the accused in a language the accused speaks and understands, and satisfy itself, himself or herself that the accused understands the indictment;
- (iii) inform the accused that, within thirty days of the initial appearance, he or she will be called upon to enter a plea of guilty or not guilty on each count but that, should the accused so request, he or she may immediately enter a plea of guilty or not guilty on one or more count;
- (iv) if the accused fails to enter a plea at the initial or any further appearance, enter a plea of not guilty on the accused's behalf;
- (v) in case of a plea of not guilty, instruct the Registrar to set a date for trial;
- (vi) in case of a plea of guilty:
 - (a) if before the Trial Chamber, act in accordance with Rule 62 *bis*, or
 - (b) if before a Judge, refer the plea to the Trial Chamber so that it may act in accordance with Rule 62 *bis*;
- (vii) instruct the Registrar to set such other dates as appropriate.

IT/218

“AMENDMENTS TO THE RULES OF PROCEDURE AND EVIDENCE”

21 JULY 2003

By decision of the Judges at the Twenty-eighth plenary session of the International Tribunal held on 17 July 2003, the following Rules of the Rules of Procedure and Evidence (“Rules”) are amended:

Rule 62
Rule 65 *bis* (A)
Rule 65 *ter* (A)
Rule 73 *bis*

Pursuant to Sub-rule 6 (D), this amendment shall enter into force seven days after the date of issue of this official document, i.e., on **28 July 2003**. Document IT/32/Rev. 28, incorporating both these amendments and the amendment contained in document IT/216, will be issued in both languages as soon as possible.

The full texts of the amended Rules are set out in the Annex to this document, in which the substantive amendments have been highlighted.

Richard May
Judge
Chair of the Rules Committee

Dated this twenty-first day of July 2003
At The Hague
The Netherlands

ANNEX

Rule 62 Initial Appearance of Accused

Upon transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber. The accused shall be brought before that Trial Chamber or a ~~permanent~~ Judge thereof without delay, and shall be formally charged. The Trial Chamber or the Judge shall:

- (i) satisfy itself, himself or herself that the right of the accused to counsel is respected;
- (ii) read or have the indictment read to the accused in a language the accused understands, and satisfy itself, himself or herself that the accused understands the indictment;
- (iii) inform the accused that, within thirty days of the initial appearance, he or she will be called upon to enter a plea of guilty or not guilty on each count but that, should the accused so request, he or she may immediately enter a plea of guilty or not guilty on one or more count;
- (iv) if the accused fails to enter a plea at the initial or any further appearance, enter a plea of not guilty on the accused's behalf;
- (v) in case of a plea of not guilty, instruct the Registrar to set a date for trial;
- (vi) in case of a plea of guilty:
 - (a) if before the Trial Chamber, act in accordance with Rule 62 *bis*, or



- (b) if before a Judge, refer the plea to the Trial Chamber so that it may act in accordance with Rule 62 *bis*;
- (vii) instruct the Registrar to set such other dates as appropriate.

Rule 65 *bis* Status Conferences

- (A) A Trial Chamber or a ~~permanent~~ Trial Chamber Judge shall convene a status conference within one hundred and twenty days of the initial appearance of the accused and thereafter within one hundred and twenty days after the last status conference:
- (i) to organize exchanges between the parties so as to ensure expeditious preparation for trial;
 - (ii) to review the status of his or her case and to allow the accused the opportunity to raise issues in relation thereto, including the mental and physical condition of the accused.

Paragraphs (B) and (C) remain unchanged.

Rule 65 *ter* Pre-Trial Judge

The Presiding Judge of the Trial Chamber shall, no later than seven days after the initial appearance of the accused, designate from among its ~~permanent~~ members a Judge responsible for the pre-trial proceedings (hereinafter "pre-trial Judge").

Paragraphs (B) to (N) remain unchanged.

Rule 73 *bis* Pre-Trial Conference

- (A) Prior to the commencement of the trial, the Trial Chamber shall hold a Pre-Trial Conference.
- (B) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 *ter* (L)(i), the Trial Chamber may call upon the Prosecutor to shorten the estimated length of the examination-in-chief for some witnesses.
- (C) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 *ter* (L)(i), the Trial Chamber, after having heard the Prosecutor, shall ~~determine set the number of witnesses the Prosecutor may call.~~
- (i) **the number of witnesses the Prosecutor may call; and**
 - (ii) **the time available to the Prosecutor for presenting evidence.**
- (D) **After having heard the Prosecutor, the Trial Chamber may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged.**
- (E) **After commencement of the trial, the Prosecutor may, if he or she considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called. the number of crime sites or incidents in respect of which evidence may be presented or the number of witnesses that are to be called or for additional time to present evidence and the Trial Chamber may grant the Prosecutor's request if satisfied that this is in the interests of justice.**
- (F) ~~After having heard the Prosecutor, the Trial Chamber shall~~

~~determine the time available to the Prosecutor for presenting evidence.~~

- (G) ~~During a trial, the Trial Chamber may grant the Prosecutor's request for additional time to present evidence if this is in the interests of justice.~~

The compiled version of
the Rules of Procedure and Evidence
(IT/32/REV.28, 28 July 2003)
is available on the website of the Tribunal
(www.un.org/icty) under "Basic Documents".

PRESIDENT

The Prosecutor v. Veselin Slijivancanin - Case No. IT-95-13/1-PT

Judge Theodor Meron, President

"DECISION ON ASSIGNMENT OF COUNSEL"

20 AUGUST 2003

The power of the President to review Registrar's decisions on assignment of counsel - The standard of review of Registrar's Decisions on assignment of counsel based on the "interests of justice" exception - The procedure to follow as regards assignment of counsel - The discretion of the Registrar in defining the bounds of the "interests of justice" exception.

The power of the President to review Registrar's decisions on assignment of counsel: the structure of the Directive on Assignment of Counsel and the wording of Article 13 suggest that the right of review established by Article 13 concerns only Registrar's decisions as to whether a suspect or an accused meets the criteria for indigence, not Registrar's decisions concerning the qualifications of a particular counsel. Because unless they expressly provide to the contrary, the Rules should normally be read as affording some avenue for judicial review of administrative decisions (...) an appeal of a Registrar's Decision on assignment of counsel may properly be directed to the President.

The standard of review of Registrar's Decisions on assignment of counsel based on the "interests of justice" exception: a Registrar's decision to permit or deny assignment of counsel based on the "interests of justice" exception involves questions of both fact and law: (1) the Registrar must first make certain factual determinations, either about the circumstances of the defendant's case or, as in this case, about the counsel in question's past conduct, or about both; (2) given the facts as he finds them, he must then determine what the "interests of justice" require. The first part of the Registrar's task is "an administrative fact-finding procedure" which must be reviewed according to the "standards for judicial review of administrative decisions" as set forth in the Appeals Chamber's Kvočka Decision.

The procedure to follow as regards assignment of counsel: the Registrar cannot be required to conduct a mini-trial each time a defendant seeks assignment of a particular lawyer. He need not hold a hearing of any kind but must provide the accused with at least a summary of the evidence upon which he intends to rely, and must take into account whatever materials the accused (in consultation with his preferred attorney) wishes to submit within some very short period to be determined by the Registrar so as to avoid undue delay. Such obligation of the Registrar does not in any way relieve the accused of the burden of establishing that the interests of justice demand the assignment of the preferred attorney. Nor does it restrict the discretion of the Registrar in defining the bounds of the "interests of justice" exception. The accused and thus his preferred attorney need not be given an opportunity to respond to all materials collected by the Registrar, only to those upon which the Registrar intends actually to rely in making his decision.

The discretion of the Registrar in defining the bounds of the "interests of justice" exception: while the Registrar possesses the authority and the responsibility to define the "interests of justice" exception in the first instance, he must apply the definition consistently across cases. The Registrar has the authority to change the criteria he uses in giving meaning to the "interests of justice" exception but, in doing so, he must observe regularities intended to ensure fairness to affected parties, to improve the accuracy of the Registrar's decisions, and to establish a basis for effective judicial review of the Registrar's decisions.

Procedural Background

- On 1 July 2003, Veselin Slijivancanin was transferred to the Detention Unit of the Tribunal. His initial appearance was scheduled to take place on 3 July 2003 but was postponed because the lawyers of his own choosing, Mr. Petronijevic and Mr. Bulatović, had not been approved by the Registrar.¹

- On 9 July 2003, the Registrar informed Mr. Slijivancanin by a letter decision ("Registrar's Decision") that the lawyers of his choice would not be assigned to him as they both failed to meet the requirement of Rule 44(A) of the Rules of Procedure and Evidence ("Rules") that counsel speak at least one of the Tribunal's working languages (English and French).² The Registrar noted that even counsel who do not fulfil the language

requirement may be appointed pursuant to Rule 44(B)³ "on an exceptional basis, where the interests of justice so demand". He declined to appoint Mr. Petronijevic under the Rule 44(B) exception because his "history raises questions about his suitability for assignment as counsel, at the Tribunal's expense".⁴ The Registrar stated that the right of the accused to choose their own counsel was limited⁵ and that neither Mr. Bulatovic nor Mr. Petronijevic had "come forward with any other reasons why the interests of justice require[d] their assignment".

- On 10 July 2003, Mr. Slijivancanin made his initial appearance, assisted by temporary counsel Stephen Solley.⁶

¹ *Slijivancanin*, IT-95-13/1-PT, Transcripts ("Tr") 3 July 2003, pages 95, 99-100, 104-106 and 108-109. The Registry received by fax a power of attorney for Mr. Petronijevic and Mr. Bulatovic signed by Mr. Slijivancanin on 24 June 2003.

² Rule 44(A) states that "Counsel engaged by a suspect or an accused shall file a power of attorney with the Registrar at the earliest opportunity. Subject to any determination by a Chamber pursuant to Rule 46 or 77, a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that the counsel is admitted to the practice of law in a State, or is a University professor of law, speaks one of the two working languages of the Tribunal, and is a member of an association of counsel practising at the Tribunal recognised by the Registrar".

³ Rule 44(B) states that "At the request of the suspect or accused and where the interests of justice so demand, the Registrar may admit a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused. The Registrar may impose such conditions as deemed appropriate. A suspect or accused may appeal a decision of the Registrar to the President".

⁴ The Registrar stated that Mr. Petronijevic had acquired negative international notoriety in matters of human rights and justice for his handling of the criminal case against ethnic Albanians while a district judge in Serbia. The Registrar considered that the past conduct of Mr. Petronijevic could endanger the reputation of the ICTY and that therefore the "interests of justice strongly dictate against his appointment".

⁵ See *infra* "The right to counsel of one's own choosing".

⁶ Mr. Slijivancanin pleaded "not guilty" to all counts.

• On 14 July 2003, Mr. Slijivancanin appealed the Registrar's Decision to the President.⁷ He claimed that the Registrar's Decision violated his right under Article 21(4)⁸ of the Statute to have counsel of his own choosing. He stated that he was confident that his preferred lawyers would work successfully on his case and that he had asked them to find an attorney from an English speaking country to work on his case when the trial got under way. Should the appointment of the two lawyers of his own choice not be possible, he requested that at least one of them be allowed to assist him in the preparation of his defence.

• On 8 August 2003, the Registrar filed a "Submission of the Registrar Pursuant to Rule 33(B)"⁹ which the President of the Tribunal Theodor Meron ("President") interpreted as a response to Mr. Slijivancanin's appeal. In his submission, the Registrar expressed his view that the language requirement is consistent with the rights of the accused (Article 21 of the Statute) and provided information on the content of the "interests of justice exception". The Registrar gave his reason for refusing the appointment of Mr. Petronijevic and Mr. Bulatovic: "neither counsel submitted any information with respect to their relationship to the accused that would give the Registry grounds to believe that there was a special relationship between them and the accused".

The Decision

The President quashed the Registrar's Decision and remanded the matter to him for reconsideration in light of the present Decision.

The Reasoning

The review of Registrar's decisions on assignment of counsel

Rule 44 establishes the standards for qualification of any Defence counsel and states in its paragraph (B) that "[a] suspect or accused may appeal a decision of the Registrar to the President". Article 13 of the Directive on Assignment of Defence Counsel ("Directive") provides that the President is competent for a review of Registrar's decisions on assignment of counsel with respect to "suspects" and that the Trial Chamber is competent to carry out such reviews with respect to "accused".¹⁰ Rule 45, which governs the assignment of counsel paid by the Tribunal, does not provide directly for a review of Registrar's decisions, and solely states in its paragraph (D) that if a request is refused a further request may be made by a suspect or an accused to the Registrar.

The Registrar's Decision suggested that the review should be undertaken by the Trial Chamber hearing Mr. Slijivancanin's case. The President declared that while the question was not "free from doubt", he believed the appeal was properly directed to him.

⁷ See *infra* "The review of Registrar's Decisions on assignment of counsel".

⁸ Article 21(4) of the Statute ("Rights of the Accused") provides in relevant part that: "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (...) (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (...) (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it: (...)".

