

PRESIDENT

**MUSLIU
IT-03-66**

- "DECISION ON ASSIGNMENT OF DEFENCE COUNSEL"
21 OCTOBER 20032

APPEALS CHAMBER

**MILOSEVIC
IT-02-54**

- "DECISION ON INTERLOCUTORY APPEAL ON THE ADMISSIBILITY OF EVIDENCE-IN-CHIEF IN THE FORM OF WRITTEN STATEMENTS"
30 SEPTEMBER 20033
Dissenting Opinion of Judge Hunt
Separate Opinion of Judge Shahabuddeen
- "DECISION ON THE PROSECUTION'S INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S 10 APRIL 2003 DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS"
28 OCTOBER 20035
Dissenting Opinion of Judge Hunt
Separate Opinion of Judge Shahabuddeen

TRIAL CHAMBERS

**BRDJANIN
IT-99-36**

- "DECISION ON THE DEFENCE 'OBJECTION TO INTERCEPT EVIDENCE'"
3 OCTOBER 20037

Summaries of the Krnojelac Appeals Judgement (IT-97-25-A, 17 September 2003) and of the Simic et al. Judgement (IT-95-9, 17 October 2003) are being prepared.

Meanwhile, it is recalled that press releases were published on 17 September and 17 October, reproducing the summaries read out in court by Presiding Judge Jorda and Presiding Judge Mumba respectively.

These summaries are available upon request from the Public Information Services or on the Tribunal's website at www.un.org/icty (Judgements page).

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PRESIDENT

The Prosecutor v. Isak Musliu - Case No. IT-03-66-PT

Judge Theodor Meron, President

"DECISION ON ASSIGNMENT OF DEFENCE COUNSEL"

21 OCTOBER 2003

Appeal by Counsel against the decision of the Registrar to remove him from the Rule 45(B) list for failure to satisfy the language requirements - Exceptions to the language requirement in the "interests of justice"

Appeal by Counsel against the decision of the Registrar to remove him from the Rule 45(B) list for failure to satisfy the language requirements: Article 14 of the Directive does not grant Counsel a right of appeal to the President from a decision of the Registrar to remove Counsel from the list where the basis of the removal is the Counsel's failure to satisfy the requirements of Article 14(A).

Exceptions to the language requirement in the "interests of justice": the "interests of justice" requirement of Article 14(A) cannot be satisfied in any case where Counsel does not speak the native language of the accused.

Procedural Background

Mr Klaus W. Kirchner sought to appeal against the Registrar's decision to remove him from the list of Counsel under Rule 45(B)¹ of the Rules of Procedure and Evidence ("Rules") and against the Registrar's refusal to assign him as lead Counsel to Isak Musliu ("the Accused").² The basis of the Registrar's decision was that he could not be satisfied that Mr Kirchner met the language requirement under Article 14(A)(iii) of the Directive on Assignment of Defence Counsel ("Directive")³ and Rule 44(A).⁴

Decision

The President determined that, under Article 14 of the Directive, Counsel has no right of appeal to the President against the decision of the Registrar to remove him from the Rule 45(B) list for failure to satisfy the language requirements, and that an appeal pursuant to Rule 44(B)⁵ must fail as Counsel does not speak the language of the Accused. He dismissed the appeal.

¹ Rule 45(B) states: "(B) A list of Counsel who, in addition to fulfilling the requirements of Rule 44, have shown that they possess reasonable experience in criminal and/or international law and have indicated their willingness to be assigned by the Tribunal to any person detained under the authority of the Tribunal lacking the means to remunerate Counsel, shall be kept by the Registrar".

² In a decision dated 8 September 2003, the Registrar decided to withdraw the assignment of Mr Bajram Krasniqi as lead-Counsel to the Accused. Mr Krasniqi was not on the Rule 45 list as he did not speak one of the two working languages of the Tribunal. He had however been assigned on 25 March 2003 under the Rule 44(B) exception, i.e. "in the interests of justice" as he spoke the language of the Accused. In the withdrawal decision, the Registrar noted that "the replacement Counsel should [...] be fully proficient in one of the working languages of the Tribunal in order to avoid delays".

³ Article 14(A)(iii) states: "(A) Any person may be assigned as Counsel if the Registrar is satisfied that he is admitted to the list of Counsel envisaged in Rule 45 (B) of the Rules. A person is eligible for admission to the list if: iii. he speaks one of the two working languages of the Tribunal, except if the interests of justice do not require this: [...]."

⁴ Rule 44(A) states: "(A) 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."

⁵ Rule 44(B) states: "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."

Reasoning

Exception to the language requirement "in the interests of justice"

Rule 44(A) of the Rules and Article 14(A) of the Directive require that a Counsel speak one of the two languages of the Tribunal (English or French) in order to be included on the Rule 45(B) list. There are however two exceptions to the requirement: Article 14(A)(iii) which envisages such an exception "in the interests of justice" and Rule 44(B) which permits such an exception "when the interests of justice so demand" and when Counsel "speaks the native language of the suspect or accused".

The President held that "the interests of justice requirement of Article 14(A) could not be satisfied in any case where Counsel did not speak the native language of the accused".⁶

Appeal by Counsel against the decision of the Registrar to remove him from the Rule 45(B) list for failure to satisfy the language requirements

Based upon Mr Kirchner's communications with the Registry, the Registrar determined that he was not sufficiently proficient in English to satisfy the language requirement and accordingly removed him from the Rule 45(B) list pursuant to Article 14(C).⁷ Following that removal, Counsel appealed to the President.

