AUGUST 2004

SUMMARIES OF ICTY CASE-LAW IN MAY-JUNE 2004

JUDICIAL SUPPLEMENT

Nº 50

Established in 1999, the Judicial Supplement is consulted today by over a thousand people (legal professionals, professors or practitioners, students, representatives of international organisations, etc.), in either its paper or electronic form.

The publication has clearly achieved its objective: that of increasing awareness of the Tribunal's judicial activity and familiarising its observers with the current advances in law generated by its Chambers. Since it was set up over five years ago, the Judicial Supplement has summarised 23 Orders, 186 Decisions, 43 Judgements and Appeals Judgements. All those texts have contributed significantly to the development of international, humanitarian and criminal law.

Defining notions of armed conflict and international armed conflict; identifying general principles such as the prohibition of torture; broadening the norms of humanitarian law to include sexual crimes; specifying the constituent elements of crimes against humanity, the crime of genocide and war crimes; reflecting essential procedural innovations, particularly in terms of the protection of witnesses; providing new interpretations and applying them to standards which have too long been overlooked, such as the criminal responsibility of superiors; the jurisprudence of the ICTY has extended and will continue to extend the borders of international law. This innovative jurisprudence is destined to leave its mark and, without a doubt, inspire other courts involved in developing and strengthening international justice.

THIS IS OUR 50TH ISSUE

The Tribunal wishes to continue reporting on this jurisprudence in a manner that meets the needs and expectations of the relevant audiences. To that end, it has been deemed appropriate at this stage to conduct another survey, since the last one dates from 2002. Thank you for showing your commitment by massively replying to the questionnaire soon to be released.

PLENARY SESSION

APPEALS CHAMBER

TRIAL CHAMBERS

A summary of the Tihomir Blaskic *Judgement (IT-95-14-A, 29 July 2004) is being prepared. Meanwhile, a press release was published on the day of the Judgement's delivery: it reproduces the summary read out in Court by Presiding Judge Pocar and is available upon request from the Public Information Services or on the Tribunal's website at www.un.org/icty (Judgements page).*

PLENARY SESSION
IT/229

"AMENDMENT TO THE RULES OF PROCEDURE AND EVIDENCE"

10 JUNE 2004

By unanimous approval of all permanent Judges of the International Tribunal, the following Rule of the Rules of Procedure and Evidence of the International Tribunal ("Rules") is amended:

Rule 11 *bis* (A) and (B) English and French

The amendments have been highlighted in the text of this document.

Pursuant to Rule 6 (D), these amendments shall enter into force seven days after the date of issue of this official document, i.e., on **17 June 2004.** Document IT/32/Rev. 31, incorporating these amendments, will be issued in both languages as soon as possible.

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

Carmel Agius
Judge
Chair of the Rules Committee

Dated this tenth day of June 2004
At The Hague
The Netherlands

ANNEX

Rule 11 *bis*
Referral of the Indictment to Another Court

(A) If an indictment has been confirmed, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a Trial Chamber for the purpose of referring a case to the authorities of a State:

(i) in whose territory the crime was committed; or
(ii) in which the accused was arrested; **or**
(iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard **and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.**

(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall, in accordance with Security Council Presidential Statement S/PRST/2002/21, consider the gravity of the crimes charged and the level of responsibility of the accused.

(D) Where an order is issued pursuant to this Rule:

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;
(ii) the Chamber may order that protective measures for certain witnesses or victims remain in force;

(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;
(iv) the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf.

(E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred to trial.

(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Trial Chamber may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

(G) Where an order issued pursuant to this Rule is revoked by the Trial Chamber, the Chamber may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal and the State shall accede to such a request without delay in keeping with Article 29 of the Statute. The Trial Chamber or a Judge may also issue a warrant for the arrest of the accused.

PLENARY SESSION
IT/231

"AMENDMENT TO THE RULES OF PROCEDURE AND EVIDENCE"

5 AUGUST 2004

By decision of the Judges at the Thirtieth plenary session of the International Tribunal held on 28 July 2004, the following Rules of the Rules of Procedure and Evidence ("Rules") are amended:

Rule 11 *bis* (C)
Rule 44
Rule 45
Rule 46
Rule 50 (A)
Rule 62 (B)
Rule 68

Pursuant to Sub-rule 6 (D), this amendment shall enter into force seven days after the date of issue of this official document, i.e., on **12 August 2004.** Document IT/32/Rev. 32, incorporating both these amendments and the amendment contained in document IT/229, will be issued in both languages as soon as possible.