⁹ Rule 33 (B) reads as follows: "The Registrar, in the execution of his or her functions, may make oral and written representations to the President or Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary".

¹⁰ Article 13 (Remedy against the Registrar's decision) reads as follows: "(A) The suspect whose request for assignment of counsel has been denied may, within fifteen days of the date of notification to him, seek the President's review of the decision of the Registrar. The President may either confirm the Registrar's decision or decide that a counsel should be assigned. (B) The accused whose request for assignment of counsel has been denied, may, within two weeks of the date of notification to him, make a motion to the Chamber before which he is due to appear for immediate review of the Registrar's decision. The Chamber may (i) confirm the Registrar's decision; or (ii) rule that the suspect or accused has means to partially remunerate counsel, in which case it shall refer the matter again to the Registrar for determination of which parts shall be borne by the Tribunal; or (iii) rule that a counsel should be assigned".

He considered that "the structure of the Directive [on Assignment of Counsel] and the wording of Article 13 suggest that the right of review established by Article 13 concerns only Registrar's decisions as to whether a suspect or an accused meets the criteria for indigence, not Registrar's decisions concerning the qualifications of a particular counsel".¹¹

The President noted that it was not in dispute that Mr. Slijivancanin lacked the means to remunerate counsel, that his preferred attorneys were not on the list, and that the Registrar's Decision "appear[ed] to have been taken"¹² under Rule 45(C), which provides that "[i]n particular circumstances, upon the request of a person lacking the means to remunerate counsel, the Registrar may assign counsel whose name does not appear on the list but who otherwise fulfils the requirements of Rule 44". He recalled that Rule 45 does not provide for a right of appeal from such Registrar's decisions and declared: "[b]ecause unless they expressly provide to the contrary, the Rules should normally be read as affording some avenue for judicial review of administrative decisions, Rule 45(C)'s incorporation of the standards of Rule 44 may be read as incorporating the provision for Presidential review of decisions under Rule 44(B) concerning the 'interests of justice' exception to the language competence requirement. For that reason, Mr. Slijivancanin's appeal may properly be directed to the President".¹³

The right to counsel of one's own choosing

The President rejected Mr. Slijivancanin's claim that the refusal of the Registrar to assign his preferred lawyers violated his right to counsel of his own choice under Article 21 of the Statute. This matter has already been addressed by the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") and by Trial Chambers of the International Criminal Tribunal for the former Yugoslavia ("ICTY"): while the wishes of an accused when selecting which lawyer will represent him may be relevant, the right of an indigent accused to choose his counsel is a limited right; the Registrar is not necessarily bound by the wishes of an indigent accused, he has wide discretion which he exercises in the interests of justice.¹⁴

The President further found that a challenge to the reasonableness of the language competence requirement itself¹⁵ must fail as "every court requires attorneys practising before it, and especially those paid by it, to be able to function in the court's working language".¹⁶ He held that "[t]he reasonableness of that requirement is made all the plainer by the availability of the 'interest of justice' exception to it".¹⁷

The standard of review of Registrar's decisions

According to the President, a Registrar's decision to permit or deny assignment of counsel based on the "interest of justice" exception involves questions of both fact and law: (1) the Registrar must first make certain factual determinations, either about the circumstances of the defendant's case or, as in this case, about the counsel in question's past conduct, or about both; (2) given the facts as he finds them, he must then determine what the "interests of justice" require.¹⁸ By analogy to the procedure whereby the Registrar determines whether legal aid can be granted, the President found that the first part of the Registrar's task was "an administrative fact-finding procedure" and held that the Registrar's findings "need only be established as more probable than not".¹⁹

¹¹ Para. 16.

¹² Para. 17.

¹³ Para. 22.

¹⁴ See *inter alia* *Kambanda*, ICTR-97-23-A, Appeals Chamber Judgement, 19 October 2000, para. 33; *Akayesu*, ICTR-96-4-A, Appeals Chamber Judgement, 1 June 2001, paras. 61-62; *Blagojevic & Jokic*, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojevic's Motion to Instruct the Registrar to Appoint New Lead and Co-counsel, 3 July 2003, paras. 74-75, summarised in the present issue of the *Judicial Supplement* page 18; *Knezevic et al.*, IT-95-4-PT, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002, *Judicial Supplement* No. 36.

¹⁵ Mr. Slijivancanin did not challenge the reasonableness of the language competence requirement.

¹⁶ Para. 20.

¹⁷ *Ibid.*

¹⁸ Para. 22.

¹⁹ *Ibid.* See *Kvočka et al.*, IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic ("*Kvočka* Decision"), 7 February 2003, *Judicial Supplement* No. 40:



In the *Kvočka* Decision, the Appeals Chamber set “standards for judicial review of administrative decisions” based on “general principles of law derived from the principal legal systems”:

“A judicial review of an administrative decision made by the Registrar [in relation to legal aid] is concerned initially with the propriety of the procedure by which Registrar reached the particular decision and the manner in which he reached it. The administrative decision will be quashed if the Registrar has failed to comply with the legal requirements of the Directive. This issue may in the particular case involve a consideration of the proper interpretation of the Directive. The administrative decision will also be quashed if the Registrar has failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or if he has taken into account irrelevant material or failed to take into account relevant material, or if he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the “unreasonableness” test). These issues may in the particular case involve, at least in part, a consideration of the sufficiency of the material before the Registrar, but (in the absence of established unreasonableness) there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled”.²⁰

In the present case, the Registrar failed to afford Mr. Sljivancanin an opportunity to respond to the evidence in support of the dismissal of his request to have his preferred attorney assigned. The President found that this amounted to “a failure to act with procedural fairness” and, for this reason, held that “the Registrar’s decision must be quashed and the matter remanded to him for reconsideration”.²¹

The procedure to follow as regards assignment of counsel

The President stated that the Registrar “cannot be required to conduct a mini-trial each time a defendant seeks assignment of a particular lawyer” and that he “need not hold a hearing of any kind”, but that he “must provide the accused with at least a summary of the evidence upon which [he] intends to rely, and [...] must take into account whatever materials the accused (in consultation with his preferred attorney) wishes to submit within some very short period to be determined by the Registrar so as to avoid undue delay”.²² The President made it clear that such obligation of the Registrar “does not in any way relieve the accused of the burden of establishing that the interests of justice demand the assignment of the preferred attorney” and does not “restrict the discretion of the Registrar in defining the bounds of the ‘interests of justice’ exception”.²³ He further emphasised that “the accused (and thus his preferred attorney) need not be given an opportunity to respond to all materials collected by the Registrar, only to those upon which the Registrar intends actually to rely in making his decision”.²⁴

The discretion of the Registrar in defining the bounds of the “interests of justice” exception

The President held that “[w]hile the Registrar possesses the authority and the responsibility to define the ‘interests of justice’ exception in the first instance, he must apply the definition consistently across cases”.²⁵ With respect to the bounds

the burden of proof of the Registrar “is not satisfaction beyond reasonable doubt, as in a criminal trial, but merely satisfaction that, more probably than not, what is asserted is true, or (as it is sometimes described) satisfaction on the balance of probabilities” (para. 12).

²⁰ *Kvočka* Decision, para. 13.

²¹ Para. 23, in keeping with the standards set forth in the *Kvočka* Decision.

²² Para. 23.

²³ *Ibid.* In paragraph 29, the President further held that “[t]he party seeking assignment of counsel bears the burden of convincing the Registrar that his preferred attorney meets the relevant criteria” and that “[t]he Registrar bears the responsibility to make clear the basis for his decisions”.

²⁴ Footnote 17 of the Decision.

²⁵ Para. 24.

themselves, the President found from two recent cases that the Registrar had indicated that, in the absence of other considerations, the interests of justice exception would be satisfied if the accused were to demonstrate the following criteria:

- “i) his preferred attorney had represented him previously before a national court in relation to the charges now being brought before the ICTY or related charges;²⁶
- ii) the accused (and his preferred attorney) have identified an individual willing to serve as co-counsel who speaks one of the working languages as well as the language of the accused well;
- iii) the proposed co-counsel has sufficient experience as a criminal defence attorney that he could take over the case if the lead counsel were to withdraw for any reason; and
- iv) all expenses for interpretation and translation beyond those usually provided by the Tribunal would be borne by the accused or the lead counsel^{27”}.²⁸

The President held that the Registrar “has the authority to change the criteria he uses in giving meaning to the ‘interests of justice’ exception” but that, in doing so, he must observe “regularities [...] intended to ensure fairness to affected parties, to improve the accuracy of the Registrar’s decisions, and to establish a basis for effective judicial review of the Registrar’s decisions”.²⁹

Those regularities are:

“First, the Registrar must explain that he is changing the meaning of the ‘interests of justice’ exception and why he is doing so. Second, he should do so in a way that does not leave a particular applicant facing new standards of which he could not reasonably be aware. He may seek an amendment of the Directive. He may make a general statement to the Association of Defence Counsel and ask them to publicize it, *e.g.*, by posting it on the Association’s website. He may also announce a new interpretation in the course of ruling on a particular request for assignment of counsel, so long as he makes clear to the affected parties the standards upon which the request for assignment will be judged”.³⁰

The President found nothing in the filings of the Registrar suggesting that he was applying a novel interpretation of those criteria and therefore reviewed the record upon which the Registrar made his decision using those criteria. He found that the materials concerning Mr. Petronijevic did not show whether the four above-mentioned criteria were satisfied in the present case. However he found that the evidence concerning Mr. Bulatovic appeared to support the propriety of his appointment as Defence counsel. The President held that the Registrar’s argument that both lawyers did not meet the first criterion would be a sufficient basis for refusing to invoke the “interest of justice”. He found, however, that the refusal to assign Mr. Petronijevic was based on another ground (his conduct when a district Judge in Serbia).³¹

The President remanded the matter to the Registrar and held that he should give Mr. Sljivancanin a brief opportunity to establish that Mr. Petronijevic and Mr. Bulatovic satisfy the four criteria. He further stated that if they fail to do so the Registrar should refuse to assign them but that if they both satisfy those criteria or if Mr. Bulatovic alone does, then the Registrar should assign Mr. Bulatovic as lead counsel. ■

²⁶ In the view of the President, this includes representation of the accused in the extradition proceedings leading to the accused’s transfer to the Tribunal (footnote 18 of the Decision).

²⁷ *Stanisic*, IT-03-69-PT, Decision of the Registrar, 18 July 2003, page 2; Letter from the Registrar to Mr. Zeljko Olujić, 25 June 2003. The letter to Mr. Olujić concerns *Ivica Rajić*, IT-95-12-PT. The letter to Mr. Olujić is not a formal decision but a proposal setting out the criteria upon which the Registrar “may favourably consider” the request for assignment (footnote adapted from footnote 19 of the Decision).

²⁸ Para. 24.

²⁹ Para. 25.

³⁰ *Ibid.*

³¹ See footnote 4 and text accompanying note.

APPEALS CHAMBER

The Prosecutor v. Mile Mrksic - Case No. IT-95-13/1-AR73

Judges Meron [Presiding], Pocar, Shahabuddeen, Güney and Weinberg de Roca

“DECISION ON DEFENCE INTERLOCUTORY APPEAL ON COMMUNICATION WITH POTENTIAL WITNESSES OF THE OPPOSITE PARTY”

30 JULY 2003

The power of the Prosecution to interview a potential Defence witness - The limits to the power of the Prosecution to interview a potential Defence witness.

The power of the Prosecution to interview a potential Defence witness: following Article 18(2) of the Statute which vests the Prosecution with “the power to question suspects, victims and witnesses” and to eventually “seek the assistance of the State authorities concerned” and following Rule 39 of the Rules which provides that in conducting an investigation the Prosecution may “summon and question suspects, victims and witnesses”, it is clear that the Prosecution has the power to request interviews with potential defence witnesses and may seek assistance from State authorities to facilitate this contact.

The limits to the power of the Prosecution to interview a potential Defence witness: when a person has declined to be interviewed, the Prosecution is entitled to take reasonable steps to persuade the person to reconsider his decision. However, the mere fact that the person has agreed to testify for the Defence does not preclude the Prosecution from interviewing him provided of course that there is no interference with the course of justice. Particular caution is needed where the Prosecution is seeking to interview a witness who has declined to be interviewed by the Prosecution, since in such a case the witness may feel coerced or intimidated.

Procedural Background

- On 7 May 2003, Trial Chamber II dismissed a Defence motion seeking precise rules for communication between the parties and prospective witnesses of the opposing party (“Impugned Decision”).¹
- On 29 May 2003, the Trial Chamber granted the Defence certification to appeal the Impugned Decision pursuant to Rule 73(B) of the Rules.²
- On 4 June 2003, the Mrksic Defence filed the “Defence Brief on an Interlocutory Appeal on Trial Chamber’s Decision on Defence Motion Requesting the Determination of Rules for Communicating with Potential Witnesses of the Opposite Party” (“Appellant’s Brief”). The Prosecution responded on 16 June 2003 (“Respondent’s Brief”).³

The Decision

The Appeals Chamber dismissed the Appeal.