The President held that "Article 14 of the Directive does not grant Counsel a right of appeal to the President from a decision of the Registrar to remove Counsel from the list where the basis of the removal is the Counsel's failure to satisfy the requirements of Article 14(A)". He confirmed, however, that there is a right of appeal to the President under Rule 44(B).⁸

As Counsel in this case neither had sufficient proficiency in either English or French nor speaks the language of the Accused, the President dismissed the appeal. He nevertheless expressed his concern that the Registrar's decision to remove Counsel was made

⁶ Para. 2.

⁷ Article 14(C) states: "The Registrar must remove the name of Counsel from the list referred to in Rule 45 (B) where Counsel no longer satisfies the requirements of Article 14 (A)."

⁸ See *Veselin Sijivancanin*, IT-95-13/1-PT, Decision on Assignment of Counsel ("*Sijivancanin* Decision"), 20 August 2003, in which the President held that "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" (para. 22). See *Judicial Supplement* No. 43.

without Counsel being granted the opportunity to be heard.⁹ He held that if Counsel could establish to the satisfaction of the Registrar that he did meet the language requirements for inclusion

⁹ In the *Slijvančanin* Decision, the President held that 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 and that the factual determination was "an administrative fact-finding procedure" which had to meet the "standards for judicial review of administrative decisions" as set by the Appeals Chamber in the *Kvočka et al.*, IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic, 7 February 2003, *Judicial Supplement* No. 40). One of the standards is that: "the administrative decision will [...] be quashed if the Registrar has

on the Rule 45(B) list, the proper course for him to follow was to provide the necessary evidence establishing this fact and to request the Registrar to consider his request based on such supporting evidence. -

failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision". In the *Slijvančanin* Decision, the President found that the Registrar failed to afford Mr. Slijvančanin an opportunity to respond to the evidence in support of the dismissal of his request to have his preferred attorney assigned and that such failure amounted to "a failure to act with procedural fairness". He decided to quash the Registrar's decision and to remand the matter to him.

APPEALS CHAMBER

The Prosecutor v. Slobodan Milošević - Case No. IT-02-54-AR73.4

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

"DECISION ON INTERLOCUTORY APPEAL ON THE ADMISSIBILITY OF EVIDENCE-IN-CHIEF IN THE FORM OF WRITTEN STATEMENTS"

30 SEPTEMBER 2003

Scope of Rule 92 bis - Safeguards in the admission of written statements under Rule 89(F) - Admission of written statements under Rule 89(F) and the interests of justice

Scope of Rule 92 bis: where the witness is present before the Court and orally attests to the accuracy of the statement, the evidence entered into the record cannot be considered to be exclusively written within the meaning of Rule 92 bis. The testimony of the witness constitutes a mixture of oral and written evidence. The appearance of the witness in court to attest to a written statement is a crucial factor which renders Rule 92 bis inapplicable

Safeguards in the admission of written statements under Rule 89(F): the fact that there should be greater safeguards when the evidence relates to the acts and conduct of the accused is a factor that a Trial Chamber may take into account in determining whether to admit, or the weight to attach to, written evidence under Rule 89(F). Nonetheless, the appearance of the witness in court to orally attest to the accuracy of the tendered statement is an important safeguard in itself because the witness is certifying the accuracy of the statement before the court and is available to answer questions from the bench.

Admission of written statements under Rule 89(F) and the interests of justice: a determination of the "interests of justice" under Rule 89(F) must be made by the Trial Chamber in relation to each individual witness, in light of not only the surrounding circumstances, but also the evidence to be given by the witness.

Procedural Background

- On 16 April 2003, Trial Chamber III denied a Prosecution motion to be allowed to submit the evidence-in-chief of some of its witnesses in writing, meaning that witnesses would provide statements or summaries of statements signed by them as being true and would thereafter be available for cross-examination.¹ It held that "under the present Rules, such written statements are only admissible under Rule 92 bis and by no other means".²
- On 6 May 2003, Trial Chamber III granted the Prosecution's leave to appeal the *Decision of the Trial Chamber* pursuant to Rule 73(C) of the Rules of Procedure and Evidence ("Rules").³ The relief sought by the Prosecution was *inter alia* a finding that written statements are not only admissible under Rule 92 bis but

¹ The application was first made in the confidential "Report by the Prosecution Concerning the Time Remaining for the Prosecution Case" filed on 11 December 2002. It was then reiterated in the confidential "Supplement to Report by the Prosecution Concerning the Time Remaining for the Prosecution Case and Request for Hearing" filed on 10 January 2003. The application is very concisely presented in both filings and was elaborated upon in oral submissions made in open session before the Trial Chamber, on 2 April 2003 (see Transcript 18481-18489).

² *Milošević*, IT-02-54-T, Decision on Prosecution Motion for the Admission of Evidence-in-Chief of its Witnesses in Writing, 16 April 2003 ("*Decision of the Trial Chamber*"), page 2. Judge Kwon appended a Dissenting Opinion in which he expressed his view that the Prosecution's application should have been granted insofar as the contents of the witness statements did not go to proof of the acts and conduct of the accused and the witnesses were available to attest to the truth of the written statements under oath at the International Tribunal and were subject to cross-examination by the Accused.