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

Carmel Agius
Judge
Chair of the Rules Committee

Dated this fifth day of August 2004
At The Hague
The Netherlands

ANNEX

Rule 11 *bis*
Referral of the Indictment to Another Court

(A) If an indictment has been confirmed, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a Trial Chamber for the purpose of referring a case to the authorities of a State:

(i) in whose territory the crime was committed; or
(ii) in which the accused was arrested; or
(iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.

(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall, in accordance with Security Council **resolution 1534 (2003)**[1] ~~Presidential Statement S/PRST/2002/21,~~ consider the gravity of the crimes charged and the level of responsibility of the accused.

(D) Where an order is issued pursuant to this Rule:

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;
(ii) the Chamber may order that protective measures for certain witnesses or victims remain in force;
(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;
(iv) the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf.

(E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred to trial.

(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Trial Chamber may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

(G) Where an order issued pursuant to this Rule is revoked by the Trial Chamber, the Chamber may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal and the State shall accede to such a request without delay in keeping with Article 29 of the Statute. The Trial Chamber or a Judge may also issue a warrant for the arrest of the accused.

[1] U.N. Doc. S/RES/1534 (2004).

Rule 44
Appointment, Qualifications and Duties of Counsel

(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 he or she**:

(i) is admitted to the practice of law in a State, or is a university professor of law;
(ii) has written and oral proficiency in one of the two working languages of the Tribunal, unless the Registrar deems it in the interests of justice to waive this requirement, as provided for in paragraph (B);
(iii) **is** a member **in good standing** of an association of counsel practicing at the Tribunal recognised by the Registrar;
(iv) has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel;
(v) has not been found guilty in relevant criminal proceedings;
(vi) has not engaged in conduct whether in pursuit of his or her profession or otherwise which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the International Tribunal or the administration of justice, or otherwise bring the International Tribunal into disrepute; and
(vii) has not provided false or misleading information in relation to his or her qualifications and fitness to practice or failed to provide relevant information.

(B) 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, **including the requirement that the counsel or accused undertake to meet all translations and interpretation costs not usually met by the Tribunal, and counsel undertakes not to request any extensions of time as a result of the fact that he does not speak one of the working languages. A suspect or accused may seek the President's review of the Registrar's decision.**

(C) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Professional Conduct for Defence Counsel **Appearing Before the International Tribunal** and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel **adopted** by the Registrar and approved by the permanent Judges.

(D) An Advisory Panel shall be established to assist the President and the Registrar in all matters relating to defence counsel. The Panel members shall be selected from representatives of professional associations and from counsel who have appeared before the Tribunal. They shall have recognised professional legal experience. The composition of the Advisory Panel shall be representative of the different legal systems. A Directive of the Registrar shall set out the structure and areas of responsibility of the Advisory Panel.

Rule 45
Assignment of Counsel

(A) Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in the Directive on the Assignment of Defence Counsel adopted by the Registrar and approved by the permanent Judges.

(B) For this purpose, the Registrar shall maintain a list of counsel who:

(i) fulfil all the requirements of Rule 44, although the language requirement of Rule 44 (A)(ii) may be waived by the Registrar as provided for in the Directive;
(ii) possess established competence in criminal law and/or international criminal law/international humanitarian law/international human rights law;
(iii) possess at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings; and
(iv) have indicated their availability and willingness to be assigned by the Tribunal to any person detained under the authority of the Tribunal lacking the means to remunerate counsel, under the terms set out in the Directive.

(C) The Registrar shall maintain a separate list of counsel who, in addition to fulfilling the qualification requirements set out in paragraph (B), are readily available as "duty counsel" for assignment to an accused for the purposes of the initial appearance, in accordance with Rule 62.

(D) The Registrar shall, in consultation with the permanent Judges, establish the criteria for the payment of fees to assigned counsel.

(E) Where a person is assigned counsel and is subsequently found not to be lacking the means to remunerate counsel, the Chamber may**, on application by the Registrar,** make an order of contribution to recover the cost of providing counsel.