The Reasoning

The Impugned Decision

In the Impugned Decision, the Trial Chamber stated that at the pre-trial stage the potential witnesses are not attached to either party and that the fact that a potential witness may have given a statement to a party does not preclude the other party from seeking an interview. It held that if the witness refuses to grant an interview, either party may apply to the Chamber for appropriate relief pursuant to Rule 54 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”).⁴

The power of the Prosecution to interview a potential Defence witness

The Appeals Chamber held that following Article 18(2) of the Statute which vests the Prosecution with “the power to question suspects, victims and witnesses” and to eventually “seek the assistance of the State authorities concerned” and following Rule 39 of the Rules which provides that in conducting an investigation the Prosecution may “summon and question suspects, victims and witnesses”, “it is clear that the Prosecution has the power to request interviews with potential defence witnesses and may seek assistance from State authorities to facilitate this contact”.⁵

It upheld the decision of the Trial Chamber not to establish the requested rules governing communication with the witnesses of the opposing party but emphasised that there are limitations to the freedom of the Prosecution to contact a potential Defence witness.

The limits to the power of the Prosecution to interview a potential Defence witness

The Appeals Chamber held that “[w]itnesses to a crime are the property of neither the Prosecution nor the Defence; both sides have an equal right to interview them” and recalled that “[w]here, however, a person for any reason declines to be interviewed, the Prosecution does not have the power to compel the person to attend an interview or to respond to questions posed by the Prosecution”.⁶ It upheld the finding of the Trial Chamber in the Impugned Decision that if the Prosecution or the Defence wishes to compel an unwilling person to submit to a pre-trial interview, it must seek the assistance of the Chamber pursuant to Rule 54, as only subpoenas and other orders issued by the Tribunal have a legally binding effect that is enforceable by the application of criminal sanctions. It found that “[w]hen a person has declined to be interviewed, the Prosecution is entitled to take reasonable steps to persuade the person to reconsider his decision”, that “the mere fact that the person has agreed to testify for the Defence does not preclude the Prosecution from interviewing him provided of course that there is no interference with the course of justice”, and that [p]articular caution is needed where the Prosecution is seeking to interview a witness who has declined to be interviewed by the Prosecution, since in such a case the witness may feel coerced or intimidated”.⁷

¹ *Mrksic*, IT-95-13/1-PT, Decision on Defence Motion Requesting the Determination of Rules for Communicating with Potential Witnesses of the Opposing Party, 7 May 2003.

² *Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

³ *Mrksic*, IT-95-13/1-AR 73, Prosecution’s Response to the “Defence Brief on an Interlocutory Appeal on Trial Chamber’s Decision on Defence Motion Requesting the Determination of Rules for Communicating with Potential Witnesses of the Opposite Party”, 16 June 2003.

⁴ 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.

⁵ Para. 14.

⁶ Para. 15.

⁷ Para. 16.

The Prosecutor v. Radislav Krstic - IT-98-33-A

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

“DECISION ON APPLICATION FOR SUBPOENAS”

1 JULY 2003

Subpoenas to prospective witnesses under Rule 54 - Assessment of the chance that a prospective witness will be able to give information which will materially assist the Defence in its case - Subpoenas to uncooperative witnesses - Subpoenas to prospective witnesses to be interviewed in anticipation of tendering evidence on appeal pursuant to Rule 115 - Subpoenas to State officials and the extent of functional immunity.

Subpoenas to prospective witnesses under Rule 54: Rule 54 permits a subpoena to be issued requiring a prospective witness to attend at a nominated place and time in order to be interviewed by the Defence where that attendance is necessary for the preparation or conduct of the trial. An order or subpoena would become “necessary” for the purposes of Rule 54 where a legitimate forensic purpose for having the interview has been shown. An applicant for such an order or subpoena before or during the trial would have to demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to the forthcoming trial.

Assessment of the chance that a prospective witness will be able to give information which will materially assist the Defence in its case: this assessment will depend largely upon the position held by the prospective witness in relation to the events in question, any relationship he may have (or have had) with the accused which is relevant to the charges, the opportunity which he may reasonably be thought to have had to observe those events (or to learn of those events) and any statements made by him to the Prosecution or to others in relation to those events.

Subpoenas to uncooperative witnesses: where a prospective witness has previously been uncooperative with the Defence, such a course would obviously be adopted only if the Judge or Trial Chamber considered that it was reasonably likely that there would be cooperation if such an order were made. If this produces the cooperation sought, the Defence can interview him before he is released by the Tribunal, but in private.

Subpoenas to prospective witnesses to be interviewed in anticipation of tendering evidence on appeal pursuant to Rule 115: in such a case, the legitimate forensic purpose to be established must be slightly adapted. An appellant must establish that there is a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in relation to clearly identified issues arising in his appeal against conviction, that the Defence has been unable to obtain the cooperation of the witness and that it is at least reasonably likely that an order would produce the degree of cooperation needed for the Defence to interview the witness.

Subpoenas to State officials and the extent of functional immunity: the Blaskic Subpoena Decision¹ was concerned with the production of documents and not with the giving of evidence by a State official regarding what he saw or heard at a time when he was a State official and in the course of exercising his official functions.

Procedural Background

Pursuant to Rule 54² of the Rules of Procedure and Evidence (“Rules”) the Appellant Radislav Krstic applied on 1 and 3 April 2003 for subpoenas to be issued to two prospective witnesses requiring each of them to attend at a location (to be nominated) in Bosnia and Herzegovina.³ The purpose of such attendance was to interview them in anticipation of the admission of additional evidence pursuant to Rule 115 of the Rules in support of Krstic’s appeal against conviction.

The Decision

The Appeals Chamber (Judge Shahabuddeen dissenting) ordered that subpoenas be issued requiring the two prospective witnesses identified in the Motion to attend at a specific time and location in Bosnia and Herzegovina to be nominated by the Krstic Defence after consultation with the Prosecution (and, if need be, with the Victims and Witnesses Section) in order to be interviewed by the Krstic Defence.⁴

¹ See *infra* note 13 and text accompanying note.

² Rule 54 (General Rule) reads as follows: “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”.

³ (Confidential) Defence Motion for the Issuance of Subpoena for Witness, 1 April 2003. (Confidential) Addendum to Defence Motion for the Issuance of Subpoena for Witness, 3 April 2003. These two motions are collectively referred to as the “Motion”.

⁴ Decision, para. 29.

The Reasoning

Admission of additional evidence on appeal

Counsel for an accused is under an obligation to exercise due diligence in relation to obtaining evidence in support of the Defence case.⁵ If additional evidence which could have been discovered through the exercise of due diligence before or during the trial is discovered after conviction, the accused will be successful in having that additional evidence admitted on the hearing of an appeal against conviction only if he discharges the burden of demonstrating that its exclusion at that stage would lead to a miscarriage of justice.⁶

In order to have that additional evidence admitted in such an appeal by demonstrating the exercise of due diligence by his Counsel before and during the trial, an accused must show that the Defence made use of all mechanisms of protection and compulsion available under the Tribunal’s Statute and Rules in order to bring evidence before the Trial Chamber. The Rules most immediately relevant are Rule 54 (ordering witnesses to attend to give evidence), Rule 71 (taking evidence by way of depositions where the witness is unable to give evidence to the Trial Chamber directly) and Rule 75 (providing protective measures for witnesses).⁷

⁵ *Ibid*, para. 5.

⁶ *Ibid*, para. 16.

⁷ *Ibid*, paras. 5-6.

Subpoenas to prospective witnesses under Rule 54

Where the Defence is unaware of the precise nature of the evidence a prospective witness can give and is unable to obtain the cooperation of that prospective witness, Rule 54 permits a Judge or Trial Chamber to make such orders or to issue such subpoenas as may be necessary for the preparation or conduct of the trial. This power makes it possible for a subpoena to be issued requiring a prospective witness to attend at a nominated place and time in order to be interviewed where that attendance is necessary for the preparation or conduct of the trial. An order or subpoena would become "necessary" for the purposes of Rule 54 where a legitimate forensic purpose for holding such an interview has been shown. An applicant for such an order or subpoena before or during the trial would have to demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case in relation to clearly identified issues relevant to the forthcoming trial.⁸

Assessment of the chance that a prospective witness will be able to give information which will materially assist the Defence in its case

The assessment of the chance that a prospective witness will be able to give information which will materially assist the Defence in its case will depend largely upon the position held by the prospective witness in relation to the events in question, any relationship he may have (or have had) with the accused which is relevant to the charges, the opportunity which he may reasonably be thought to have had to observe those events (or to learn of those events) and any statements made by him to the Prosecution or to others in relation to those events. The test would have to be applied in a reasonably liberal way. However, as with applications for access to confidential material, the Defence will not be permitted to undertake a fishing expedition - where it is unaware whether the particular person has any relevant information and it seeks to interview that person merely in order to discover whether he has any information which may assist the Defence.⁹

Subpoenas to uncooperative witnesses

Where a prospective witness has previously been uncooperative with the Defence, such a course would obviously be adopted only if the Judge or Trial Chamber considered that it was reasonably likely that there would be cooperation if such an order were made. That is not a determination which the Defence may safely make for itself. If it were decided by the Judge or Trial Chamber that such a course is unlikely to produce the cooperation sought or if such an order is made without success, an alternative course could be to make an order or to issue a subpoena pursuant to Rule 54 requiring the prospective witness to appear before the Tribunal, at which point the Judge who issued the order can explain to him the importance of his cooperation to assist in producing a just result in the trial, and how he will be afforded protection by the Tribunal if it is required. If this produces the cooperation sought, the Defence can interview him before he is released by the Tribunal, but in private.¹⁰

Subpoenas to prospective witnesses to be interviewed in anticipation of tendering evidence on appeal pursuant to Rule 115

Where, as in the present case, an appellant seeks the issuance of a subpoena to a prospective witness to be interviewed in anticipation of tendering that person's evidence on appeal pursuant to Rule 115, the legitimate forensic purpose to be established must be slightly adapted. An appellant must establish that there is a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in relation to clearly identified issues arising in his appeal against conviction, that the

Defence has been unable to obtain the cooperation of the witness and that it is at least reasonably likely that an order would produce the degree of cooperation needed for the Defence to interview the witness.¹¹

Subpoenas to State officials and the extent of functional immunity

In the present case, the two prospective witnesses were officers in the Army at the relevant time and it appears that whatever relevant information they may have would have been gained by them in their capacity as State officials and be related to their official functions, rather than as individuals acting in their private capacity. The Prosecution submitted that, in those circumstances, the Chamber "may be limited" in its power to issue a subpoena.¹² This submission was based upon statements made by the Appeals Chamber in the *Blaskic* Subpoena Decision.¹³

The Appeals Chamber held that the *Blaskic* Subpoena Decision was concerned with the production of documents, not with the giving of evidence by a State official regarding what he saw or heard at a time when he was a State official and in the course of exercising his official functions.¹⁴ Nothing that was said by the Appeals Chamber in the *Blaskic* Subpoena Decision should be interpreted as giving such immunity to officials of the nature whose testimony is sought in the present case. No authority for such a proposition has been produced by the Prosecution and none has been found. Such immunity does not exist. No issue arises for determination in this case as regards whether there are different categories of State officials to whom any such immunity may apply, and it is unnecessary to determine such an issue here.¹⁵

Dissenting opinion of Judge Shahabuddeen

Judge Shahabuddeen disagreed with the finding of the majority of the Appeals Chamber that it is competent to subpoena a State official to testify about what he has seen or heard in his official capacity. He reviewed the scope of the *Blaskic* Subpoena Decision and could not find any cogent reason to argue that this decision was confined to the production of State documents. Judge Shahabuddeen also disagreed with the majority finding that the Appeals Chamber has the competence to subpoena potential witnesses to attend a Defence interview. In his view, the Appeals Chamber has the power to facilitate the attendance of such witness but cannot compel such attendance. ■

⁸ *Ibid.*, para. 10.

⁹ *Ibid.*, para. 11.

¹⁰ *Ibid.*, para. 12.

¹¹ *Ibid.*, para. 17.

¹² *Ibid.*, para. 19.

¹³ *Blaskic*, IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 ("*Blaskic* Subpoena Decision"), 29 October 1997.

¹⁴ Decision, paras. 23-24.

¹⁵ *Ibid.*, paras. 26-27.

The Prosecutor v. Hadzihasanovic et al. - Case No. IT-01-47-AR72

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

“DECISION ON INTERLOCUTORY APPEAL CHALLENGING JURISDICTION IN RELATION TO COMMAND RESPONSIBILITY”

16 JULY 2003

Command responsibility in internal conflicts - Command responsibility for crimes committed before the superior-subordinate relationship exists.