³ *Milošević*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal against Decisions of the Trial Chamber, 6 May 2003.

also under Rule 89(F) as evidence-in-chief, whereby the witnesses provide statements signed by them as being true, before being available for cross-examination.

Decision

The Appeals Chamber allowed the appeal from the *Decision of the Trial Chamber* insofar as it found that, as a matter of law, the Rules allow for the admission of a written witness statement under Rule 89(F) when the witness: a) is present in court, b) is available for cross-examination and any questioning by the judges, and c) attests that the statement accurately reflects his or her declaration and what he or she would say if examined. It returned the matter to Trial Chamber III for it to consider the admission of evidence in accordance with the present Decision. On 21 October 2003, Judge Hunt appended a dissenting opinion. Judge Shahabuddeen appended a separate opinion on 31 October 2003. Other Judges reserved the right to append opinions to the present Decision.

Reasoning

Applicable law

Under Rule 92 bis, evidence presented in the form of a written statement may be admitted in lieu of oral testimony where the statement goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.⁴ Under Rule

⁴ *Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C) ("*Galić Decision*"), 7 June 2002, para. 10, *Judicial Supplement* No. 34. See also *Milošević*, IT-02-54-T, Decision on Prosecution's Request to Have Written Statement Admitted under Rule 92 bis,

89(F) a Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form. There is no requirement in Rule 89 that the evidence so presented goes only to proof of a matter other than the acts and conduct of the accused.

Connection between Rule 89 and Rule 92 bis

In the *Galic* Decision of 7 June 2002, the Appeals Chamber held that "Rule 92 bis is the *lex specialis* which takes the admissibility of written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89(C)".⁵ In accordance with this ruling, the requirements of Rule 92 bis must be met when a party seeks to have evidence admitted under Rule 89 when the said materials could also be presented under the *lex specialis*. The Appeals Chamber held in the present case that "the prohibition does not extend to material not governed by Rule 92 bis".⁶

Scope of Rule 92 bis

The Appeals Chamber found that "the fact that the witness is present and can orally attest to the accuracy of the written statement is sufficient to place this application beyond the scope of Rule 92 bis" and that "[w]here the witness is present before the Court and orally attests to the accuracy of the statement, the evidence entered into the record cannot be considered to be exclusively written within the meaning of Rule 92 bis".⁷ It held that "[t]he testimony of the witness constitutes a mixture of oral and written evidence" and that "[t]he appearance of the witness in court to attest to a written statement is a crucial factor which renders Rule 92 bis inapplicable".⁸ The reasoning given was that unless the written statement is intended to be *in lieu* of oral evidence, the fact that a written statement has been prepared for the purposes of legal proceedings does not by itself suffice to make it admissible under Rule 92 bis only.⁹

Safeguards in the admission of written statements under Rule 89(F)

The Appeals Chamber held that the fact that there should be greater safeguards when the evidence relates to the acts and conduct of the accused¹⁰ (as in the present instance) is "a factor that a Trial Chamber may take into account in determining whether to admit, or the weight to attach to, written evidence under Rule 89(F)". It nonetheless held that "the appearance of the witness in court to orally attest to the accuracy of the tendered statement is an important safeguard in itself because the witness is certifying the accuracy of the statement before the court and is available to answer questions from the bench".¹¹

Admission of written statements under Rule 89(F) and the interests of justice

Under Rule 89(F), a Chamber may receive the evidence of a witness in written form "where the interests of justice allow". The Appeals Chamber held that "a determination of the 'interests of justice' under Rule 89(F) must be made by the Trial Chamber in relation to each individual witness, in light of not only the surrounding circumstances, but also the evidence to be given by the witness".¹²

21 March 2002, para. 22: "[T]he phrase 'acts and conduct of the accused' in Rule 92 bis is a plain expression and should be given its ordinary meaning: deed and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so". See *Judicial Supplement* No. 31 bis.

⁵ *Galic* Decision, para. 31.

⁶ Para. 10.

⁷ Para. 16.

⁸ *Ibid.* The Appeals Chamber added that the fact that a witness may merely give a brief oral statement to the effect that the written statement is accurate does not alter this conclusion.

⁹ Para. 18 (emphasis in the original).

¹⁰ Argument of the *amici curiae* in para. 11 of their "Amici Brief" (*Milosevic*, IT-02-54-AR73.4, Amici Curiae Reply to Prosecution Motion for the Admission of Evidence-in-Chief of its Witnesses in Writing, 21 May 2003).

¹¹ Para. 19.

¹² Para. 21.

Dissenting Opinion of Judge Hunt¹³

Judge Hunt reviewed the history of Rule 89(F) and Rule 92 bis as well as the previous decisions of the Appeals Chamber on this matter.¹⁴ He insisted on the importance of the Rule 92 bis restriction which stipulates that the evidence so presented must not go to proof of the acts and conduct of the accused or, as a discretionary matter, to the acts or conduct of those in close proximity to the accused. He explained that all the Appeals Chamber jurisprudence concerning the relationship between Rule 89(F) and Rule 92 bis "clearly" demonstrated that: "its view that written statements prepared for use in the proceedings are admissible only where they fall within Rule 92 bis is based on important matters of principle and the fairness of the proceedings, and not merely on utilitarian practical considerations such as the desire to complete cases as quickly as possible" (para. 8). He found the interpretation of the majority of the Appeals Chamber to be "alarming" in two respects:

"First, whereas Rule 92 bis prevents evidence being given in a written form where it goes to proof of the acts and conduct of the accused or (as a discretionary matter) to the acts or conduct of those in close proximity to the accused, the Majority Appeals Chamber Decision will permit evidence to be given in written form which *does* go to such acts and conduct without restriction – unless the Trial Chamber is prepared to exclude it in the exercise of its discretion under Rule 89(F) on the basis that it would be unfair to the accused to admit it. The Majority Appeals Chamber Decision does not address this issue of discretion. Secondly, the evidence relating to the particularly sensitive issue of the acts or conduct of the accused, or of those in close proximity to the accused, will be in a document formulated by the party which calls the witnesses. Again, this is not merely a matter of formality. The prohibition in Rule 92 bis against the use of written statements in relation to this particularly sensitive issue was designed to ensure the reliability of the evidence in relation to it, and to prevent the possibility of the statement placing the best gloss on the evidence which suits that party. It is no answer to such a possibility to say that the witness may be cross-examined on that statement. By that time, the material is already in evidence in an inadmissible and possibly unreliable form, in a way which is clearly directly inconsistent with the policy of Rule 92 bis" (para. 17).

He found that the Appeals Chamber had cited no authority to interpret Rule 92 bis in the way that it did and expressed his fear of an eventual "destruction of the rights of the accused" (para. 20). In his opinion, "it is improper to take the Completion Strategy into account in departing from interpretations which had earlier been accepted by the Appeals Chamber where this is at the expense of those rights". He stated that "[t]his Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials" (para. 22).

Separate Opinion of Judge Shahabuddeen¹⁵

Judge Shahabuddeen explained why all written statements prepared for the purpose of legal proceedings are not admissible only under Rule 92 bis but also under Rule 89(F), and therefore go to proof of facts related to the acts and conduct of the accused. In

¹³ Dissenting Opinion of Judge Hunt on Admissibility of Evidence-in-Chief in the Form of Written Statements, 21 October 2003.

¹⁴ *Kordic & Cerkez*, IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, *Judicial Supplement* No. 18. *Galic*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002 ("Galic Decision"); *Milosevic*, IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, *Judicial Supplement* No. 34.

¹⁵ Separate Opinion of Judge Shahabuddeen Appended to Appeals Chamber's Decision Dated 30 September 2003 on Admissibility of Evidence-in-Chief in the Form of Written Statements, 31 October 2003.

his view, the possibility of calling a witness to appear for cross-examination allowed under Rule 92 *bis* is only a "back-up arrangement". He stated that "the opening sentence of Rule 92 *bis*(A), together with Rule 92 *bis*(A)(ii)(a) and (b) and Rule 92 *bis*(C), shows that in the normal case the witness is absent from court" (para. 6).

As to the possibility of assessing the demeanour of the witness testifying under Rule 89(F), Judge Shahabuddeen found that while the way in which a witness responds to the examination-in-chief is "often more informative with regard to his reliability than his reaction to cross-examination"¹⁶ (para. 13), "cross-examination, to which the witness would be immediately subjected, could redress any disadvantages sufficiently to satisfy the interests of justice" (para. 14).

¹⁶ Quoting *Cross and Tapper on Evidence*, 8th ed. (London, 1995), page 284.

In connection with the fairness of the trial, he stated that "cross-examination should be enough to afford reasonable redress to the fact that the evidence was not given orally, together with the circumstance that it was prepared by one side only and not collected by a neutral investigating judicial officer as in civil law countries" (para. 19). He added that the witness will be subject to re-examination by the moving party and that the Judges may also ask him questions on any part of his written statement and that, as a result, "[t]he substance of the right of the accused to a fair trial will be retained" (para. 19).

Judge Shahabuddeen concluded, *inter alia*, that "it would not be correct for the Appeals Chamber to give priority to the Completion Strategy of the Security Council over the rights of the accused" and that it is "therefore not surprising that that Strategy has not been mentioned in the decision of the Appeals Chamber". He stated that "the reasoning may be microscopically examined, but it leaves no room for a judicial finding that a plainly inadmissible factor has been taken into account" (para. 21).

The Prosecutor v. Slobodan Milosevic - Case No. IT-02-54-AR73.5

Judges Pocar [Presiding], Shahabuddeen, Hunt, Güney and Weinberg De Roca

"DECISION ON THE PROSECUTION'S INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S 10 APRIL 2003 DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS"

28 OCTOBER 2003

Legal test for admission of adjudicated facts under Rule 94(B)

By taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial.

Procedural Background

- On 12 December 2002, the Prosecution requested Trial Chamber II to take judicial notice of adjudicated facts derived from four cases which had been the subject of final appeal decisions.¹
- On 6 February 2003, the *amici curiae* filed their reply and requested that the Trial Chamber deny the Motion.²
- On 2 April 2003, the Prosecution called to the attention of the Trial Chamber the 28 February 2003 Decision in the *Krajisnik* case ("Krajisnik Decision") in which Trial Chamber I took judicial notice of certain facts. Those included the facts whose admission the Prosecution was seeking in the present case.³
- On 10 April 2003, the Trial Chamber rendered its "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts" ("Impugned Decision") in which it admitted some of the facts in question while rejecting the others on the basis that they could have been the subject of "reasonable dispute".⁴

- On 22 April 2003, the Prosecution requested certification to appeal the Impugned Decision. Certification was granted on 6 May 2003. The Trial Chamber took into account the fact that, in the *Krajisnik* Decision, Trial Chamber I had reached a different conclusion and that the issue would benefit from resolution by the Appeals Chamber.⁵
- On 21 May 2003, the Prosecution filed its Interlocutory Appeal.⁶

Decision

The Appeals Chamber returned the matter to the Trial Chamber for it to review the taking of judicial notice of the adjudicated facts in accordance with the present decision. Judge Hunt appended a dissenting opinion and Judge Shahabuddeen a separate opinion. Other judges reserved the right to append opinions.

