APRIL 2004

SUMMARIES OF ICTY CASE-LAW IN MARCH 2004

JUDICIAL SUPPLEMENT

Nº 48

# APPEALS CHAMBER



# TRIAL CHAMBERS





JUDICIAL SUPPLEMENT

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APPEALS CHAMBER

# The Prosecutor v. Naser Oric

Case No. IT-03-68-AR73

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

# "PUBLIC REDACTED VERSION OF 'DECISION ON INTERLOCUTORY APPEAL CONCERNING RULE 70' ISSUED ON 24 MARCH 2004"

26 MARCH 2004

**Purpose of Rule 70(F) - "Specific information in possession of an accused" in Rule 70(F)**

**Purpose of Rule 70(F):** the purpose of Rule 70(F) is to encourage third parties to provide confidential information to the Defence in the same way as Rule 70(B) encourages parties to do the same for the Prosecution.

**"Specific information in possession of an accused" in Rule 70(F):** the reference in Rule 70(F) to "specific information in the possession of an accused" is not a condition of the making of an order that the Rule applies. The circumstance that the accused is not now in possession of such information is therefore not pertinent.

## Procedural Background

On 16 February 2004, Trial Chamber III rendered its "Confidential and *Ex Parte* Decision on Defence Application for an Order Applying Rule 70[1] to Specific Information to be Provided to the Defence" whereby it denied the Accused's request on the ground that it was premature. The Accused, in his motion ("Motion"), was seeking an order of the Chamber to protect information that its source would only give provided the information could be granted confidentiality. Upon denial of the request, the provider of the information again informed the Accused that it would only assist the Defence in obtaining the information sought provided that the Trial Chamber grant an order to protect the confidentiality of that information pursuant to Rule 70(F) of the Rules of Procedure and Evidence ("Rules"). The Accused filed a further motion requesting that the Trial Chamber reconsider its previous order or, in the alternative, that it grant him certification to appeal.[2]

On 25 February 2004, the Trial Chamber chose to certify the issue pursuant to Rule 73(B) of the Rules ("Impugned Decision").[3]

## Decision

The Appeals Chamber allowed the appeal, set aside the Impugned Decision, and remitted the Accused's Motion to the Trial Chamber for further consideration in light of the present Decision.

## Reasoning

Rule 70(F) states that a Trial Chamber "may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused".

### Purpose of Rule 70(F)

The Appeals Chamber noted that the Prosecution can, pursuant to Rule 70(B), guarantee the provider that the given confidential information will not be subject to disclosure, as information provided to the Prosecution on a confidential basis is automatically subject to the confidentially protection of Rule 70. In its view, the reference in Rule 70(F) to the fact that the provisions of Rule 70 shall apply "*mutatis mutandis*" to information in the possession of an accused, implies that the Defence shall be given the same guarantees as the Prosecution. It found that the "purpose of Rule 70(F) is to encourage third parties to provide confidential information to the Defence in the same way as Rule 70(B) encourages parties to do the same for the Prosecution".[4]

### "Specific information in possession of an accused" in Rule 70(F)

In the Appeals Chamber's view, the reference in Rule 70(F) to "specific information in the possession of an accused", read in the context of Rule 70, should not be strictly interpreted. It held:

> "Read within the context of the Rule therefore, and with its purpose in mind, the reference of Rule 70(F) to 'specific information in the possession of an accused' is not a condition of the making of an order that the Rule applies; it is a reference to what the Rule will apply to after the making of an order that it is to apply. The circumstance that the accused is not now in possession of such information is therefore not pertinent."[5] ■

[1] Rule 70 (Matters not Subject to Disclosure) reads in its relevant parts:
"(B)If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.
[…]
(F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused."

[2] Urgent, Confidential and *Ex Parte* Defence Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defence, 23 February 2004.

[3] Decision on Defence Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defence, issued confidentially and *ex parte* on 25 February 2004.

[4] Para. 6. On the interpretation of Rule 70, see *Milosevic*, IT-02-54-AR108 *bis* & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2003, *Judicial Supplement* No. 37.

[5] Para. 7.

APPEALS CHAMBER

# The Prosecutor v. Mitar Vasiljevic

Case No. IT-98-32-A

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

# "JUDGEMENT"

25 FEBRUARY 2004

**Differences between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor - Standard of proof – Verbal abuse of the victims as an aggravating factor**

**Differences between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor:** there are differences that exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility: (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design. (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.

**Standard of proof:** when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence. When a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences.

**Verbal abuse of the victims as an aggravating factor:** verbal abuse can be taken into account by Trial Chambers as an aggravating factor.