Command responsibility in internal conflicts: the fact that it was in the course of an internal armed conflict that a war crime was about to be committed or was committed is not relevant to the responsibility of the commander. The basis of the commander's responsibility lies in his obligations as commander of troops making up an organised military force under his command, and not in the particular theatre in which the act was committed by a member of that military force.

Command responsibility for crimes committed before the superior-subordinate relationship exist: no practice can be found, nor there is any evidence of *opinio juris* that would sustain the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate. An accused cannot be charged under Article 7(3) of the Statute for crimes that have been committed by a subordinate before the said accused assumed command over that subordinate.

Procedural Background

- On 12 November 2002, Trial Chamber II rendered its “Decision on Joint Challenge to Jurisdiction” (“Impugned Decision”). It held (1) that the doctrine of command responsibility already by -and since- 1991 was applicable in the context of an internal armed conflict under customary international law and that Article 7(3) of the Statute constitutes a declaration of existing law under customary international law and does not constitute new law, and (2) that in principle a commander can be liable under the doctrine of command responsibility for crimes committed prior to the moment that the commander assumed command.¹
- On 27 November 2002, Enver Hadzihasanovic, Mehmed Alagic² and Amir Kubura (“Appellants”) filed an “Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction” (“Interlocutory Appeal”) pursuant to Rule 72(B)(i) of the Rules of Procedure and Evidence (“Rules”), challenging the Impugned Decision on (1) and (2). The Prosecution filed a response on 9 December 2002³ and an addendum on 20 December 2002. The Appellants filed a joint reply on 13 December 2002.
- On 21 February 2003, a bench of three appellate Judges, under Rule 72(E) of the Rules, declared the Interlocutory Appeal valid insofar as it challenges (1) and (2).

The Decision

The Appeals Chamber unanimously dismissed the first ground of appeal but allowed the second ground of appeal, by majority (Judge Shahabuddeen and Judge Hunt dissenting).

The Reasoning

Command responsibility in internal armed conflict

The Appellants submitted that the Trial Chamber erred in two respects: (a) it wrongly found that there was a basis in customary international law for the applicability of the doctrine of command responsibility in internal armed conflicts at the time material to the Indictment; and (b) it failed to respect the

principle of legality in reaching its conclusion that it had jurisdiction in the present case.⁴

Whether customary international law provides for command responsibility in internal armed conflicts

The Appeals Chamber first stated that there are two “uncontested” points of law: 1) serious violations of international humanitarian law in internal armed conflicts –included those of Article 3 common to the four Geneva Conventions- entail criminal responsibility under customary international law;⁵ 2) at all times relevant to the indictment the doctrine of command responsibility was part of customary international law related to international armed conflicts.⁶

From those two points, the Appeals Chamber inferred that violations of Common Article 3 committed in international armed conflicts would be prosecutable under the regime of command responsibility. It thereafter found “difficult to see why the concept [of command responsibility] would not equally apply to breaches of the same prohibitions when committed in the course of an internal conflict”.⁷

The Appeals Chamber analysed the weight of the principle of responsible command in the main provisions related to internal armed conflicts, held that Article 3 of the Statute of the Tribunal (Violations of the Laws or Customs of War) “assumes that there is an organized military force”, that it is “evident” that there cannot be organised military force save on the basis of responsible command, and that it is “also reasonable” to hold that it is responsible command which leads to command responsibility as “command responsibility is the most effective method by which international criminal law can enforce responsible command”.⁸ The Appeals Chamber however admitted that “most States have not legislated for command responsibility to be the counterpart of responsible command in internal conflicts”.⁹

¹ *Hadzihasanovic*, IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002, *Judicial Supplement* No. 38.

² Mehmed Alagic passed away on 7 March 2003. By order of 21 March 2003, the Trial Chamber terminated the proceedings against him.

³ Prosecution's Response to Defence Interlocutory Appeal on Jurisdiction (“Response”).

⁴ The issue of the principle of legality will not be dealt with in the present summary as it has been dealt with extensively by the Appeals Chamber in *Milutinovic*, IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, *Judicial Supplement* No. 41.

⁵ See *Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (“*Tadic* Jurisdiction Decision”), 2 October 1995, Appeals Chamber, para. 134.

⁶ *Delalic et al*, IT-96-21-A, Judgement (“*Celebici* Appeal Judgment”), 20 February 2001, paras. 222-241, *Judicial Supplement* No. 23; *Bagilishema*, ICTR-95-1A-A, Judgement (Reasons), 13 December 2002, paras. 35-37.

⁷ Para. 13.

⁸ Paras. 14-16.

⁹ Para. 17.

The interpretation of the Appeals Chamber is that a military organisation implies responsible command, that responsible command in turn implies command responsibility, and finally that since customary international law recognises that some war crimes can be committed by a member of an organised military force in the course of an internal armed conflict, it also recognises that there can be command responsibility in respect of such crimes.¹⁰

Internal armed conflicts and reciprocity

The Appeals Chamber addressed the argument of the Appellants that international law developed to regulate the relations between States on the basis of reciprocity and that command responsibility for acts committed in the course of an internal armed conflict does not raise any questions of reciprocity.¹¹

The Appeals Chamber did not consider that the matter depends on notions of reciprocity and held that, to the extent that States have come to consider that they have a common interest in the observance of certain minimum standards of conduct in certain matters¹² including certain aspects of conduct in an internal armed conflict, internal armed conflict are "now the concern of international law without any questions of reciprocity".¹³

From this finding the Appeals Chamber inferred that "the fact that it was in the course of an internal armed conflict that a war crime was about to be committed or was committed is not relevant to the responsibility of the commander".¹⁴ According to the Appeals Chamber, it is the principle of responsible command that matters: "[t]he basis of the commander's responsibility lies in his obligations as commander of troops making up an organised military force under his command, and not in the particular theatre in which the act was committed by a member of that military force".¹⁵

Responsible command and command responsibility

The Appellants argued that there is a clear distinction between the principle of responsible command and the principle of command responsibility. The Appeals Chamber concurred that there is a difference between the two concepts: "[t]he difference is due to the fact that the concept of responsible command looks to the duties comprised in the idea of command, whereas that of command responsibility looks at liability flowing from breach of those duties".¹⁶ The Appeals Chamber maintained that "the elements of command responsibility are derived from the elements of responsible command".¹⁷ It relied on the United States Supreme Court's decision in *Yamashita v. Styer*, which held that "the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates",¹⁸ in order to hold also that "the duties comprised in responsible command are generally enforced through command responsibility" and that "the latter flows from the former".¹⁹

Responsible command in other courts

As a further justification, the Appeals Chamber recalled that Article 7(3) of the Statute envisages superior responsibility for acts of subordinates amounting to violations including those of Article 3 of the Statute. The Appellants, however, contend that for this specific reason Article 7(3) is *ultra vires*. This is not the opinion of

the Appeals Chamber which to supplement its finding that command responsibility applies to internal conflicts notes that this issue is not disputed before the tribunals established for Rwanda, Sierra Leone and East Timor. In its view, "the establishment of these bodies was consistent with the proposition that customary international law previously included the principle that command responsibility applied in respect of an internal armed conflict".²⁰

The fact that command responsibility is not envisaged in Protocol II additional to the Geneva Conventions of 1949

The Appellants further submitted that the doctrine of command responsibility was referred to in the 1977 Protocol I additional to the Geneva Conventions of 1949²¹ applicable to international armed conflicts but was not included in Protocol II applicable to non-international armed conflicts. This difference, in their view, supports the argument that State practice did not consider command responsibility for internal armed conflicts as part of customary international law.

The Appeals Chamber held that "the non-reference in Protocol II to command responsibility in relation to internal armed conflicts did not necessarily affect the question whether command responsibility previously existed as part of customary international law relating to internal armed conflicts".²² In its view, there is a "play of factors responsible for the silence which, for any of a number of reasons, sometimes occurs over the codification of an accepted point in the drafting of an international instrument".²³ It held: "[w]ere it otherwise, the Appeals Chamber would have to uphold that, 'as argued by the Defence, it is not a crime for a commander in an internal conflict to fail to prevent or punish the killings committed by his subordinates',²⁴ *i.e.*, even if the commander knows or has reason to know of the killings".²⁵ The Appeals Chamber did not consider that it was "required to sustain so improbable a view in contemporary international law" and found such a view to be "not consistent with its reasoning in the *Tadic* Jurisdiction Decision²⁶ and in the *Celibici* Appeal Judgment²⁷ or with the reasoning of the Trial Chamber in *Aleksovski*".²⁸,²⁹

The Appeals Chamber upheld the finding of the Trial Chamber that "command responsibility was at all times material to this case a part of customary international law in its application to war crimes committed in the course of an internal armed conflict".³⁰

Command responsibility for crimes committed before the superior-subordinate relationships exists

The Prosecution alleged in the Indictment that Amir Kubura was responsible for the acts of his subordinates before he took up his position as acting commander of the Bosnian Army, 3rd Corps, 7th Muslim Mountain Brigade, because "the material fact for determination is [...] not who was in command at the time of the crime, but when a commander became aware of the crime, yet failed to take the 'reasonable and necessary measures' to punish the violation".³¹ The Prosecution relied on the *Kordic* Trial

¹⁰ Paras. 17-18.

¹¹ Interlocutory Appeal, para. 39.

¹² The Appeals Chamber referred to *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports 1951, p. 23; and *Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1986, pp. 112 and 114.

¹³ Para. 19.

¹⁴ Para. 20.

¹⁵ *Ibid.*

¹⁶ Para. 22.

¹⁷ *Ibid.*

¹⁸ 327 U.S. &, 14-15 (1946).

¹⁹ Para. 23.

²⁰ Para. 26.

²¹ *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* ("Additional Protocol I"), 1125 UN Treaty Series, pp. 3-608.

²² Para. 28.

²³ Para. 29.

²⁴ Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction, 27 November 2002, para. 20(a).

²⁵ Para. 30.

²⁶ *Tadic* Jurisdiction Decision, 2 October 1995, para.77.

²⁷ *Celibici* Appeal Judgement, paras. 116-181.

²⁸ *Aleksovski*, IT-95-14/1-T, Judgement, 25 June 1999, para. 228.

²⁹ Para. 30.

³⁰ Para. 31.

³¹ Prosecution's Response to Defence Written Submissions on Joint Challenge to Jurisdiction Arising from the Amended Indictment, 24 May 2002, para. 17.

Judgement, which states that “[t]he duty to punish naturally arises after a crime has been committed” and that “[p]ersons who assume command after the commission are under the same duty to punish”.³² The Appellants argued that there is no basis in conventional or customary law for holding a commander criminally responsible for the acts of persons who were not his subordinates when they committed the acts.

The Appeals Chamber held that “no practice can be found nor there is any evidence of *opinio juris* that would sustain the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander’s assumption of command over that subordinates”.³³ It found “indications that militate against the existence of a customary rule establishing such responsibility”: Article 28 of the Statute of the International Criminal Court, Article 86(2) of Protocol Additional to the Geneva Convention (Protocol I),³⁴ and Article 6 of the Draft Code of Crimes Against Humanity and Security of Mankind adopted by the International Law Commission at its forty-eighth session all envisage situations in which a breach is in the process of being committed or is going to be committed and do not envisage breaches that have been committed.³⁵

The Appeals Chamber held that “an accused cannot be charged under Article 7(3) of the Statute for crimes that have been committed by a subordinate before the said accused assumed command over that subordinate”.³⁶

Partial Dissenting Opinion of Judge Shahabuddeen

Judge Shahabuddeen agreed with the Appeals Chamber that the doctrine of command responsibility applied to internal armed conflicts at the time of the acts charged in the Indictment. However, he could not agree with the Appeals Chamber that the doctrine does not apply to commanders in respect of crimes committed by their subordinates before they assumed command. In his view, there are no available cases determining the issue one way or the other. He recalled that the Tribunal has the competence to interpret established principles of law such as command responsibility and to determine whether a particular situation before it falls within the principle as so interpreted. In doing so, he considers that the Appeals Chamber “will not be changing customary international law but will be carrying out its true intent by interpreting and applying one of its existing principles”.³⁷ He reviewed the principles of interpretation and the articles relevant to command responsibility, and found that the Appeals Chamber should have dismissed the second ground of appeal.

Separate and Partially Dissenting Opinion of Judge Hunt, Command Responsibility Appeal

Judge Hunt expressed his complete agreement with the finding of the Appeals Chamber as regards the first ground of appeal and the reasoning which led to it but disagreed with the Appeals Chamber as regards the second ground of appeal. In his view, the situation of a commander who knows or has reasons to know that a person who has become his subordinates committed a crime before he became that person’s superior reasonably falls within the principle of command responsibility. Judge Hunt agreed with the majority of the Appeals Chamber that there is no case-law on the issue but disagreed with the finding that the absence of such reference excludes criminal responsibility in such a situation. In his opinion, which rejects all of the arguments of the majority, he reviews the case-law referred to by the Appeals Chamber as well as its interpretation of the articles relevant to command responsibility. ■

³² *Kordic and Cerkez*, IT-95-14/2-T, Judgement (“*Kordic* Trial Judgement”), 26 February 2001, para. 446, *Judicial Supplement* No. 23.