Reasoning

Legal test for admission of adjudicated facts under Rule 94(B)⁷

The Appeals Chamber considered the legal test for admission of adjudicated facts under Rule 94(B).

¹ *Milosevic*, IT-02-54-T, Prosecution Motion for Judicial Notice of Adjudicated Facts ("Motion"), 12 December 2002.

² *Milosevic*, IT-02-54-T, Amici Curiae Observations on the "Prosecution Notice of Adjudicated Facts" filed on 12 December 2002, 6 February 2003.

³ *Krajisnik*, IT-00-39-PT, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 *bis* ("Krajisnik Decision"), 28 February 2003, *Judicial Supplement* No. 40.

⁴ *Milosevic*, IT-02-54-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 10 April 2003. The Trial Chamber relied on previous applications made under Rule 94(B) and identified the "relevant features" of that rule: (a) the purpose of taking judicial notice is to promote judicial economy and narrow the factual issues; (b) a balance between judicial economy and the right of the accused to a fair trial must be achieved; (c) Trial Chambers may take judicial notice of factual findings in other cases but not of the legal characterisation of such facts; (d) the Trial Chamber may only take judicial notice of facts which are not the subject of reasonable dispute; and (e) for a fact to be capable of admission under Rule 94(B) it should have been the subject of adjudication and not based upon an agreement between parties in previous proceedings. It noted the holding made

in the *Krajisnik* Decision that taking judicial notice of a fact has the effect of creating a presumption and that the burden of proof thereafter shifts to the opposing party, which may challenge the fact thereafter by submitting its own evidence (paras 15-16).

⁵ *Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal against Decision of the Trial Chamber, 5 May 2003.

⁶ *Milosevic*, IT-02-54-T, Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", 21 May 2003.

⁷ Rule 94(B) states: "At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings".

Recalling its previous finding that “[o]nly facts in a judgement, from which there has been no appeal, or as to which any appellate proceedings have concluded, can truly be deemed ‘adjudicated facts’ within the meaning of Rule 94(B)”,⁸ the Appeals Chamber held:

“[B]y taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial”.⁹

Dissenting Opinion of Judge David Hunt¹⁰

Judge Hunt dissented since he found it “inappropriate to impose rebuttable presumptions of fact in favour of the prosecution in relation to the proof of its own case” (para. 6). In his view, “[t]o identify an adjudicated fact as a presumption, necessarily (as the prosecution concedes) places some burden of proof upon the accused, and this is contrary to the presumption of innocence which the Statute provides” (para. 7).

He explained that it was the Prosecution which was seeking to have judicial notice taken of these facts, and that it was therefore for the Prosecution to establish its entitlement to such relief:

“It is for the prosecution to establish that the facts are not the subject of reasonable dispute, not for the accused to show that the facts are unsafe. It is, however, insufficient for the accused merely to say that he disputes the facts in question. Just as in the case of the ‘defence’ of alibi, he must point to evidence given (or material available) which demonstrates a genuine dispute” (para. 11).¹¹

Judge Hunt recalled that a basic right of the Accused enshrined in the Tribunal’s Statute is that he or she is innocent until proven guilty by the Prosecution. He concluded: “Proof by way of presumptions of fact such as will be permitted by the majority decision offends against that basic right. It should only be where a fact is not the subject of reasonable dispute that judicial notice may be taken of it, and thus it cannot be challenged” (para. 14).

Separate Opinion of Judge Shahabuddeen¹²

Judge Shahabuddeen agreed with the decision of the Appeals Chamber but wished to clarify certain matters. He pointed out the differences between Rule 94(A) and Rule 94(B) of the Rules. The former provides for judicial notice of facts of “common knowledge” and the latter provides for judicial notice of “adjudicated facts or documentary evidence”. One of the differences between the two Rules is that, under Rule 94(A), neither party is permitted to adduce evidence in rebuttal (para. 4) whereas under Rule 94(B) the opposing party has a right to rebut the evidence so given (para. 6). In the absence of such a right of rebuttal, he argued that there could be an impairment of the

presumption of innocence (para. 23). He further explained that the burden of proof is not changed under Rule 94(B) as it is still for the Prosecution to prove the accused’s guilt:

“A distinction has to be drawn between facilitating proof and dispensing with proof. It is not said that the accused must prove his innocence; the position still is that the prosecution must prove guilt. All that the law does is that it facilitates proof by allowing a party to adduce required evidence in a certain way. What is the value of that evidence is then a matter for the parties in the ordinary way. In establishing the value of the evidence – including evidence given by judicial notice being taken of adjudicated facts – the accused is entitled to a right of rebuttal.” (para. 24).

Judge Shahabuddeen could not find any reason why Rule 94(B) should be confined to material which is not in reasonable dispute between the parties (para. 29). -

⁸ *Kupreskic et al.*, IT-95-16-A, Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001, para. 6, *Judicial Supplement* No. 24.