## Procedural Background

On 29 November 2002, the Trial Chamber found Mitar Vasiljevic guilty, in relation to the Drina River incident,[1] as a co-perpetrator of persecution as a crime against humanity pursuant to Article 5(h) of the Statute, for the murders of five Muslim men and the inhumane acts inflicted on the two surviving Muslim men (Count 3), and murder as a violation of the laws or customs of war pursuant to Article 3 of the Statute, for the murder of the five Muslim men (Count 5). The Trial Chamber acquitted the Accused on the remaining counts, either because it found the evidence to be insufficient or because the convictions would have been cumulative. For the convictions on Counts 3 and 5, the Trial Chamber imposed a prison sentence of twenty years.[2]

On 30 December 2002, Mitar Vasiljevic ("Appellant") filed his notice of appeal from the Judgement ("First Notice of Appeal")[3] pursuant to Rule 108 of the Rules of Procedure and Evidence.[4]

On 21 January 2003, the Prosecution filed a motion regarding defects in the First Notice of Appeal, seeking an order that the Appellant be required to re-file the Notice of Appeal since he did not comply with the requirements of the Rules and the Practice Direction.[5]

On 29 January 2003, the Pre-Appeal Judge found that the First Notice of Appeal did not conform to the requirements of Rule 108 of the Rules and that the Appellant had to re-file a notice of appeal within 14 days.[6] The Appellant submitted a new Notice of Appeal ("Defence Notice of Appeal") on 12 February 2003.[7]

On 29 May 2003, the Appellant filed a motion for extension of time, asking for a 14-day extension to submit the Appellant's Brief.[8] The Prosecution filed its response noting that in the event of the Appellant being granted an extension, the Prosecution would request an extension to file its Respondent's Brief.[9] On 3 June 2003, the Pre-Appeal Judge ordered the Appellant to file his Appellant's Brief not later than 24 June 2003 and the Prosecution to file its Respondent's Brief not later than 18 August 2003.[10]

On 24 June 2003, the Appellant filed the "Defence Appellant's Brief Against Judgement of November 29, 2002" and an "(Additional) Defence Appeal Brief".

On 18 July 2003 the Prosecution filed confidentially its "Prosecution Respondent's Brief".[11]

On 2 September 2003, the Appellant filed confidentially his Reply[12] and an Additional Reply[13] to the Prosecution Response.

On 6 November 2003, noting that the Prosecution Response and the Appellant Reply were filed confidentially, the Pre-Appeal Judge ordered the parties to file redacted public versions of the documents.[14] The Prosecution filed the public version of its

[1] It was alleged in the Indictment that on or about 7 June 1992 the Accused together with his two co-accused (Milan Lukic and Sredoje Lukic) and other unidentified individuals, had led seven Bosnian Muslim men to the bank of the Drina River. There, they forced them to line up on the bank of the river, facing the river, and opened fire at them. It was alleged that five of the seven died as a result of the shooting while the other two escaped without serious physical injury.

[2] *Vasiljevic*, IT-99-32-T, Judgement ("Trial Chamber Judgement"), 29 November 2002, *Judicial Supplement* No. 38.

[3] Notice of Appeal Against the Trial Judgement of 29 November 2002.

[4] Rule 108 ("Notice of Appeal") reads:

> "A party seeking to appeal a judgement shall, not more than thirty days from the date on which the judgement was pronounced, file a notice of appeal, setting forth the grounds. The Appellant should also identify the order, decision or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought. The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal."

[5] Prosecution Motion Concerning Defects in the Defence Notice of Appeal and Response to Defence Motion for Extension of Time, 3 January 2003. The Defence responded to the Prosecution motion on 21 January 2003 (Defence Reply to the Prosecution Motion Concerning Defects in the Defence Notice of Appeal and Defence Reply to the Prosecution Motion Concerning Defence Motion for Extension of Time Limited, 21 January 2003).

[6] Decision on Prosecution Motion Concerning Defects in the Defence Notice of Appeal and on Defence Motion for Extension of Time, 29 January 2003.

[7] Notice of Appeal Against Judgement of November 29, 2002.

[8] Defence Motion for Extension of Time, 29 May 2003.

[9] Prosecution Response to Defence Motion for Extension of Time, 30 May 2003.

[10] Decision on Defence and Prosecution Motions for Extension of Time, 3 June 2003. The Pre-Appeal Judge found that the circumstances raised both by the Defence and the Prosecution motions constituted good cause within the meaning of Rule 127 of the Rules. He also considered that it was in the interest of justice to allow the Defence the adequate time to adjust for the changes they had made in the composition of their team.

[11] Prosecution Respondent's Brief, filed confidentially on 18 August 2003.

[12] Defence Respondent's Brief against Prosecution Respondent's Brief of 18 August 2003, filed confidentially on 2 September 2003.

[13] (Additional) Defence Brief in Reply, 2 September 2003.

[14] Order to File Redacted Public Versions, 6 November 2003.

Response on 7 November 2003 and the Appellant filed the public version of his Reply on 17 November 2003.