³³ Para. 45.

³⁴ In the *Celibici* Appeal Judgement, the Appeals Chamber held that the “criminal offence based on command responsibility is defined in Article 86(2) only” (para. 237).

³⁵ Paras. 46-49.

³⁶ Para. 51.

³⁷ Para. 10.



TRIAL CHAMBERS

The Prosecutor v. Milomir Stakic - Case No. IT-97-24-T

Trial Chamber II (Judges Schomburg [Presiding], Vassilenko and Argibay)

“JUDGEMENT”

31 JULY 2003

Co-perpetratorship - Individual criminal responsibility v. command responsibility - Deportation - The mens rea for persecution in cases of indirect perpetratorship.

Co-perpetratorship: for co-perpetration it suffices that there was an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct. For this kind of co-perpetration it is typical, but not mandatory, that one perpetrator possesses skills or authority which the other perpetrator does not. These can be described as shared acts which when brought together achieve the shared goal based on the same degree of control over the execution of the common acts. The co-perpetrator can achieve nothing on his own. The plan only works if the accomplice works with the other person. Both perpetrators are thus in the same position. They can only realise their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act.

Individual criminal responsibility v. command responsibility: Article 7(3) serves primarily as an omnibus clause in cases where the primary basis of responsibility cannot be applied. It is in general not necessary to make findings under Article 7(3) if the Chamber is already satisfied beyond reasonable doubt of both responsibility under 7(1) and the superior positions held by the accused. The superior positions of the accused, without diminishing their importance, would then only constitute an aggravating factor, the seriousness of which would depend on the concrete superior status of the accused over his subordinates. The superior positions of the accused must be established in detail and related to the concrete conduct established under Article 7(1).

Deportation: the protected interests behind the prohibition of deportation are the right and expectation of individuals to be able to remain in their homes and communities without interference by an aggressor, whether from the same or another State. It is the *actus reus* of forcibly removing, essentially uprooting, individuals from the territory and the environment in which they have been lawfully present, in many cases for decades and generations, which is the rationale for imposing criminal responsibility and not the destination resulting from such a removal.

The mens rea for persecution in cases of indirect perpetratorship: in cases of indirect perpetratorship, proof is required only of the general discriminatory intent of the indirect perpetrator in relation to the attack committed by the direct perpetrators/actors. Even if the direct perpetrator/actor did not act with a discriminatory intent, this, as such, does not exclude the fact that the same act may be considered part of a discriminatory attack if only the indirect perpetrator had the discriminatory intent.

Procedural Background

- On 23 March 2001, pursuant to a warrant of arrest issued by the International Tribunal on 22 January 2001, Dr Milomir Stakic (“Accused”) was arrested in Belgrade. That same day he was transferred to the United Nations Detention Unit in The Hague.
- The trial of the Accused based on the allegations set out in the Fourth Amended Indictment dated 11 April 2002 (“Indictment”), began on 16 April 2002. The Indictment covers the period from 30 April 1992 to 30 September 1992 and charges the Accused with genocide (Count 1) or, alternatively, complicity in genocide (Count 2), murder as a crime against humanity (Count 3), extermination (Count 4), murder as a violation of the laws or customs of war (Count 5), persecutions (Count 6), deportation (Count 7) and inhumane acts (Count 8).
- The trial concluded on 15 April 2003 after 150 days of hearings. The Trial Chamber heard 37 live Prosecution witnesses and admitted 19 witness statements pursuant to Rule 92 *bis* (Proof of Facts other than by Oral Evidence). The Prosecution called three expert witnesses. Pursuant to Rule 98 (Power of Chambers to Order Production of Additional Evidence), the Chamber called six witnesses and ordered the Prosecution to appoint a forensic handwriting examiner and a forensic document expert. The Trial Chamber heard 38 live Defence witnesses and admitted seven Rule 92 *bis* statements and one Rule 94 *bis* report (Testimony of Expert Witnesses). The Defence called two expert witnesses and introduced the report of an expert on constitutional issues by means of Rule 94 *bis*. A total of 1,448 exhibits were admitted into evidence, 796 for the Prosecution, 594 for the Defence and 58 for Chamber.

The Judgement

The Trial Chamber found the Accused Dr Milomir Stakic not guilty of Count 1 (Genocide), Count 2 (Complicity in Genocide) and Count 8 (Other Inhumane Acts (forcible transfer), a Crime against Humanity). It found the Accused guilty of Count 4 (Extermination, a Crime against Humanity), Count 5 (Murder, a Violation of the Laws or Customs of War), Count 6 (Persecutions, Crimes against Humanity) incorporating Count 3 (Murder, a Crime against Humanity), and Count 7 (Deportation, a Crime against Humanity). It sentenced Dr Milomir Stakic to life imprisonment.¹

Factual findings²

On 7 January 1992, the Serbian members of the Prijedor Municipal Assembly and the presidents of the local Municipal Boards of the Serbian Democratic Party (“SDS”) proclaimed a parallel Assembly of the Serbian People of the Municipality of Prijedor. Dr Milomir Stakic, a physician, was elected President of this Assembly. Ten days later, in a decision signed by Dr Stakic, the Assembly endorsed “joining the Serbian territories of the Municipality of Prijedor to the Autonomous Region of Bosnian Krajina [“ARK”]”. By the end of April 1992, a number of clandestine Serbian police stations had been created in the municipality and more than 1,500 armed men were ready to take the municipality over.

¹ On 1 September 2003, Defendant Milomir Stakic filed his notice of appeal against the Judgement.

² The following factual findings are taken from the summary of the Judgement. The summary and the full text of the Judgement are available at the “Judgements” page on the Tribunal’s website (www.un.org/icty).

During the night of 29-30 April 1992, the forcible takeover of power led by the SDS took place. Legitimate central authorities were replaced by SDS or SDS-loyal personnel. Dr Stakic replaced the freely elected President of the Municipal Assembly, Professor Cehajic.

The Trial Chamber found that the takeover was an illegal *coup d'état* which had been planned and coordinated for months and which had as its final goal the creation of a pure Serbian municipality. The plans were never hidden and were implemented through coordinated action by the police, army and politicians. Dr Stakic was by then playing the leading role in the political life of the Municipality.

Shortly after the takeover, the municipal People's (National) Defence Council started to hold meetings which were presided over by Dr Stakic in his capacity as President of the post-takeover Municipal Assembly.

On 20 May 1992, the Municipal Assembly was replaced by the Crisis Staff of Prijedor municipality, later known as the War Presidency, whose membership was almost identical to that of the People's Defence Council. Dr Stakic was its President. The Crisis Staff met very frequently in the period immediately after the takeover and adopted numerous decisions, orders and other enactments.

Civilian life in Prijedor was transformed in a myriad of ways after the takeover. There was a marked increase in the military presence in town and a propaganda war against non-Serbs was launched. Pursuant to a decision of the Crisis Staff, armed attacks were launched against the non-Serb civilian population throughout the municipality. The creation of an atmosphere of fear in Prijedor culminated in the agreement amongst members of the Prijedor Crisis Staff to establish the Omarska, Keraterm and Trnopolje camps.

The Trial Chamber found that killings occurred frequently in the camps and that there could be no reasonable doubt that a number of massacres were committed *inter alia* in Room 3 of the Keraterm camp on or about 24 July 1992. In late July 1992, over a hundred people were killed in the Omarska camp and, on 5 August 1992, approximately 120 people were taken out of Omarska on buses and later killed. On 21 August 1992, approximately 200 people in a deportation convoy escorted by members of the Prijedor Intervention Squad were killed on Mount Vlasic by members of this platoon. Many more were killed during the attacks by the Bosnian Serb army on predominantly Bosnian Muslim villages and towns throughout the Municipality of Prijedor - Kozarac, Hambarine, Biscani, Ljubija, to name a few - and several massacres of Muslims took place. The Trial Chamber found that more than 1,500 killings occurred and identified 486 victims by name.³

Rapes and sexual assaults were committed in the camps and the thousands of persons detained were subjected to inhuman and degrading treatment, including routine beatings and torture. Detainees lived in unhygienic conditions and were given little more than a subsistence diet.

Bosnian Muslims who had lived their whole lives in the Municipality of Prijedor were expelled from their homes and deported in huge numbers, often in convoys organised and supervised by the Serb authorities from Prijedor. The Trial Chamber heard evidence from many witnesses who were forced to flee the territory of the Municipality of Prijedor in 1992, mostly to Travnik or Croatia, in order to escape Serb-controlled territory. The exodus of the mainly non-Serb population from Prijedor started as early as 1991 but accelerated considerably in the run-up to the takeover and reached its peak in the months after the takeover. More than 20,000 persons became victims of this campaign of deportation. Most people travelled in one of the daily convoys of buses and trucks leaving the territory.

The Trial Chamber was satisfied that between January 1991 and September 1992 Dr Stakic was the leading political figure in the Municipality of Prijedor and found him responsible for all the above crimes as a co-perpetrator.⁴

Legal findings

Co-perpetratorship

The Accused was primarily charged on the basis of the joint criminal enterprise concept, this being a definition of "committing" under Article 7(1) of the Statute.⁵ The Trial Chamber did not find it necessary to have recourse to the judicial expression "joint criminal enterprise" and preferred to use the expression "co-perpetration". It proposed a definition of co-perpetration which it stated "approaches that of [...] joint criminal enterprise and even overlaps in part [but] is closer to what most legal systems understand as 'committing' and avoids the misleading impression that a new crime not foreseen in the Statute has been introduced by the backdoor".⁶

The Trial Chamber referred to a recent Decision rendered by the Appeals Chamber regarding joint criminal enterprise in the *Milutinovic et al.* case. The Appeals Chamber found that joint criminal enterprise is a form of "commission" pursuant to Article 7(1) of the Statute and 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 abettor to the crime which is contemplated.⁷ It referred to the definition of "committed" set out in the *Kvočka et al.* Trial Judgement:

"[t]he *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal's Statute, through positive acts or omissions, whether individually or jointly with others".⁸

In the Trial Chamber's view, this definition required that a detailed analysis of co-perpetration be given. It defined co-perpetration as follows:

"For co-perpetration it suffices that there was an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct. For this kind of co-perpetration it is typical, but not mandatory, that one perpetrator possesses skills or authority which the other perpetrator does not. These can be described as shared acts which when brought together achieve the shared goal based on the same degree of control over the execution of the common acts. In the words of *Roxin*: "The co-perpetrator can achieve nothing on his own...The plan only 'works' if the accomplice⁹ works with the other person."¹⁰ Both perpetrators are thus in the same position. As *Roxin* explains, "they can only realise their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act."¹¹ *Roxin* goes

⁴ For more details on Dr Stakic's responsibility, see "Individual Criminal Responsibility of Dr Stakic" in the summary of the Judgement. On the nature of the Accused's responsibility, see *infra* "Co-perpetration".

⁵ Article 7(1) reads: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime".

⁶ Para. 441.

⁷ *Milutinovic et al.*, IT-99-37-ART2, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 20, *Judicial Supplement* No. 41.

⁸ *Kvočka et al.*, IT-98-30/1-T, Judgement ("*Kvočka et al.* Trial Judgement"), 2 November 2001, para. 251, *Judicial Supplement* No. 29.

⁹ In this context the term "accomplice" is used interchangeably with "co-perpetrator" (footnote added by the Trial Chamber).

¹⁰ *Roxin, Claus, Täterschaft und Tatherrschaft* (Perpetration and control over the act), 6th Edition, Berlin, New York, 1994, p. 278 (footnote from the Trial Chamber Judgement).