⁹ The Appeals Chamber followed in part paragraph 16 of the *Krajisnik* Decision which states: “By taking judicial notice of an *adjudicated fact*, thus, the Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial – *unless* the other party brings out new evidence and successfully challenges and disproves the fact at trial”.

¹⁰ Filed the same day as the Appeals Chamber Decision.

¹¹ On the defence of “alibi”, see *Kunarac et al.*, IT-96-23&23/1-T, Judgement, 22 February 2001, para. 625: “The Prosecution bore the onus of establishing the facts alleged in the Indictment. Having raised the issue of alibi, the accused bore no onus of establishing that alibi. It was for the Prosecution to establish that, despite the evidence of the alibi, the facts alleged in the Indictment were nevertheless true”.

¹² Separate Opinion of Judge Shahabuddeen Appended to the Appeals Chamber’s Decision dated 28 October 2003 on the Prosecution’s Interlocutory Appeal against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 31 October 2003.

TRIAL CHAMBERS

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

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

“DECISION ON THE DEFENCE ‘OBJECTION TO INTERCEPT EVIDENCE’”

3 OCTOBER 2003

Admissibility of illegally obtained evidence – Exclusion of evidence under Rule 95 - Admission of intercept evidence and right to a fair trial

Admissibility of illegally obtained evidence: the drafters of the Rules specifically chose not to set out a rule providing for the automatic exclusion of evidence illegally or unlawfully obtained and opted instead to leave the matter of admissibility of evidence irrespective of its provenance to be dealt with under and in accordance with Rules 89 and 95. It is clear from the review of national laws and international law, and the Rules and practice of this International Tribunal, that before this Tribunal evidence obtained illegally is not, *a priori*, inadmissible, but rather that the manner and surrounding circumstances in which evidence is obtained, as well as its reliability and effect on the integrity of the proceedings, will determine its admissibility. Illegally obtained evidence may, therefore, be admitted under Rule 95 since the jurisprudence of the International Tribunal has never endorsed the exclusionary rule as a matter of principle.

Exclusion of evidence under Rule 95: in applying the provisions of Rule 95, this Tribunal considers all the relevant circumstances and will only exclude evidence if the integrity of the proceedings would indeed otherwise be seriously damaged.

Admission of intercept evidence and right to a fair trial: in assessing whether intercept evidence is admissible, a Trial Chamber is required under Rule 89(D) of the Rules to use a balancing test to ensure that the right of an accused to a fair trial is not violated. The correct balance must be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.

Procedural Background

On 3 July 2003 and 18 July 2003 respectively, the Defence for Radislav Brdjanin filed its “Objection to Intercept Evidence” (“Objection”) and its “Supplemented Objection to Intercept Evidence” (“Supplemental Objection”). It objected to the admission of evidence obtained through the allegedly illegal interception of telephone conversations.¹ It essentially argued that the International Covenant on Civil and Political Rights² (“ICCPR”) and the European Convention on Human Rights³ (“ECHR”) both provide a framework in which the right to privacy may be protected. In its view, the admission of illegally intercepted evidence, in contravention of the laws of the State of BiH and conventional and customary international law, would contravene Rules 89⁴ and 95⁵ of the Rules of Procedure and Evidence (“Rules”) in that it would seriously damage the integrity of the proceedings.

¹ The evidence submitted by the Prosecution contained several transcripts of intercepted telephone conversations, recorded by internal security personnel of the government of the Republic of Bosnia and Herzegovina (“BiH”) before and during the war. In response to the Defence Objection, the Prosecution asserted that the intercepts were obtained legally and that even if they had been obtained illegally they would still have been admissible.

² Article 17 of the ICCPR states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Everyone has the right to the protection of the law against such interference or attacks.

³ Article 8 of the ECHR states:

Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁴ Rule 89 (General Provisions) states, in relevant part:

(C) A Chamber may admit any relevant evidence which it deems to have probative value

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

⁵ Rule 95 of the Rules (Exclusion of Certain Evidence) states:

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, or would seriously damage, the integrity of the proceedings.

Decision

The Trial Chamber rejected the Objection and Supplemental Objection and admitted the proposed evidence.

Reasoning

Admissibility of illegally or unlawfully obtained evidence

The Trial Chamber first made it clear that it has primarily reached its Decision on the basis of Rules 89 and 95 of the Rules of Procedure and Evidence (“Rules”). Nevertheless, in order to highlight the real import of these two rules, it decided to review the relevant international law and national laws.

Admission of illegally obtained evidence in international law and national laws

International instruments protect the right to privacy of individuals.⁶ That right, however, is not absolute as it may be derogated from in times of public emergency which threatens the life of the nation.⁷ Article 8(2) of the ECHR further envisages that there can be interferences with this right “in accordance with the law” and when “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. In principle the right to privacy may be breached by intercepts of private conversations, as the Trial Chamber has acknowledged in the present case.⁸

⁶ See footnotes 2 and 3 and accompanying text. The Trial Chamber also referred to Article 11 of the American Convention on Human Rights which states:

Everyone has the right to have his honor respected and his dignity recognized.

No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

Everyone has the right to the protection of the law against such interference or attacks.

⁷ Article 4 of the ICCPR, Article 15 of the ECHR and Article 27 of the American Convention on Human Rights.

⁸ Para. 31.