## Judgement

The Appeals Chamber allowed Mitar Vasiljevic's appeal with regard to his convictions as a co-perpetrator of persecution, a crime against humanity (murder and inhumane acts) under Count 3 of the Indictment, and of murder, a violation of the laws or customs of war under Count 5 of the Indictment. It set aside these convictions and found Mitar Vasiljevic guilty of Counts 3 and 5 of the Indictment as an aider and abettor to persecution, a crime against humanity (murder and inhumane acts), and as an aider and abettor to murder, a violation of the laws or customs of war, pursuant to Article 7(1) of the Statute of the Tribunal ("Statute").[15] The Appeals Chamber dismissed Mitar Vasiljevic's appeal against convictions in all other respects and dismissed his appeal against sentence. It imposed a new sentence, taking into account his responsibility established on the basis of the convictions entered on appeal. Mitar Vasiljevic was sentenced to fifteen years' imprisonment to run as of the day of the Judgement, subject to credit being given under Rule 101(C) of the Rules for the period he had already spent in detention, that is from 25 January 2000 to the day of the Judgement. Judge Shahabuddeen appended a separate and dissenting opinion.

## Reasoning

Before reviewing the Appellant's grounds of appeals,[16] the Appeals Chamber recalled the standards of review under Article 25 of the Statute[17] and the case-law of the Tribunal.[18] The present summary will address the question of the law applicable to participation in a joint criminal enterprise as a co-perpetrator or as an aider and abettor, and of the applicable standard of proof. With regard to the sentencing factors, the present summary will address the question as to whether verbal abuse of the victims can be considered an aggravating factor.

### Differences between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor

Joint criminal enterprise is a form of liability which, although not explicitly referred to in the Statute, existed in customary international law in 1992 and as such is a form of "commission" under Article 7(1) of the Statute.[19] Three categories of joint criminal enterprise have been identified in the Tribunal's case-law: the "basic" form of joint criminal enterprise, the "systemic" form of joint criminal enterprise, and the "extended" form of joint criminal enterprise.[20] While the Trial Chamber considered that the first and second categories of joint criminal enterprise applied to the Drina River incident, the Appeals Chamber considered that only the first category applied to the present case. In this category, all co-perpetrators act pursuant to a common purpose and possess the same criminal intention. When there is, for example, a plan to kill formulated by the participants in such a joint criminal enterprise, the participants do not need to carry out the same role, but all have the intent to kill.

In a joint criminal enterprise, the participants are considered co-perpetrators. As noted by the Appeals Chamber, however, there can also be participants in a joint criminal enterprise by "aiding and abetting". This participation "is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime".[21] The Appeals Chamber noted that when a crime is committed by several co-perpetrators, the aider and abettor is "always an accessory to these co-perpetrators, although the co-perpetrators may not always know of the aider and abettor's contribution".[22] It pointed to the differences that exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility:

> "(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.
>
> (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose."[23]

### Standard of proof

The Appeals Chamber recalled that to find an accused criminally responsible as a co-perpetrator in a joint criminal enterprise, the Prosecution must establish that i) the accused voluntarily participated in one aspect of the common purpose even if he or she did not physically commit the crime; and ii) the accused, even if not personally effecting the crime, nevertheless intended this result (emphasis added).[24]

The Appeals Chamber endorsed the test adopted by the Trial Chamber according to which, when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.[25] It added that "when a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences".[26] In the present case, the Appeals Chamber found, Judge Shahabuddeen dissenting, that "no reasonable tribunal could have found that the only reasonable inference available on the evidence [was] that the Appellant had the intent to kill the seven Muslim men".[27] It found the Appellant guilty as an aider and abettor and expressed its view that "aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator".[28]

### Verbal abuse of the victims as an aggravating factor

Before the finding to that effect in the Trial Chamber Judgement, verbal abuse had never been used at the International Tribunal as an aggravating factor.[29] The Appeals Chamber, noting the Trial Chambers' wide discretion in determining sentence and in considering aggravating factors,[30] confirmed that "verbal abuse

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[15] Article 7(1) (Individual Criminal Responsibility) reads :
"1. 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."

[16] The grounds of appeal are detailed in paras. 192-200 of the Judgement. The Judgement and the summary Judgement are available on the Tribunal's website at www.un.org/icty under "Judgements".

[17] Article 25 (Appellate Proceedings) reads:
"1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
(a)an error on a question of law invalidating the decision; or
(b)an error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers."

[18] Judgement, paras. 4-12.

[19] See *Tadic*, IT-94-1-A, Judgement ("*Tadic* Appeals Judgement"), 15 July 1999, paras. 188 and 226.

[20] *Tadic* Appeals Judgement, paras. 195-226. See also the summary of the *Krnojelac* Appeals Judgement (*Krnojelac*, IT-97-25-A, Judgement) and the box on joint criminal enterprise in *Judicial Supplement* No. 45.

[21] Para. 102.

[22] *Ibid.*

[23] *Ibid.*

[24] *Tadic* Appeals Judgement, para. 196.

[25] Para. 120, referring to para. 68 of the Trial Chamber Judgement. This test was first adopted in *Krnojelac*, IT-97-25-T, Judgement, 15 March 2002, para. 83, *Judicial Supplement* No. 31 *bis*.