¹¹ *Ibid.*

³ See Part VI of the Judgement: "List of victims known by name".

on to say, "[t]his type of 'key position' of each co-perpetrator describes precisely the structure of joint control over the act."¹² (para. 440)

The Trial Chamber found that "the mode of liability described as 'co-perpetratorship' best characterise[d] Dr Stakic's participation in offences committed in Prijedor Municipality in 1992".¹³

Individual criminal responsibility v. command responsibility

In keeping with the Tribunal's case-law, it is permissible to find a person criminally responsible both as an individual for his own acts (Article 7(1)) and as a military or civilian commander for the acts of his subordinates (Article 7(3)). In the *Krnjelac* Trial Judgement, the Trial Chamber considered it "inappropriate to convict under both heads of responsibility based on the same acts".¹⁴ It decided to charge the Accused on the basis of Article 7(1) only and to take the Accused's position as a superior as a factor aggravating his criminal responsibility under Article 7(1).¹⁵ The present Trial Chamber followed the same reasoning and held that "Article 7(3) serves primarily as an omnibus clause in cases where the primary basis of responsibility cannot be applied. In cases where the evidence leads a Trial Chamber to the conclusion that specific acts satisfy the requirements of Article 7(1) and that the accused acted as a superior, this Trial Chamber shares the view of the *Krnjelac* Trial Chamber that a conviction should be entered under Article 7(1) only and that the accused's position as a superior amounts to an aggravating factor."¹⁶ It held that "it is in general not necessary in the interests of justice and of providing an exhaustive description of individual responsibility to make findings under Article 7(3) if the Chamber is already satisfied beyond reasonable doubt of both responsibility under 7(1) and the superior positions held by the accused. The superior positions of the accused, without diminishing their importance, would then only constitute an aggravating factor, the seriousness of which would depend on the concrete superior status of the accused over his subordinates. The superior positions of the accused must be established in detail and related to the concrete conduct established under Article 7(1)".¹⁷

Deportation

The case-law of the Tribunal has drawn a distinction between deportation under Article 5(d) of the Statute and forcible transfer as other inhumane acts under Article 5(i) of the Statute:

"[b]oth deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State".¹⁸

In the Trial Chamber's view, the core aspect of deportation is two-fold: "(1) to take someone out of the place where he or she was lawfully staying, and (2) to remove that person from the protection of the authority concerned".¹⁹ It considered that "[t]he protected interests behind the prohibition of deportation are the right and expectation of individuals to be able to remain in their homes and communities without interference by an aggressor, whether from the same or another State" and it held that "it is the *actus reus* of forcibly removing, essentially uprooting,

individuals from the territory and the environment in which they have been lawfully present, in many cases for decades and generations, which is the rationale for imposing criminal responsibility and not the destination resulting from such a removal".²⁰ It added that "should a definite destination requirement be specified, it would often be difficult to determine whether and when the crime occurred because the victims may have been transferred in several stages and therefore through several territories and across borders that may have changed every day" and that "[a] fixed destination requirement might consequently strip the prohibition against deportation of its force".²¹

The Trial Chamber stated that "[f]or the purposes of the present case, [...] Article 5(d) of the Statute must be read to encompass forced population displacements both across internationally recognised borders and *de facto* boundaries, such as constantly changing frontlines, which are not internationally recognised". It concluded that "[t]he crime of deportation in this context is therefore to be defined as the forced displacement of persons by expulsion or other coercive acts for reasons not permitted under international law from an area in which they are lawfully present to an area under the control of another party".²²

The *mens rea* for persecution in cases of indirect perpetratorship

The definition of the crime of persecution on political, racial and religious grounds (a crime against humanity under Article 5(h) of the Statute) is settled in the case-law of the Tribunal:

The crime of persecution consists of an act or omission which:

1. *discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the actus reus); and*
2. *was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the mens rea).*²³

The *mens rea* of this crime consists of: "1. the intent to commit the underlying act; [and] 2. the intent to discriminate on political, racial or religious grounds".²⁴ In both the *Vasiljevic* and the *Krnjelac* Trial Judgments, the Accused were closely involved in the actual commission of the crimes and proof was required that they acted with discriminatory intent in relation to the specific acts charged. In the present case, however, the Accused is charged as a co-perpetrator who did not actually commit the crimes himself (indirect perpetrator) but was in command of those who directly committed the crimes (direct perpetrators/actors). In such a context, the Trial Chamber considered that "to require proof of the discriminatory intent of both the Accused and the acting individuals in relation to all the single acts committed would lead to an unjustifiable protection of superiors and would run counter to the meaning, spirit and purpose of the Statute of this International Tribunal".²⁵

The Trial Chamber held that "[i]n cases of indirect perpetratorship, proof is required only of the general discriminatory intent of the indirect perpetrator in relation to the attack committed by the direct perpetrators/actors. Even if the direct perpetrator/actor did not act with a discriminatory intent, this, as such, does not exclude the fact that the same act may be considered part of a discriminatory attack if only the indirect perpetrator had the discriminatory intent".²⁶

¹² *Ibid.*

¹³ Para. 468.

¹⁴ *Krnjelac*, IT-97-25-T, Judgment ("*Krnjelac* Trial Judgment"), 15 March 2002, para. 316, *Judicial Supplement* No. 31 *bis*.

¹⁵ *Ibid.*, para. 496.

¹⁶ Para. 465.

¹⁷ Para. 466.

¹⁸ *Krstic*, IT-98-33-T, Judgement ("*Krstic* Trial Judgement"), 2 August 2001, para. 521, *Judicial Supplement* No. 27.

¹⁹ Para. 674 (emphasis in the original).

²⁰ Para. 677.

²¹ *Ibid.*

²² Para. 679.

²³ See *Vasiljevic*, IT-98-32-T, Judgement ("*Vasiljevic* Trial Judgement"), 29 November 2002, para. 244, *Judicial Supplement* No. 38. See also *Krnjelac* Trial Judgment para. 431.

²⁴ *Vasiljevic* Trial Judgement, para. 248.

²⁵ Para. 742.

²⁶ Para. 743.

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

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

“DECISION ON PROSECUTION MOTION FOR THE ADMISSION OF TRANSCRIPTS IN LIEU OF VIVA VOCE TESTIMONY PURSUANT TO 92 *BIS* (D) - FOCA TRANSCRIPTS”

30 JUNE 2003

Rule 92 bis - Admissibility of Rule 92 bis materials - Cross-examination of the witnesses - The applicable test - Cross-examination and the need to protect victims and witnesses.

Cross-examination and the need to protect victims and witnesses: cross-examination should not be permitted mechanically and as a matter of course. Where the rights of the accused are protected by earlier cross-examinations, the balance should be struck on the side of the victims and witnesses.

Procedural Background

- On 10 January 2003, the Prosecution filed the “Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis* (D)” (“Motion”) in which it sought the admission into evidence, without cross-examination, of transcripts related to the testimony of witnesses in the *Krnjelac* and *Kunarac* cases¹ in lieu of *viva voce* evidence. It alleged that the evidence deals exclusively with crime base events alleged to have occurred in the Foca municipality and not with the acts and conduct of the Accused, and that the evidence does not go to a critical element of the Accused’s case, such that cross-examination by the Accused would be appropriate.

- On 3 February 2003, the *Amici Curiae* filed the “Amici Curiae Observations on the Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis* (D), filed 10 January 2003” (“Observations”) in which it is asserted that whilst the transcripts do not contain evidence properly characterised as going to the acts and conduct of the Accused, the Trial Chamber should exercise its discretion not to admit the transcripts and to require all witnesses to attend to give all their evidence as *viva voce* evidence. Further the *Amici* argued that should the Chamber decide to admit the transcripts under Rule 92 *bis* (D), the witnesses should be required to attend for cross-examination.

- On 10 February 2003, the Prosecution filed the “Prosecution’s Reply to Amici Curiae Observations on the Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis* (D)” (“Reply”). On 28 April 2003, the Chamber heard oral argument on the Motion. On 1 May 2003, the Prosecution filed a partly confidential “Addendum to Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis* (D)” (“Addendum”), in which it sets out areas on which the witnesses were previously cross-examined of relevance to the cross-examination of the Accused in this case.

The Decision

On 8 May 2003, the Trial Chamber rendered the following oral ruling on the Motion:

“Th[is]...ruling concerns the Foca transcript evidence and the admissibility...of transcripts...under Rule 92 *bis*. All the...transcripts...are admissible under the Rule. The following witnesses must attend for cross-examination: B-1015, B-1533, B-1618, B-1120, B-1536. By a majority, Judge Robinson dissenting, the following are admitted without cross-examination: B-1542, B-1543, B-1121, B-1537, B-1538, B-1540”. T Written reasons for this ruling will follow”.

The following is a summary of the reasoned decision of the majority of the Trial Chamber. The partial dissenting opinion of Judge Robinson is also briefly summarised.

The Reasoning

Rule 92 *bis*² deals with the proof of facts other than by oral evidence in the form of a written statement (Rule 92 *bis*(A)) or in

² Rule 92 *bis* (Proof of Facts other than by Oral Evidence)

- (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.
- (i) Factors in favour of admitting evidence in the form of a written statement include but are not limited to circumstances in which the evidence in question:
- is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
 - relates to relevant historical, political or military background;
 - consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
 - concerns the impact of crimes upon victims;
 - relates to issues of the character of the accused; or
 - relates to factors to be taken into account in determining sentence.
- (ii) Factors against admitting evidence in the form of a written statement include whether:
- there is an overriding public interest in the evidence in question being presented orally;
 - a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
 - there are any other factors which make it appropriate for the witness to attend for cross-examination.
- (B) A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person’s knowledge and belief and
- the declaration is witnessed by:
 - a person authorised to witness such a declaration in accordance with the law and procedure of a State; or
 - a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and
 - the person witnessing the declaration verifies in writing:
 - that the person making the statement is the person identified in the said statement;
 - that the person making the statement stated that the contents of the written statement are, to the best of that person’s knowledge and belief, true and correct;
 - that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
 - the date and place of the declaration.
- The declaration shall be attached to the written statement presented to the Trial Chamber.
- (C) A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:
- is so satisfied on a balance of probabilities; and
 - finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability.
- (D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.

¹ *Krnjelac*, IT-97-25-T; *Kunarac et. al.*, IT-96-23-T & IT-96-23/1-T.

the form of transcripts of evidence given by a witness in other Tribunal proceedings (Rule 92 *bis*(D)). Rule 92 *bis*(A) provides that a Trial Chamber "may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment". It provides a non-exhaustive list of factors in favour of admitting evidence in the form of a written statement.

The regime of Rule 92 *bis* is as follows: 1) the Trial Chamber uses its discretionary power to determine whether the proposed materials are admissible (*i.e.* whether they relate or not to "acts and conduct of the accused"); 2) the Trial Chamber determines whether the witnesses should appear for cross-examination.

The admissibility of Rule 92 *bis* materials

The Appeals Chamber in the *Galic* case dealt extensively with the nature of the "acts and conduct of the accused".³ It also held that "the proximity to the Accused of the acts and conduct which are described in the written statement is relevant to the Trial Chamber's discretion in deciding whether the evidence should be admitted in written form at all" and that "[w]here the evidence is so pivotal to the prosecution case, and where the person whose acts and conduct the written statement describes is so proximate to the accused, the Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form".⁴

Considering the above-mentioned criteria, the Trial Chamber held that the transcripts were admissible under Rule 92 *bis*. It found that the evidence contained in the transcripts did not go to the acts and conduct of the Accused, that the evidence was not so pivotal to the Prosecution case or so proximate to the Accused that the Chamber should consider exercising its discretion to exclude the transcripts from admission. It further found that "[w]hether the earlier Trial Chamber accepted the evidence is irrelevant".⁵

Cross examination of the witnesses

The applicable test

The Trial Chamber first dealt with the witnesses who the Prosecution conceded "quite properly" should appear for cross-examination, the issues at stake being "live"⁶ to the parties (the role of the JNA and Serb paramilitaries in the takeover of municipalities and villages in Croatia and Bosnia and Herzegovina). It required these witnesses to attend for cross-examination and held that the Accused would not be limited to the areas of evidence he has shown to be in issue, but will be limited only by the requirement to avoid repetition and the time constraints imposed by the Trial Chamber.

The Trial Chamber then turned to the remaining witnesses whose statements the Prosecution sought to have admitted without cross-examination. According to the Trial Chamber in *Sikirica*, the applicable test is whether the transcript went to proof of a critical element of the Prosecution's case against the accused and whether the cross-examination in the other proceedings dealt adequately with the issues relevant to the defence in the current proceedings.⁷ According to the present Trial Chamber, another

matter for consideration to allow cross-examination is whether the evidence relates to a "live and important issue between the parties, as opposed to a peripheral or marginally relevant issue".⁸ The Trial Chamber also took into account the finding of the Appeals Chamber in the *Galic* Decision that the proximity to the accused of the acts and conduct described in the evidence is relevant to the question of whether the witness should be required to attend for cross-examination.⁹ Finally, the present Trial Chamber considered a decision of the Appeals Chamber in *Aleksovski* setting the ratio for admitting transcripts without cross-examination. A ground for admitting the transcript without cross-examination is whether the witness was extensively cross-examined in the previous proceedings by an accused with a common interest.¹⁰

The Trial Chamber considered all the elements of the test and found that cross-examination was not needed. In doing so it also specified that the extensive character of a cross-examination is not a matter of quantity but of adequacy, which "cannot be calculated to a nicety" but can be inferred from the "length and subject-matter" of the cross-examination.

Cross-examination and the need to protect victims and witnesses

In respect of the two witnesses who had been victims of multiple rapes, the Trial Chamber recalled that the protection and privacy of witnesses appearing before it is an affirmative one and that in determining the appropriate measures in a case the Trial Chamber must balance the rights of the accused to a fair and public trial and the protection of victims and witnesses.¹¹ It held that "[c]ross-examination should not be permitted mechanically and as a matter of course" and that "[w]here the rights of the accused are protected [...] by earlier cross-examinations, the balance [...] should be struck on the side of the victims and witnesses". It therefore found a further reason in the present case not to call these witnesses: avoiding the risk of further traumatising.