The crucial issue is then whether evidence obtained through illegal, unlawful or questionable methods (and potentially in breach of the right to privacy) may still be admitted in criminal proceedings. As little guidance is to be found in the case-law of international courts,⁹ the Trial Chamber turned to the case-law of national courts. It found that a variety of approaches may be taken when dealing with the admission of such evidence: 1. the law itself may specifically provide for the automatic exclusion of any evidence which has been illegally or otherwise inappropriately obtained; 2. the issue of exclusion or admission of such evidence may be left as a matter for the discretion of the judge who has the judicial duty to ensure fairness to the accused; 3. the courts might concern themselves only with the quality of the evidence and not consider its provenance at all; in other words the courts would only seek to find out whether the evidence was relevant and reliable and had probative value irrespective of whether that evidence was obtained lawfully or unlawfully (mostly common law approach).¹⁰

Admission of illegally obtained evidence in the Tribunal's Rules

Nothing in the Rules of the Tribunal provides for the exclusion of illegally obtained evidence. The issue was, however, addressed in the *Kordic & Cerkez* case at the 2 February 2000 hearing. Judge Robinson stated during the proceedings that inadmissibility under Bosnian law did not necessarily make evidence inadmissible under Rule 89 or 95 of the Rules.¹¹ Judge May stated that: "even if the illegality was established (...) [w]e have come to the conclusion that the evidence obtained [...] by eavesdropping on an enemy's telephone calls during the course of a war is certainly not within the conduct which is referred to in Rule 95. It's not antithetical to and certainly would not seriously damage the integrity of the proceedings".¹² The Trial Chamber endorsed this approach stating that: "communications intercepted during an armed conflict are not as such subject to exclusion under Rule 95 and should therefore be admitted upon a challenge based on the grounds laid down in that Rule".¹³ In its view, "the drafters of the Rules specifically chose not to set out a rule providing for the automatic exclusion of evidence illegally or unlawfully obtained and opted instead to leave the matter of admissibility of evidence irrespective of its provenance to be dealt with under and in accordance with Rules 89 and 95".¹⁴ The Trial Chamber ruled that: "It is clear from the review of national laws and international law, and the Rules and practice of this International Tribunal, that before this Tribunal evidence obtained illegally is not, *a priori*, inadmissible, but rather that the manner and surrounding circumstances in which evidence is obtained, as well as its reliability and effect on the integrity of the proceedings, will determine its admissibility. Illegally obtained evidence may, therefore, be admitted under Rule 95 since the jurisprudence of the International Tribunal has never endorsed the exclusionary rule as a matter of principle".¹⁵

Exclusion of evidence under Rule 95

The Trial Chamber held that "in applying the provisions of Rule 95, this Tribunal considers all the relevant circumstances and will only exclude evidence if the integrity of the proceedings would indeed otherwise be seriously damaged".¹⁶ It considered its finding to be consistent with and in the same spirit as the *Decision on Interlocutory Appeal Concerning Legality of Arrest in the Dragan Nikolic* case in which the Appeals Chamber, in analyzing the impact that a violation of an accused's human rights would have on the exercise of its jurisdiction, held that "certain human rights

violations are of such a serious nature that they require that the exercise of jurisdiction be declined" and that "[t]he correct balance must [...] be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law".¹⁷

Admission of intercept evidence and right to a fair trial

The Trial Chamber stated that in assessing whether intercept evidence is admissible, a Trial Chamber is required under Rule 89(D) of the Rules to use "a balancing test to ensure that the right of an accused to a fair trial is not violated".¹⁸ It found that the "correct balance must [...] be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law".¹⁹

The Trial Chamber found that there was no basis for declaring that the intercepts in question had been obtained illegally and held that, even if the evidence had been obtained illegally, there were circumstances militating towards their admission into evidence. Having held that the intercept evidence was admissible under Rule 95, it then turned to the requirement that they be admissible under Rule 89, namely that they be relevant and have probative value. It found this to be the case and admitted the proposed materials. ■

⁹ For example, the European Court of Human Rights leaves the matter of assessing evidence to the national courts. See *inter alia Van Mechelen and Others v. The Netherlands* (1998) 25 EHRR 647.

¹⁰ See paras. 33-52.

¹¹ See *Kordic & Cerkez*, IT-95-14/2-T, Transcripts ("T.") 13670.

¹² *Ibid.*, T. 13694.

¹³ Para. 53.

¹⁴ Para. 54.

¹⁵ Para. 55.

¹⁶ Para. 61, emphasis in the original. The Trial Chamber referred to the oral decision of Judge May in the *Kordic and Cerkez* case (see footnote 12 *supra* and text accompanying note).

¹⁷ *Dragan Nikolic*, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, *Judicial Supplement* No. 42.

¹⁸ Para. 62.

¹⁹ *Ibid.* The Trial Chamber added that it agreed "without hesitation" with the finding of the European Court of Human Rights that "the use at the applicant's trial of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6§1 of the Convention" (*Khan v. United Kingdom* (2001) 31 EHRR 45, para. 40).