[26] Para. 131.

[27] *Ibid.*

[28] Para. 182 (footnote omitted).

[29] Trial Chamber Judgement, para. 276.

[30] Article 24(2) of the Statute (Penalties) reads: "2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances

can be taken into account as an aggravating factor by Trial Chambers".[31] The Appeals Chamber found, on the basis of the evidence, that the Trial Chamber's finding that verbal abuse had occurred was reasonable.

Since the Appellant was actually challenging not only whether verbal abuse had occurred but also whether he had personally abused anyone, the Appeals Chamber further held that "regardless of who made it, verbal abuse aggravated the gravity of the crime committed".[32]

of the convicted person." Rule 101(B) of the Rules (Penalties) reads: "(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as: (i) any aggravating circumstances; […]".

[31] Para. 161.

[32] Para. 162.

## Separate and Dissenting Opinion of Judge Shahabuddeen

Judge Shahabuddeen, while agreeing with the Appeals Chamber that the Appellant had criminal responsibility, differed as to the level of the Appellant's responsibility. In his view, it had not been demonstrated that no reasonable tribunal of fact could have assessed the relevant evidence differently from the way in which the Trial Chamber assessed it. He would accordingly have affirmed the Trial Chamber Judgement that, both on murder and on persecution, the criminal responsibility of the Appellant was that of a co-perpetrator and not that of an aider and abettor. ■

APPEALS CHAMBER

# The Prosecutor v. Radoslav Brdjanin

**Case No. IT-99-36-A**

**Judges Meron [Presiding], Shahabuddeen, Güney, El Mahdi and Weinberg de Roca**

# "DECISION ON INTERLOCUTORY APPEAL"

**19 MARCH 2004**

**Joint criminal enterprise as a form of criminal liability - Criminal liability for crimes falling outside of the agreed crimes - Rule 98 *bis* standard of review**

Joint criminal enterprise as a form of criminal liability: the third category of joint criminal enterprise liability is, as with other forms of criminal liability such as command responsibility or aiding and abetting, not an element of a particular crime. It is a mode of liability through which an accused may be individually responsible despite not being the direct perpetrator of the offence.

Criminal liability for crimes falling outside of the agreed crimes: provided that the standard applicable to the third category of joint criminal enterprise, i.e. "reasonably foreseeable and natural consequences" is established, criminal liability can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise.

Rule 98 *bis* standard of review: the purpose of Rule 98 *bis* proceedings is to test the sufficiency of the Prosecution's evidence-in-chief. This purpose does not preclude the Trial Chamber from entertaining legal issues where determination of those issues at that time is of benefit to the parties and the efficiency of the proceedings.

## Procedural Background

● On 28 November 2003, Trial Chamber I rendered its "Decision on Motion for Acquittal Pursuant to Rule 98 *bis*" ("Impugned Decision") whereby it acquitted Radoslav Brdjanin of Count 1 of the Indictment (Genocide) in the context of the third category of joint criminal enterprise ("JCE III").[1] It found that the specific intent required to establish the crime of genocide pursuant to Article 4 of the Statute[2] was incompatible with the lower *mens rea* standard of JCE III according to which the Prosecution is required to prove only awareness on the part of the Accused that the said crime would be committed by other members of the joint criminal enterprise.

● On 10 December 2003, following certification of the Trial Chamber,[3] the Prosecution filed its appeal from the Impugned Decision,[4] whereby it submitted that "(i) the Trial Chamber erred in law in concluding that the third category of joint criminal enterprise liability is 'incompatible' with the specific intent requirement of Genocide; and (ii) the Trial Chamber erred in law in dismissing a mode of liability at the Rule 98 *bis* stage of the proceedings".

## Decision

The Appeals Chamber allowed the Prosecution's appeal, reversed the Impugned Decision to acquit Brdjanin of Count 1 of the Indictment (Genocide) with respect to the third category of joint criminal enterprise, and reinstated that count. Judge Shahabuddeen appended a separate opinion.

## Reasoning

### Joint criminal enterprise as a form of criminal liability

In the *Milutinovic* Decision, the Appeals Chamber found that joint criminal enterprise is not a separate offence in itself but a "mode of committing one of the offences prescribed by Articles 2

[1] *Brdjanin*, IT-99-36-T, *Decision on Motion for Acquittal Pursuant to Rule 98* bis, 28 November 2003. The third category of joint criminal enterprise concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the execution of that common purpose. On the three categories of joint criminal enterprise, see *Tadic* Appeals Judgement (*Tadic*, IT-94-1-A, Judgement, 15 July 1999), paras. 195-226. See also the summary of the *Krnojelac* Appeals Judgement (*Krnojelac*, IT-97-25-A, Judgement) and the box on joint criminal enterprise in *Judicial Supplement* No. 45.

[2] Article 4(2) of the Statute (Genocide) reads :

"2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group." (emphasis added).