As a final observation, the Trial Chamber recalled that in circumstances where issues arise later in the trial that call into question aspects of the testimony given in prior proceeding the witness can be called and subjected to cross examination, which possibility is "a discretion that always resides with the Trial Chamber".

Dissenting Opinion of Judge Patrick Robinson

Judge Robinson joined the majority Decision that all the transcripts were admissible but is of the view that all the witnesses concerned should have been subject to cross-examination. In his Opinion, he explains why the discretionary power given to the Chamber should be exercised in favour of cross-examination with regard to the vast majority of Motions for the admission of transcripts.

(E) Subject to Rule 127 or any order to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

³ *Galic*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) ("*Galic* Decision"), 7 June 2002, *Judicial Supplement* No. 34.

⁴ *Galic* Decision, para. 13.

⁵ Para. 26. In their Observations, the *Amici* submitted that there was no evidence before the Trial Chamber that the testimony of the witnesses was accepted as reliable evidence of probative value by the previous Trial Chambers (*Amici* Observation, para. 13).

⁶ See *infra* note 8 and text accompanying note.

⁷ *Sikirica et. al.*, IT-95-8-T, Decision on Prosecutor's Application to Admit Transcripts under Rule 92 *bis*, 23 May 2001, para. 4, *Judicial Supplement* No. 24.

⁸ *Milosevic*, IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92 *bis*, 21 March 2002, paras. 24-5, *Judicial Supplement* No. 31 *bis*. In this Decision, the Trial Chamber also used the term "critical element of the Prosecution's case".

⁹ *Galic* Decision, para. 13.

¹⁰ *Aleksovski*, IT-95-14/1-AR73, 16 February 1999, para. 25, *Judicial Supplement* No. 2.

¹¹ *Tadic*, IT-94-1-T, 31 July 1996, p. 4.

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

Trial Chamber I (Judges Liu [Presiding], Vassylenko & Argibay)

“DECISION ON INDEPENDENT COUNSEL FOR VIDOJE BLAGOJEVIC’S MOTION TO INSTRUCT THE REGISTRAR TO APPOINT NEW LEAD COUNSEL AND CO-COUNSEL”

3 JULY 2003

Assignment of co-counsel - Withdrawal of counsel - Decisions of counsel against the wishes of an accused.

Assignment of co-counsel: there is no accused’s right to have co-counsel. It falls within the discretion of the Registrar to appoint a co-counsel in the interests of justice upon a request by the lead counsel. While it certainly is a more favourable situation when lead counsel and an accused can agree on the selection of co-counsel, barring evidence that the Accused had a conflict of interest with the proposed co-counsel or that he/she was manifestly unqualified or incompetent, or, that through his/her performance as legal assistant, proposed co-counsel demonstrated that he/she was ineffective or uninterested in being a zealous advocate for the Accused, lead counsel’s choice will be considered as a valid one. It is for the Accused to present evidence of such factors.

Withdrawal of counsel: the Registrar is vested with the discretion to withdraw the assignment of counsel upon the request of an accused. If such withdrawal is not seen to be in the interests of justice, the Registrar has the discretion to refuse to withdraw counsel. The burden of proof is squarely on the person requesting the withdrawal of assigned counsel to demonstrate good cause.

Decisions of counsel against the wishes of an accused: in what circumstances a given counsel decides to take a decision that may be against the wishes of his/her client because that counsel, being competent and under professional obligations, genuinely believes that the decision is in the best interests of the client is largely a question for counsel, and only counsel to answer. The Trial Chamber must satisfy itself “only” that the counsel made this decision in light of his obligations under the Rules, the Directive and the Code, namely the duty of loyalty, honesty, competency, skill and care, with open communication, and the overarching duty to act in the best interests of the client.

Procedural Background

- On 10 August 2001, Vidoje Blagojevic (“the Accused”) was transferred to the United Nations Detention Unit.
- On 31 August 2001, in accordance with a request from the Accused, Michael Karnavas was appointed lead counsel for the Accused.¹
- On 25 September 2002, in accordance with a request from Mr. Karnavas, the Registrar appointed Suzana Tomanovic co-counsel for the Accused.²
- At the 27 November 2002 Status Conference, the Accused informed the pre-trial Judge of some problems with his Defence. At the *ex parte*³ and closed-session hearing held the same day (“November Hearing”), the Accused explained that his complaint concerned the assignment of co-counsel which he stated “was not carried out pursuant to my suggestion and with my consent”. He declared that this would have “serious consequences”.⁴ He expressed his belief that lead counsel and co-counsel “have to be elected and assigned in accordance with the request and the interests of the client”. He informed the pre-trial Judge that he had sent a letter to the Registry on 16 September 2002 in which he had recommended another person (“Third Person”) as co-counsel. He asked the Registry to explain him in writing why his suggestion had been refused.⁵ A representative of OLAD informed the Trial Chamber that she had met with the Accused to explain to him that the Third Person did not fulfil the criteria for appointment and that Suzana Tomanovic’s appointment did

conform with the Directive on Assignment of Defence Counsel (“Directive”) as amended on 12 July 2002,⁶ as it is for lead counsel to select co-counsel.

- On 9 December 2002, Trial Chamber II denied the Accused’s motion to have his co-counsel replaced as no good cause had been shown requiring it to intervene in the Registrar’s decision.⁷ It found that both Lead counsel and co-counsel had been appointed in conformity with the Rules of the Tribunal and the Directive⁸ and that the Accused’s request to have his co-counsel removed stemmed from his desire to have the Third Person assigned and was “not due to any misconduct, incompetence or any conflict of interest on the part of the co-counsel”.⁹ The Trial Chamber found that no grounds had been identified that would amount to an “insufficient atmosphere of trust between the Accused and the defence team or which would otherwise show that co-operation between the Accused and his team is no longer possible”.¹⁰ No appeal or motion for certification to appeal from the Trial Chamber Decision was lodged by the Accused.
- At the 27 March 2003 Status Conference, the Accused again raised the issue. After the Status Conference, an *ex parte* hearing¹¹ was held (“March Hearing”), at which the Accused asserted that while the matter of the assignment of his counsel had been resolved in accordance with the Rules, it had not been resolved in accordance with his rights, as he understood them to be. The pre-trial Judge heard all the parties and held that it was for the Registrar to make a decision on the merits. The pre-trial Judge further stated that, after the decision by the Registrar, it would be for the Trial Chamber, based on its inherent powers to intervene in exceptional cases, to decide on whether or not it was had to come to a conclusion based on the submissions.

- On 8 April 2003, the Registrar issued a decision (“Registrar’s Decision”) in which he refused to replace co-counsel or Lead

¹ Decision by the Registrar Assigning Counsel as of 31 August 2001, dated 3 September 2001 and filed 5 September 2001. The initial appointment of Mr. Karnavas was for 120 days, pending the review of Mr. Blagojevic’s financial status. The appointment of Mr. Karnavas was renewed on 24 December 2001.

² Decision by the Registrar Assigning Counsel as of 25 September 2002, dated 2 October 2002 and filed 3 October 2002. The Decision states: “Considering that on the basis of Article 16 (C) of the Directive, the Registrar may upon a request of the lead counsel, assign a second counsel in the interests of justice.”

³ At the hearing, defence counsel for Mr. Blagojevic, the Prosecution and representatives of the Registry/Office of Legal Aid and Detention Matters section (“OLAD”) were present.

⁴ November Hearing, Transcripts (“T.”) 107.

⁵ *Ibid.*, T. 110.

⁶ IT-73/Rev.9.

⁷ Decision on Oral Motion to Replace Co-Counsel, 9 December 2002 (“Trial Chamber Decision”).

⁸ Trial Chamber Decision, page 4.

⁹ *Ibid.*, pages 4-5.

¹⁰ *Ibid.*, page 6.

¹¹ Present at the hearing were the Accused, Counsel and representatives of the Prosecution.

counsel. He found that the Accused "ha[d] not shown any substantive grounds relating to the performance or professional ethics of Ms. Tomanovic justifying a replacement; that no change in circumstances had taken place since the Trial Chamber's Decision of 9 December 2002; and that to replace co-counsel at this point in the proceedings may cause prejudice to the Accused by having the potential to cause, *inter alia*, a delay in the proceedings and thereby adversely affect his right to be tried expeditiously". No appeal of the Registrar's Decision was lodged by the Accused.

- At the Pre-Trial Conference held on 5 May 2003, the Accused contended that he did not have a lawyer present, as he had dismissed Mr. Karnavas. The Trial Chamber informed him that it had, to date, found no reason to change his Defence team and that it would ask the Registrar to assign to him an independent counsel to consult on the matter and assist him in drafting a motion should he wish to do so. The Trial Chamber also notified him that his present Counsel would continue working with him.

- On 23 May 2003, in keeping with an Order of the Trial Chamber of 9 May 2003,¹² the Registrar appointed Mr. Jan Sjöcrona independent legal counsel ("Independent Counsel") for the Accused. That same day, the Trial Chamber ordered that an *ex parte* and closed session hearing be held on 29 May 2003 in order to discuss the matter, with the Accused represented by Independent Counsel.

- At the 29 May 2003 hearing ("May Hearing"), through the Independent Counsel, the Accused asked for current counsel to be withdrawn and a new legal team to be appointed. He alleged *inter alia* a lack of trust in his Defence and a subsequent breakdown in communication.

- On 5 June 2003, Independent Counsel filed an *ex parte* and confidential Motion for the Registrar to appoint a new lead and co-counsel.¹³

- On 11 June 2003, the Registrar filed a confidential and *ex parte* response to the May Hearing and the Motion.¹⁴

- On 12 June 2003, the Prosecution filed its response on a confidential and *ex parte* basis.¹⁵

- On 16 June 2003, Counsel¹⁶ filed their Response to the Motion on a confidential and *ex parte* basis ("Counsel's Response").¹⁷ Following the filing of Counsel's Response, the Trial Chamber ordered Independent Counsel, if he wished to do so, to file a reply by 27 June 2003.¹⁸ It denied Independent Counsel's request to file a reply on 18 August 2003.

The Decision

The Trial Chamber denied the Motion.¹⁹ It ordered that:

¹² Order on the Appointment of Independent Legal Counsel ("Appointment Order of Independent Counsel"), 9 May 2003.

¹³ Independent Counsel for Vidoje Blagojević's Motion to Instruct Registrar to Appoint New Lead and Co-counsel ("Motion"). On 6 June 2003, the Trial Chamber lifted the confidentiality of the Motion.

¹⁴ Motion of the Registrar ("Registrar's Response"). The Trial Chamber lifted the *ex parte* nature of the Registrar's Response on 12 June 2003.

¹⁵ Prosecution's Response to Independent Counsel for Vidoje Blagojević's Motion to Instruct Registrar to Appoint New Lead and Co-Counsel ("Prosecution's Response"). The Trial Chamber lifted the *ex parte* nature of the Prosecution's Response in relation to the Accused, Independent Counsel, and Counsel on 13 June 2003.

¹⁶ The Trial Chamber refers to Michael Karnavas as "lead counsel", to Suzana Tomanovic as "co-counsel" and to both of them together as "Counsel".

¹⁷ Counsel's and Co-Counsel's Response to the Motion by Independent Counsel, 16 June 2003.

¹⁸ In the same Order, the Trial Chamber lifted the *ex parte* nature of Counsel's Response.

¹⁹ On 25 July 2003, the Accused filed a confidential and *ex parte* request for certification to appeal the Decision pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules"). His request was granted by Trial Chamber I that same day (Decision on Vidoje Blagojević's Request for Certification). On 15 September 2003, the Appeals Chamber dismissed the Appeal (IT-02-60-AR73.4, Decision on Appeal by Vidoje Blagojević to Replace his Defence Team). It considered that

1. the Registrar shall appoint, in consultation with the Accused, a legal representative to assist the Accused and his defence team in the preparation of his defence before the Tribunal in accordance with the terms specified below no later than 10 days after the issuance of this Decision;
2. the legal representative, who shall not fall under the lead counsel's authority or be remunerated from the resources currently granted to Counsel, must share Counsel's objectives in ensuring that the Accused receives a fair and expeditious trial and a competent, effective and zealous defence; towards that end, the legal representative shall work with the Accused and Counsel, not simply as a "bridge" or interlocutor, but as a temporary addition to the Accused's defence team, to contribute as the Accused, primarily, and Counsel, see fit to ensure the proper working and effective presentation of the Accused's defence. It is primarily, therefore, for the Accused, through his actions, to assess *how* effective his Counsel can be in ensuring that his rights are protected and interests are promoted; and
3. the terms of the assignment of the legal representative are:
 - the legal representative shall be a person who meets the qualifications of counsel pursuant to Rule 44 and Rule 45 of the Rules, and is currently on the list of counsel maintained by the Registrar pursuant to Rule 45 of the Rules;
 - the legal representative shall be assigned for a period of up to three months;
 - the legal representative is a complement to the defence team and is not a replacement; the Accused must work with his Counsel, through whatever means he finds most appropriate, while recognising that the legal representative's appointment is a *temporary* and extraordinary measure to normalise the situation;
 - the legal representative has the right to appear in court;
 - the legal representative is bound by lawyer-client privilege;
 - in the event that the Accused has a specific issue he would like to raise before the Trial Chamber, he may do so through Counsel or, upon being granted leave, through the legal representative;
 - the legal representative will not have the right to examine and cross-examine witnesses; and
 - the legal representative shall be paid at a rate between legal assistant and co-counsel, to be determined by the Registry.