(F) A suspect or an accused electing to conduct his or her own defence shall so notify the Registrar in writing at the first opportunity.

Rule 46
Misconduct of Counsel

(A) If a Judge or a Chamber finds that the conduct of a counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings, or that a counsel is negligent or otherwise fails to meet the standard of professional competence and ethics in the performance of his duties, the Chamber may, after giving counsel due warning:

(i) refuse audience to that counsel; and/or
(ii) determine, after giving counsel an opportunity to be heard, that counsel is no longer eligible to represent a suspect or an accused before the Tribunal pursuant to Rule 44 and 45.

(B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in the counsel's State of admission or, if a **university** professor **of law** and not otherwise admitted to the profession, to the governing body of that counsel's University.

(C) Under the supervision of the President, the Registrar shall publish and oversee the implementation of a Code of Professional Conduct for defence counsel.

Rule 50
Amendment of Indictment

(A) (i) The Prosecutor may amend an indictment:

(a) at any time before its confirmation, without leave;
(b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
(c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.

(ii) ~~After the assignment of the case to a Trial Chamber it shall not be necessary for the amended indictment to be confirmed.~~ **Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment.**

(iii) Further confirmation is not required where an indictment is amended by leave.

~~(iii)~~**(iv)** Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

Rule 62
Initial Appearance of Accused

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

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

(a) if before the Trial Chamber, act in accordance with Rule 62 *bis*, or
(b) if before a Judge, refer the plea to the Trial Chamber so that it may act in accordance with Rule 62 *bis*;

(vii) instruct the Registrar to set such other dates as appropriate.

(B) Where the interests of justice so require, the Registrar may assign a duty counsel as within Rule 45 (C) to represent the accused at the initial appearance. Such assignments shall be treated in accordance with the relevant provisions of the Directive referred to in Rule 45 (A).

Rule 68
Disclosure of Exculpatory and Other Relevant Material

Subject to the provisions of Rule 70,

(i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;
(ii) without prejudice to paragraph **(i)**, the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically;
(iii) the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph **(i)** above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused;
(iv) the Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under **paragraph (i)** to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential;
(v) notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph **(i)** above.

APPEALS CHAMBER

The Prosecutor v. Milan Milutinovic

Case No. IT-99-37-AR72.2

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

"REASONS FOR DECISIONS DISMISSING INTERLOCUTORY APPEAL CONCERNING JURISDICTION OVER THE TERRITORY OF KOSOVO"

8 JUNE 2004

Jurisdiction of the Tribunal: Kosovo

Pursuant to Article 1 of the Statute, the International Tribunal has jurisdiction over crimes allegedly committed in the territory of Kosovo.

Procedural Background

- On 6 May 2003, Trial Chamber III rendered its "Decision on Motion Challenging Jurisdiction" ("Impugned Decision")[1] whereby it dismissed "General Dragoljub Ojdanic's Preliminary Motion to Dismiss Lack of Jurisdiction: Kosovo", filed on 29 November 2002.

- On 13 May 2003, General Ojdanic ("Appellant") filed his Appeal from the Impugned Decision.[2]

- On 30 January 2004, the Appellant filed its Opening Brief.[3]

- On 9 February 2004, the Prosecution filed its "Prosecution's Response to Admissibility of 'General Ojdanic's Opening Brief'".

- On 27 February 2004, a Bench of three Judges from the Appeals Chamber rendered its "Decision" whereby it declared that the Appeal "may be proceeded" with regard to the following grounds: 1. The Trial Chamber erred in its conclusion that the FRY was a member of the United Nations for the purposes of the jurisdiction of the Tribunal over crimes committed on its territory; 2. The Trial Chamber erred in its conclusion that the Security Council's Chapter VII powers could be exercised to confer on the Tribunal jurisdiction over crimes committed on the territory of the FRY even if it was not a member of the United Nations at the relevant time; and 3. The Trial Chamber erred in failing to determine that the Tribunal's jurisdiction over crimes committed on the territory of the FRY could not be based upon the principle of universal jurisdiction.

- On 12 March 2004, the Prosecution filed its Response to General Ojdanic's Appeal from the Impugned Decision.[4]

Decision

On 12 May 2004, the Appeals Chamber rendered its "Decision on Interlocutory Appeal" whereby it dismissed the Appeal and indicated that the reasons for its Decision were to be given in due course. The reasons were issued on 8 June 2004.