[3] The certification to appeal the Impugned Decision was given by the Trial Chamber on 3 December 2003 (Trial Transcripts 23122).

[4] *Brdjanin*, IT-99-36-A, Prosecution's Appeal from Trial Chamber's Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, 10 December 2003.

to 5 of the Statute".[5] In the *Stakic* Judgement, Trial Chamber II noted with reference to the *mens rea* of joint criminal enterprise that Article 7(1) lists "modes of liability only", that "these cannot change or replace the elements of the crimes defined in the Statute", and that in particular "the *mens rea* requirements for an offence listed in the Statute cannot be altered".[6]

In the present Decision, the Appeals Chamber found that the "third category of joint criminal enterprise liability is, as with other forms of criminal liability, such as command responsibility or aiding and abetting, not an element of a particular crime" but a "mode of liability through which an accused may be individually responsible despite not being the direct perpetrator of the offence".[7]

### Criminal liability for crimes falling outside of the agreed crimes

The Appeals Chamber held that an "accused convicted of a crime under the third category of joint criminal enterprise need not be shown to have intended to commit the crime or even to have known with certainty that the crime was to be committed" and that "it is sufficient to prove that that accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of the agreed upon crime made it reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise, and it was committed".[8] In other words the Appeals Chamber found that "[p]rovided that the standard applicable to [JCE III], i.e. 'reasonably foreseeable and natural consequences' is established, criminal liability can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise".[9]

In the present case, the Appeals Chamber found with respect to the crime of genocide that the Prosecution was required to establish that it was reasonably foreseeable to the accused that an act specified in Article 4(2) would be committed and that it would be committed with genocidal intent.[10]

### Rule 98 *bis* standard of review

On the basis of Rule 98 *bis*, a Trial Chamber shall order the entry of acquittal on the motion of an accused or *proprio motu* if it finds that the evidence is "insufficient to sustain a conviction on that or those charges". In the *Jelisic* Judgement, the Appeals Chamber set out the legal standard for such review. It held:

> "[...] the Appeals Chamber follows its recent holding in the *Delalic* appeal judgement, where it said: '[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question'.[11] The capacity of the prosecution's evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution's evidence (if accepted ) but whether it could."[12]

The Appeals Chamber, in the present case, acknowledged that "the purpose of Rule 98 *bis* proceedings is to test the sufficiency of the Prosecution's evidence-in-chief" and added that "this purpose does not preclude the Trial Chamber from entertaining legal issues where determination of those issues at that time is of benefit to the parties and the efficiency of the proceedings".[13] Given that it upheld the first ground of appeal, it did not find it necessary to further discuss this second ground of appeal (dismissal of a mode of liability at the Rule 98 *bis* stage of the proceedings).

## Separate Opinion of Judge Shahabuddeen

In his Separate Opinion, Judge Shahabuddeen, while supporting the conclusion reached by the Appeals Chamber, expressed it uneasiness about its finding, in paragraph 5, that an "accused convicted of a crime under the third category of joint criminal enterprise need not be shown to have intended to commit the crime or even to have known with certainty that the crime was to be committed". In his view, this wording suggests that "a case brought under the third category of joint criminal enterprise of *Tadic* may be a case in which intent is not shown and that nevertheless a conviction could be made". In his interpretation, JCE III "does not dispense to prove intent" but "provides a mode of proving intent in particular circumstances, namely, by proof of foresight in those circumstances". He found that JCE III "does not, because it cannot, vary the elements of the crime; it is not directed to the elements of the crime; it leaves them untouched". ■

[5] *Milutinovic* et al., IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise*, 21 May 2003, para. 44, *Judicial Supplement* No. 41.
[6] *Stakic*, IT-97-24-T, Judgement, 31 July 2003, para. 437, *Judicial Supplement* No.43.
[7] Para. 5.
[8] *Ibid.* With regard to the mental element of JCE III, the Appeals Chamber stated in the *Tadic* Appeals Judgement, para. 228, that: "With regard to the third category [of joint criminal enterprise], what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*". See also *Krnojelac* Appeals Judgement, para. 32.
[9] Para. 9.
[10] Para. 6.
[11] *Delalic* et al., IT-96-21-A, Judgement, 20 February 2001, para. 434, *Judicial Supplement* No. 23.
[12] *Jelisic*, IT-95-10-A, Judgement, 5 July 2001, para. 37, *Judicial Supplement* No. 26.
[13] Para. 11.

TRIAL CHAMBERS

# The Prosecutor v. Radoslav Brdjanin

Case No. IT-99-36-R77

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

# "CONCERNING ALLEGATIONS AGAINST MILKA MAGLOV / DECISION ON MOTION FOR ACQUITTAL PURSUANT TO RULE 98 *BIS*"

19 MARCH 2004

**Specific intent requirement for contempt of the Tribunal - Intimidation of a witness - Otherwise interfering with a witness - Disclosing the identity of a witness to a member of the public in violation of an order of a Chamber.**

**Specific intent requirement for contempt of the Tribunal**: for each form of criminal contempt, the Prosecution must establish that the accused acted with specific intent to interfere with the Tribunal's due administration of justice.