The Reasoning

The admissibility of the Motion

The Trial Chamber recognised that the Registrar has primary responsibility in the matter of assignment of counsel²⁰ but recalled that the Trial Chamber, pursuant to its inherent power and its duty to guarantee a fair trial and the proper administration of justice as set forth in the Statute, may review Registrar's decisions on assignment of counsel.²¹ It therefore found itself competent to review the Registrar's Decision of 8 April 2003.

Assignment of co-counsel

The relevant provision is Article 16 of the Directive on Assignment of Counsel ("Directive") which states that an accused "shall be entitled to have *one* counsel assigned to him and that counsel shall handle all stages of the procedure and all matters arising out of the conduct of the [...] accused's defence, including

the Appellant has failed to demonstrate any error of the Trial Chamber in the Impugned Decision that would warrant the interference of the Appeals Chamber and that it was in the interests of justice that the Appellant retain his assigned Counsel.

²⁰ See *inter alia* Blagojević, IT-02-60-PT, Decision on Oral Motion to Replace Co-Counsel, 9 December 2002, *Judicial Supplement* No. 38.

²¹ *Ibid.* See also Hadzihasanović et al., IT-01-47-PT, Decision on the Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-counsel to the Accused Kubura, 26 March 2002, *Judicial Supplement* No. 31 bis.

where two or more crimes are joined in one indictment" (Article 16(A)); that "[i]n the interests of justice and at the request of the person assigned as counsel, the Registrar *may* [...] assign a second counsel to assist the lead counsel. The counsel first assigned shall be called the lead counsel" (Article 16(C)); that "[u]nder the authority of lead counsel, who is responsible for the defence, co-counsel may deal with all stages of the procedure and all matters arising out of the representation of the accused or of the conduct of his defence [...]" (Article 16(D)).²²

The Trial Chamber explained that the provision on assignment of co-counsel was written to the Directive upon a proposal by the Registry during the June 1996 Plenary. It referred to the Registry's memorandum which explained why such a provision was necessary ("Registry's Memorandum").²³ According to the memorandum, co-counsel was clearly seen as a resource and assistant for lead counsel²⁴ and not intended to be a "second counsel" for the accused.²⁵ The Registry submitted that by inserting the amendment in Article 16 instead of creating a new article, it was clear that it was "not for the Accused to apply for a second counsel, but for Lead Counsel to do so" and that "once appointed, co-counsel is firmly under the supervision and authority of Lead Counsel, who has the responsibility for the defence team".²⁶

The Trial Chamber held that "[a]s evident from the Statute, Rules and the Directive, and recently affirmed in a decision by the President of the Tribunal, there is no right for the Accused to have co-counsel; it falls within the *discretion* of the Registrar to appoint a co-counsel in the interests of justice and upon a request by the Lead Counsel".²⁷ It found that the appointment of Ms. Tomanovic did conform with the requirements of the Rules and the Directive and that Lead Counsel had acted in a manner consistent with his obligations under the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal ("Code").²⁸ In reaching this finding, the Trial Chamber attached particular significance to the fact that Mr. Karnavas had "*communicated* his proposal to appoint Ms. Tomanovic as co-counsel from the time he was under consideration as lead counsel and *informed* the Accused of the status of his defence team".²⁹

The Trial Chamber held that "[w]hile it certainly is a more favourable situation when lead counsel and an accused can agree on the selection of co-counsel, barring evidence that the Accused had a conflict of interest with the proposed co-counsel or that she was manifestly unqualified or incompetent, or, that through her performance as legal assistant, proposed co-counsel demonstrated that she was ineffective or uninterested in being a zealous advocate for the Accused, lead counsel's choice will be considered as a valid one".³⁰ It found that the Accused had failed to present evidence of such factors and, consequently, that the selection and appointment of Ms. Tomanovic as co-counsel had to stand.

Withdrawal of counsel

Article 19(A) of the Directive (Suspension and Withdrawal of Counsel) states that in the interests of justice the Registrar may "i. at the request of the accused, or his counsel, withdraw the assignment of counsel; ii. at the request of lead counsel withdraw

²² Emphasis in the original.

²³ Memorandum from the Deputy Registrar to the President of the Tribunal and the Registrar entitled "Proposed amendments to the Directive on the Assignment of Defence Counsel", 21 June 1996.

²⁴ *Ibid.*, page 4: "Conceptually, the Co-counsel should be considered as a resource to the Lead Counsel, rather than as a second counsel assigned to the Accused."

²⁵ *Ibid.*, pages 3-4: "In the situation where assigned counsel needs the assistance of a co-counsel, this amendment allow [for] him to apply to the Registrar for one to be appointed".

²⁶ *Ibid.*, page 4.

²⁷ Para. 79 (emphasis in the original). The Trial Chamber relied on *Brdjanin*, IT-99-36-T, Confidential Order Relating to Lead Counsel's Appeal from Registrar's Confidential Decision of 7 March 2003, 1 April 2003 and *Krajisnik*, Decision by the Registrar, 23 January 2003 (the appointment of co-counsel to assist lead counsel, upon his request, was justified due to "the increase of work resulting from the preparation of the hearing").

²⁸ IT/125/Rev.1, 12 July 2002. See for example Article 12 (Communication) which states that "Counsel shall keep a client informed about the status of a matter before the Tribunal in which the client is an interested party and must promptly comply with all reasonable requests for information".

²⁹ Para. 84 (emphasis in the original).

³⁰ Para. 85.

the assignment of co-counsel". The Trial Chamber held that the Registrar "is vested with the discretion to withdraw the assignment of counsel upon the request of an accused; if such withdrawal is not seen to be interests of justice, the Registrar has the discretion to refuse to withdraw counsel".³¹ The Registrar has granted such request by accused either when it found that "exceptional circumstances" existed³² or when assigned counsel had agreed that to his or her withdrawal was justified and in the interests of justice.³³ In some other cases, the Registrars as well as Trial and Appeals Chambers of both the ICTY and the International Criminal Tribunal for Rwanda ("ICTR"), have refused accused's requests to withdraw counsel.³⁴ The Trial Chamber inferred from these cases that "the burden of proof is squarely on the person requesting the withdrawal of assigned counsel to demonstrate good cause for the withdrawal of assigned counsel".³⁵

In the present case, the Registrar denied the request as the Accused had not provided grounds for the withdrawal of Counsel. The Trial Chamber did not find that there were factors which the Registrar had failed to take into consideration when determining whether sufficient grounds for the disqualification or dismissal of counsel existed.³⁶

Decisions of counsel against the wishes of an accused

While rejecting the alleged breakdown in communication between the Accused and his Counsel, the Trial Chamber held that "in what circumstances a given counsel decides to take a decision that may be against the wishes of his or her client *because* that counsel, being competent and under professional obligations, genuinely believes that the decision is in the best interests of the client is largely a question for counsel, and only counsel to answer. The Trial Chamber must satisfy itself 'only' that the counsel made this decision in light of his obligations under the Rules, the Directive and the Code, namely the duty of loyalty, honesty, competency, skill and care, with open communication, and the over arching duty to act in the best interests of the client".³⁷

The Trial Chamber denied the Motion and decided that Mr. Karnavas would remain Mr. Blagojevic's Lead Counsel and that Ms. Tomanovic would continue to act as co-counsel. Nevertheless, given "the reality that the Accused's right to a fair trial may be compromised due to his refusal to meet with, instruct and make use of the counsel that have been assigned to him",³⁸ the Trial Chamber decided to order a "somewhat extraordinary measure".³⁹ In an effort to "promote better communication between the accused and counsel",⁴⁰ it instructed the Registrar to appoint, in consultation with the Accused, a legal representative to assist him and his defence team in the preparation of his case.

³¹ Para. 86.

³² *Martinovic*, IT-98-34-A, Decision by the Registrar, 19 May 2003.

³³ *Delalic et al.*, IT-96-21-T, Decision on Request by Accused Mucic for Assignment of New Counsel, 24 June 1996.

³⁴ The Trial Chamber took note of *Barayagwiza* Decision, in which the Trial Chamber considered the fact that the accused did not lack confidence in his lawyers and that he did not argue that they were incompetent to be relevant in deciding upon the motion for withdrawal of counsel (*Barayagwiza*, ICTR-97-19-T, Decision of Defence Counsel Motion to Withdraw, 2 November 2000). It also referred to *Delalic et al.*, IT-96-21-A, Order Regarding Esad Landzo's Request for Removal of John Ackerman as Counsel on Appeal for Zejnir Delalic, 6 May 1999, in which the Accused requested that lead counsel for a co-accused be withdrawn on the basis of a potential conflict of interest.

³⁵ Para. 86.

³⁶ In paragraph 92 of the Decision, the Trial Chamber emphasised that "what is relevant to its consideration of all counsel appearing before the Tribunal are their *legal* qualifications, as reflected in Rule 44 and Rule 45 of the Rules, including reasonable experience in criminal or international law". In relation to claims of ineffective assistance of counsel, it recalled that what must be demonstrated is that *inter alia* "Counsel failed to act with competence, skill, care, honesty and loyalty; Counsel failed to diligently and promptly protect the client's best interests; and failed to keep the client informed about the status of his case", as stated in Articles 10-12 of the Code (para. 93).

³⁷ Para. 104.

³⁸ Para. 112.

³⁹ Para. 114.

⁴⁰ *Ibid.*

AVAILABLE DOCUMENTS

- JULY/AUGUST 2003 -

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

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DATE	CASE	NO.	DOCUMENT NAME
01/07/03	KRSTIC	IT-98-33-A	DECISION ON APPLICATION FOR SUBPOENA
02/07/03	MILOSEVIC	IT-02-54-T	DECISION ON CONFIDENTIAL <i>EX PARTE</i> PROSECUTION MOTION FOR PROTECTIVE MEASURES FOR WITNESSES TESTIFYING DURING THE CROATIA PHASE OF THE TRIAL
03/07/03	MILUTINOVIC <i>ET AL.</i>	IT-99-37-AR65.3	DECISION REFUSING MILUTINOVIC LEAVE TO APPEAL
03/07/03	BLAGOJEVIC	IT-02-60-PT	DECISION ON INDEPENDENT COUNSEL FOR VIDOJE BLAGOJEVIC'S MOTION TO INSTRUCT THE REGISTRAR TO APPOINT NEW LEAD AND CO-COUNSEL
03/07/03	NASER ORIC	IT-03-68-I	DECISION ON PRELIMINARY MOTION REGARDING DEFECTS IN THE FORM OF THE INDICTMENT
04/07/03	BLAGOJEVIC	IT-02-60-PT	DECISION ON REQUEST FOR CONSIDERATION OF THE DECISION OF 1 JULY 2003, OR REQUEST FOR LEAVE TO APPEAL AGAINST THAT DECISION
08/07/03	MILUTINOVIC <i>ET AL.</i>	IT-99-37-PT	DECISION ON MOTION FOR ADDITIONAL FUNDS
11/07/03	MEJAKIC <i>ET AL.</i>	IT-02-65-PT	DECISION ON DEFENDANT DUSAN FUSTAR'S EMERGENCY MOTION SEEKING TEMPORARY PROVISIONAL RELEASE TO ATTEND THE 40 DAY MEMORIAL OF HIS FATHER'S DEATH
16/07/03	HADZIHASANOVIC <i>ET AL.</i>	IT-95-14-AR72	DECISION ON INTERLOCUTORY APPEAL CHALLENGING JURISDICTION IN RELATION TO COMMAND RESPONSIBILITY
18/07/03	HADZIHASANOVIC <i>ET AL.</i>	IT-95-14-A	DECISION ON JOINT DEFENCE ORAL MOTION FOR RECONSIDERATION OF THE "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"
25/07/03	NASER ORIC	IT-03-68-I	DECISION ON APPLICATION ON PROVISIONAL RELEASE
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01/08/03	HADZIHASANOVIC <i>ET AL.</i>	IT-95-14-A	DECISION ON REQUEST FOR LEAVE TO FILE AN <i>AMICUS CURIAE</i> BRIEF
05/08/03	KRSTIC	IT-98-33-A	DECISION ON APPLICATIONS FOR ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL
20/08/03	SLJIVANCANIN	IT-95-13/1	DECISION ON ASSIGNMENT OF DEFENCE COUNSEL
26/08/03	MILOSEVIC	IT-02-54-T	DECISION TO LIFT THE CONFIDENTIAL STATUS OF THE PLEA AGREEMENT IN THE ERDEMOVIC CASE