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12/09/03	MILOSEVIC	IT-02-54-T	DECISION ON PROSECUTION MOTIONS FOR THE ADMISSION OF THE STATEMENT OF THE WITNESS BARON VAN LYNDEN PURSUANT TO RULE 92 <i>BIS</i> (A) AND TRANSCRIPT OF TESTIMONY IN ANOTHER TRIAL PURSUANT TO RULE 92 <i>BIS</i> (D)
12/09/03	MILOSEVIC	IT-02-54-T	DECISION ON CONFIDENTIAL PROSECUTION MOTION PURSUANT TO RULE 75 (G) FOR VARIATION OF PROTECTIVE MEASURES FOR WITNESS C-1149
12/09/03	LIMAJ <i>ET AL.</i>	IT-03-66-PT	DECISION ON PROVISIONAL RELEASE OF FATMIR LIMAJ
15/09/03	KRSTIC	IT-98-33-A	DECISION ON APPLICATIONS FOR ADMISSION OF FURTHER ADDITIONAL EVIDENCE ON APPEAL
15/09/03	MILOSEVIC	IT-02-54-T	FIFTH DECISION ON APPLICATIONS PURSUANT TO RULE 54 <i>BIS</i> OF PROSECUTION AND SERBIA AND MONTENEGRO
16/09/03	LIMAJ <i>ET AL.</i>	IT-03-66-PT	DECISION ON PROVISIONAL RELEASE OF HARADIN BALA
16/09/03	KRNOJELAC	IT-97-25-A	PUBLIC VERSION OF THE CONFIDENTIAL DECISION PROSECUTION'S MOTION TO ADMIT ADDITIONAL EVIDENCE PURSUANT TO RULE 115 OF THE RULES OF PROCEDURE AND EVIDENCE FILED ON 11 SEPTEMBER 2003
17/09/03	LIMAJ <i>ET AL.</i>	IT-03-66-PT	DECISION ON PROVISIONAL RELEASE OF ISAK MUSLIU
30/09/03	MILOSEVIC	IT-02-54-AR73.4	DECISION ON INTERLOCUTORY APPEAL ON THE ADMISSIBILITY OF EVIDENCE-IN-CHIEF IN THE FORM OF WRITTEN STATEMENTS
02/10/03	MILOSEVIC	IT-02-54-T	DECISION ON PROSECUTION MOTION FOR A RULING ON THE ADMISSION OF WITNESS STATEMENTS UNDER RULE 92 <i>BIS</i> (A)
03/10/03	BRDJANIN	IT-99-36-T	DECISION ON THE DEFENCE 'OBJECTION TO INTERCEPT EVIDENCE'
07/10/03	MILOSEVIC	IT-02-54-T	DECISION ON PROSECUTION MOTIONS FOR THE ADMISSION OF EVIDENCE PURSUANT TO RULE 92 <i>BIS</i>
10/10/03	KVOCKA <i>ET AL.</i>	IT-98-30/1-A	DECISION ON MOTION FOR APPLICATION OF THE NEW LAW BEFORE ICTY
14/10/03	MILOSEVIC	IT-02-54-T	DECISION ON PROSECUTION'S MOTION FOR LEAVE TO ADD WITNESS MIROSLAV DERONJIC
16/10/03	TODOVIC & RASEVIC	IT-97-25/1-I	DECISION ON ASSIGNMENT OF DEFENCE COUNSEL
20/10/03	MILOSEVIC	IT-02-54-T	DECISION ON PROSECUTION'S MOTION FOR LEAVE TO ADD WITNESS MICHEL RIVIERE
21/10/03	VASILJEVIC	IT-98-32-A	DECISION ON APPLICATION FOR ADMISSION OF ADDITIONAL EVIDENCE
21/10/03	MILOSEVIC	IT-02-54-AR73.6	DISSENTING OPINION OF JUDGE DAVID HUNT ON ADMISSIBILITY OF EVIDENCE IN CHIEF IN THE FORM OF WRITTEN STATEMENTS (MAJORITY DECISION GIVEN 30 SEPTEMBER 2003)
21/10/03	LIMAJ <i>ET AL.</i>	IT-03-66-PT	DECISION ON ASSIGNMENT OF DEFENCE COUNSEL
28/10/03	MILOSEVIC	IT-02-54-AR73.5	DECISION ON PROSECUTION'S INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S 10 APRIL 2003 DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS
31/10/03	LIMAJ <i>ET AL.</i>	IT-03-66-AR65.2	DECISION ON HARADIN BALA'S REQUEST FOR PROVISIONAL RELEASE
31/10/03	LIMAJ <i>ET AL.</i>	IT-03-66-AR65.3	DECISION ON FATMIR LIMAJ'S REQUEST FOR PROVISIONAL RELEASE
31/10/03	BLASKIC	IT-95-14-A	DECISION ON EVIDENCE
31/10/03	LIMAJ <i>ET AL.</i>	IT-03-66-AR65.3	DECISION ON ISAK MUSLIU'S REQUEST FOR PROVISIONAL RELEASE
31/10/03	MILOSEVIC	IT-02-54-AR73.5	SEPARATE OPINION OF JUDGE SHAHABUDDEN APPENDED TO THE APPEALS CHAMBER'S DECISION DATED 28 OCTOBER 2003 ON THE PROSECUTION'S INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S 10 APRIL 2003 DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS
31/10/03	MILOSEVIC	IT-02-54-AR73.4	SEPARATE OPINION OF JUDGE SHAHABUDDEN APPENDED TO THE APPEALS CHAMBER'S DECISION DATED 30 SEPTEMBER 2003 ON ADMISSIBILITY OF EVIDENCE-IN-CHIEF IN THE FORM OF WRITTEN STATEMENTS