**Intimidation of a witness**: intimidation of a witness as contempt of court requires proof that: a) the accused engaged in conduct that is likely to intimidate a witness; and b) the accused acted knowingly and wilfully.

**Otherwise interfering with a witness**: otherwise interfering with a witness as contempt of court requires proof that: a) the accused engaged in conduct that is likely to deter a witness or a potential witness from giving evidence, or to influence the nature of the witness' or potential witness' evidence; and b) the accused acted knowingly and wilfully.

**Disclosing the identity of a witness to a member of the public in violation of an Order of a Chamber**: in order to hold a person in contempt of the Tribunal for disclosing the identity of a witness to a member of the public in violation of an order of a Chamber, the Prosecution must establish that: a) the accused disclosed the identity of a witness to a member of the public; b) the disclosure was in violation of an order of a Chamber; and c) the violation was knowingly and wilfully committed.

## Procedural Background

On 15 April 2003, the Trial Chamber issued the "Order Concerning Allegations Against Milka Maglov ("Respondent")",[1] finding that facts before this Trial Chamber, if believed, could lead to the conclusion that: 1) the Respondent approached a potential Prosecution witness ("Witness") and intimidated the Witness; and/or 2) the Respondent revealed the identity of the Witness to a member of the public in violation of an order of a Chamber; and on the basis of this there were sufficient grounds to proceed against the Respondent for contempt of the Tribunal pursuant to Rule 77(A)(iv) and Rule 77(A)(ii) of the Rules of Procedure and Evidence ("Rules").[2]

On 8 May 2003, the Trial Chamber issued the "Order Instigating Proceedings Against Milka Maglov",[3] directing the Registrar to appoint an *Amicus Curiae* ("*Amicus Curiae* Prosecutor") and ordering the *Amicus Curiae* Prosecutor to prosecute the Respondent for: 1. the alleged intimidation of the Witness, and 2. the alleged disclosure of the identity of the Witness to a member of the public in violation of an order of a Chamber.

On 6 February 2004, the Trial Chamber granted the motion by the *Amicus Curiae* Prosecutor to amend the allegations for contempt of the Tribunal,[4] ordering the *Amicus Curiae* Prosecutor to prosecute the Respondent for the following allegations ("Allegations"): Intimidating, or otherwise interfering with the Witness, pursuant to Rule 77(A)(iv) (Count 1); or, alternatively, Attempting to intimidate, or otherwise interfere with the Witness, pursuant to Rule 77(B)[5] (Count 2); and Disclosing the identity and whereabouts of the Witness to a member of the public, in violation of an order of a Chamber, pursuant to Rule 77(A)(ii) (Count 3).

Trial proceedings against the Respondent commenced on 16 February 2004. The *Amicus Curiae* Prosecutor closed her case on 19 February 2004, after four days of trial, during which five witnesses were called to testify and seventeen documents were tendered into evidence. The Respondent tendered five documents into evidence.

On 24 February 2004, the Respondent filed confidentially a "Motion for Judgement of Acquittal – Rule 98 *bis*[6]".[7] The *Amicus Curiae* Prosecutor filed confidentially a "Response to The Respondent's Motion for Judgement of Acquittal – Rule 98 *bis*" on 26 February 2004,[8] and a "Corrigendum to Confidential Response to The Respondent's Motion for Judgement of Acquittal – Rule 98 *bis*" on 27 February 2004.[9] On 4 March 2004, the Respondent filed confidentially "Milka Maglov's Reply to the Prosecutor's Response to Ms. Maglov's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis*".[10]

[1] *Brdjanin*, IT-99-36-T, Order Concerning Allegations Against Milka Maglov, 15 April 2003.

[2] Rule 77 ("Contempt of the Tribunal") reads in relevant parts:

"(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who:

[…]

(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;

[…]

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or

[…]."

[3] *Brdjanin*, IT-99-36-R77, Order Instigating Proceedings Against Milka Maglov, 8 May 2003.

[4] *Brdjanin*, IT-99-36-R77, Decision on Motion by *Amicus Curiae* Prosecutor to Amend Allegations of Contempt of the Tribunal, 6 February 2004.

[5] Rule 77 (B) reads: "Any incitement or attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties." Under Rule 77 (G), the maximum penalty that may be imposed on a person found to be in contempt of the Tribunal "shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both".

[6] Rule 98 *bis* (Motion for Judgement of Acquittal) reads:

"(A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A)(ii).

(B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges."

[7] *Brdjanin, Concerning Allegations Against Milka Maglov*, Confidential Motion for Judgement of Acquittal – Rule 98 *Bis*, 24 February 2004 ("Rule 98 *bis* Motion").

[8] *Brdjanin*, IT-99-36-T, *Concerning Allegations Against Milka Maglov*, Confidential Response to The Respondent's Motion for Judgement of Acquittal – Rule 98 *Bis*, 26 February 2004.

[9] *Brdjanin*, IT-99-36-T, *Concerning Allegations Against Milka Maglov*, Corrigendum to Confidential Response to The Respondent's Motion for Judgement of Acquittal – Rule 98 *Bis*, 27 February 2004.

[10] *Brdjanin*, IT-99-36-T, *Concerning Allegations Against Milka Maglov*, Confidential Milka Maglov's Reply to the Prosecutor's Response to Ms. Maglov's Motion for Judgement of Acquittal Pursuant to Rule 98 *Bis*, 4 March 2004.

## Decision

The Trial Chamber granted the Rule 98 *bis* Motion only with respect to Count 3 of the Allegations regarding the alleged disclosure of the whereabouts of the Witness to a member of the public in violation of an order of a Chamber, and declared that there was no case to answer on the part of the Respondent with regards to this specific part of the Charge. It dismissed the Rule 98 *bis* Motion with respect to all other issues raised by the Respondent and rejected her motion for acquittal for Counts 1 and 2, and for the remaining part of Count 3.

## Reasoning

### Specific intent requirement for contempt of the Tribunal

The Trial Chamber recalled that the Tribunal has an inherent power to hold in contempt those who knowingly and wilfully interfere with its administration of justice[11] and defined contempt of court as an "act or an omission intended to interfere with the due administration of justice".[12] It noted that Rule 77 (A) envisages various forms of conduct for contempt of court and recalled the finding of the *Aleksovski* Contempt Decision that there are differences in the states of mind required for each conduct.[13] It found, however, a common element to all those conducts: "for each form of criminal contempt, the Prosecution must establish that the accused acted with specific intent to interfere with the Tribunal's due administration of justice".[14]

### Intimidation of a witness

The Trial Chamber held that "[i]ntimidation of a witness as contempt of court requires proof that: a) the accused engaged in conduct that is likely to intimidate a witness; and b) the accused acted knowingly and wilfully.[15]

#### *Actus reus*

The Trial Chamber found that the *actus reus* of the offence of intimidating a witness as contempt of court "consists of acts or culpable omissions that are likely to constitute direct, indirect, or potential threats to a witness or a potential witness" and that for the conduct in question to amount to contempt of court, the said conduct must be of "sufficient gravity to be likely to intimidate a witness".[16] It held that "[i]ntimidation of a witness as contempt of court is a crime of conduct, which does not require proof of a result", that consequently the fact that the witness was actually intimidated is immaterial, and that therefore the Prosecution need only prove that the conduct in question was intended to interfere with the Tribunal's due administration of justice.[17]

#### *Mens rea*

As to the *mens rea* of the offence of intimidation of a witness as contempt of court, the Trial Chamber held that the Prosecution must establish that the accused had knowledge that his conduct was likely to intimidate a witness and that, as for all forms of conduct underlying the offence of contempt of the Tribunal, proof is also required that the accused acted with the specific intent to interfere with the Tribunal's due administration of justice.[18]

### Otherwise interfering with a witness

The Trial Chamber found that otherwise interfering with a witness as contempt of court requires proof that:

"(a) the accused engaged in a conduct that is likely to deter a witness or a potential witness from giving evidence, or to influence the nature of the witness' or potential witness' evidence; and
(b) the accused acted knowingly and wilfully."[19]

#### *Actus reus*

The Trial Chamber held that the *actus reus* for the offence of otherwise interfering with a witness included, but was not limited to the following conducts:

- keeping a witness out of the way, by bribery or otherwise, so as to avoid or prevent service of a subpoena;
- assaulting, threatening or intimidating a witness or a person likely to be called as a witness;
- endeavouring to influence a witness against a party by, for instance, disparagement of the party;
- or endeavouring by bribery to induce a witness to suppress evidence.[20]

It stated that "[t]he acts or omissions of the accused, viewed in light of the circumstances of the case, have to be likely to deter a witness or a potential witness from giving evidence or to influence the nature of the evidence".[21] As in the case of intimidation of a witness as a form of contempt of court, it is not necessary for the Prosecution to prove that the witness was actually deterred or influenced.

The Trial Chamber expressed its view that while "otherwise interfering with a witness" refers to other acts or conduct of a similar gravity that equally seek to influence the outcome of a pending case by interfering with a witness or a potential witness, "interference with a witness by threatening, intimidating, causing an injury, or by offering a bribe ought to be so charged specifically".[22]

#### *Mens rea*

The Trial Chamber held that the *mens rea* for otherwise interfering with a witness requires proof of the "accused's knowledge that his conduct is likely to deter a witness or a potential witness from giving evidence, or that his conduct is likely to influence the nature of the evidence".[23] The Prosecution must also prove the accused's specific intent to interfere with the Tribunal's due administration of justice.

### Attempt to intimidate or otherwise interfere with a witness

Having found that the Rule 98 *bis* standard[24] had been met in relation to Count 1 of the Allegations, the Trial Chamber decided that it was superfluous at this stage of the proceedings to discuss the legal issues pertinent to the alternative charge of attempting to intimidate or otherwise interfere with the Witness pursuant to Count 2.

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[11] See *Tadic*, IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin ("*Tadic* Contempt Decision"), 27 February 2001, para. 26, *Judicial Supplement* No. 23; *Aleksovski*, IT-95-14/1-AR77, Judgement on Appeal by Anto Nobilo Against Finding of Contempt ("*Aleksovski* Contempt Decision"), 30 May 2001, para. 30, *Judicial Supplement* No. 24.
[12] Para. 14.
[13] *Aleksovski* Contempt Decision, paras. 40 and 42.
[14] Para. 15.
[15] Para. 21.
[16] Para. 22.
[17] *Ibid.*
[18] Para. 23.
[19] Para. 27. In *Kajelijeli*, the Appeals Chamber of the International Criminal Tribunal for Rwanda had found that "[i]nterference with a witness as contempt is to be construed as prohibiting only undue influence with a witness. Undue interference […] could have occurred […] if the individuals concerned […] tried to induce them to change their testimony" (*Kajelijeli*, ICTR-98-44A-T, Decision on Kajelijeli's Motion to hold members of the Office of the Prosecutor in Contempt of the Tribunal, 15 November 2002, para. 9).
[20] Para. 27 and footnotes accompanying text.
[21] Para. 27.
[22] Para. 27.
[23] Para. 28.
[24] According to the Rule 98 *bis* standard set out in the *Jelisic* Appeals Judgement (*Jelisic*, IT-95-10-A, Judgement, 5 July 2001, para. 37, *Judicial Supplement* No. 26), a Trial Chamber has to decide on whether a reasonable trier of fact could be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of the Respondent as charged.

### Disclosing the identity of a witness to a member of the public in violation of an order of a Chamber

The Trial Chamber found that in order to hold a person in contempt of the Tribunal for disclosing the identity of a witness to a member of the public in violation of an order of a Chamber, the Prosecution must establish that: "a) the accused disclosed the identity of a witness to a member of the public; b) the disclosure was in violation of an order of a Chamber; and c) the violation was knowingly and wilfully committed".[25]

#### *Actus reus*

The Trial Chamber held that "[i]n determining whether an order of a Chamber has been violated, reference must be made to the exact content of the order that is subject to the alleged contempt of court".[26]

#### *Mens rea*

In the *Aleksovski* Contempt Decision, the Appeals Chamber found that actual knowledge of the allegedly breached order is not required before it can be knowingly violated, in the event that the person charged with violating an order of a Chamber acted in wilful blindness of the said order.[27] The Appeals Chamber also held that mere negligence in failing to ascertain whether an order had been made granting protective measures to a particular witness could never amount to actual knowledge and, considering the circumstances of the case, did not answer the question as to whether other states of mind, such as reckless indifference to the existence of an order, are sufficient to constitute a "knowing" violation of an order.[28] While noting the *Amicus Curiae* Prosecutor's submission that reckless indifference to the existence of an order is sufficient to establish a "knowing" violation of an order, the present Trial Chamber did not determine –at this stage of the proceedings - whether reckless indifference to the existence of an order would be sufficient to constitute contempt.

The Trial Chamber found that a "finding that the accused intended to violate an order would almost necessarily follow in most cases where the Prosecution establishes that the accused had knowledge of the existence of an order (either *actual* knowledge or a wilful blindness as to its existence)".[29] It noted the finding of the Appeals Chamber in the *Aleksovski* Contempt Decision that there can be cases where an accused acted with reckless indifference as to whether his conduct was in violation of an order of a Chamber.[30] The Appeals Chamber clarified that this is not equivalent to reckless indifference to the existence of an order of a Chamber: this is "reckless indifference to the consequences of the act by which the order is violated, rather than a reckless indifference to the existence of the violated order".[31] In the opinion of the Appeals Chamber, such conduct is "sufficiently culpable to warrant punishment as contempt, even though it does not establish a specific intention to violate the order".[32] In that case it is "sufficient to establish that the act which constituted the violation was deliberate and not accidental".[33] The Trial Chamber pointed out that "even though no specific intent to violate an order is required for an accused to be held in contempt, the Prosecution must nevertheless establish that the accused had the specific intent to interfere with the Tribunal's due administration of justice".[34]

[25] Para. 35.
[26] Para. 36.
[27] *Aleksovski* Contempt Decision, para. 45.
[28] The Appeals Chamber in the *Aleksovski* Contempt Decision left the issue to be decided by other Chambers (para. 45).
[29] Para. 40.
[30] *Aleksovski* Contempt Decision, para. 54 (emphasis not in the original).
[31] *Aleksovski* Contempt Decision, footnote 104.
[32] *Aleksovski* Contempt Decision, para. 54.
[33] *Ibid.*
[34] Para. 40.

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