Reasoning

The Appeals Chamber recalled its previous finding in the *Tadic* Jurisdiction Decision whereby it held that "[t]he establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41 [of the United Nations Charter]" and that "the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter".[5]

In respect of the three issues raised by the Appellant, the Appeals Chamber considered that the "only question which the Tribunal has to consider is whether the terms in which [the Tribunal] has been given jurisdiction embrace the particular territory in question". It referred to Article 1 of the Statute of the Tribunal (Competence of the International Tribunal) which reads:

> "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."

It noted that "Kosovo is, and was, at the relevant time, a part of the territory of the former Yugoslavia" and found that "pursuant to Article 1 of the Statute, the International Tribunal has jurisdiction over General Ojdanic for crimes allegedly committed in the territory of Kosovo". ■

[1] The Impugned Decision has been summarised in *Judicial Supplement* No. 41. It *inter alia* addressed the membership of the Federal Republic of Yugoslavia ("FRY") in the United Nations between 1992 and 2000, and the authority of the Security Council under Chapter VII of the United Nations Charter.

[2] *Milutinovic* et al., IT-99-37-AR72.2, General Ojdanic's Appeal from Decision on Motion Challenging Jurisdiction and Motion for an Extension of Time to File Opening Brief ("Appeal"), 13 May 2003.

[3] *Milutinovic* et al., IT-99-37-AR72.2, General Ojdanic's Opening Brief ("Opening Brief"), 30 January 2004.

[4] *Milutinovic* et al., IT-99-37-AR72.2, Prosecution's Response to Defence Interlocutory Appeal on Jurisdiction (Kosovo), 12 March 2004.

[5] *Tadic*, IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 36 and 40.

APPEALS CHAMBER

The Prosecutor v. Sefer Halilovic

Case No. IT-01-48-AR73

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

"DECISION ON THE ISSUANCE OF SUBPOENAS"

21 JUNE 2004

Rule 54 - Subpoenas: applicable law - Use of subpoenas - Subpoenas to interview a witness of the opposing party - *Rationale*

Applicable law: in deciding whether the applicant has met the evidentiary threshold, the Trial Chamber may properly consider both whether the information the applicant seeks to elicit through the use of subpoena is necessary for the preparation of his case and whether this information is obtainable through other means. The background principle informing both considerations is whether, as Rule 54 requires, the issuance of subpoenas is necessary "for the preparation or conduct of the trial". The Trial Chamber's considerations, then, must focus not only on the usefulness of the information to the applicant but also on its overall necessity in ensuring that the trial is informed and fair.

Use of subpoenas: being a mechanism of judicial compulsion, backed up by the threat and the power of criminal sanctions for non-compliance, the subpoena is a weapon which must be used sparingly and where it would serve the overall interests of the criminal process, not where it would merely facilitate a party's task in litigation.

Subpoenas to interview a witness of the opposing party:
- Trial Chambers should not hesitate to resort to this instrument when it is necessary to elicit information of importance to the case and to ensure that the defendant has sufficient means to collect information necessary for the preparation of an effective defence.
- In entertaining a request for a subpoena, a Trial Chamber is entitled to take into account the fact that a witness whom a party seeks to subpoena is scheduled to testify during the trial, and to refuse the request where its sole rationale is to prepare for a more effective cross-examination.

***Rationale*:** the Trial Chamber erred in rejecting the Defence request for subpoenas solely on the basis of the fact that the Defence will have the opportunity to cross-examine the proposed witnesses. The Trial Chamber should have examined whether the Defence has presented reasons for the need to interview these witnesses which went beyond the need to prepare a more effective cross-examination.

Procedural Background

On 29 December 2003, the Defence for Sefer Halilovic requested that the Trial Chamber issue subpoenas to three individuals on the Prosecution's list of witnesses who had refused its requests to be interviewed.[1]

On 16 February 2004, the Trial Chamber rejected the Motion. It noted that all three witnesses would be subject, at trial, to cross-examination by the Defence and that the Defence "had not specified what aspects must be covered during the [sought] interviews of each of the three witnesses that could not be adequately covered during cross-examination."[2]

On 24 February 2004, the Defence submitted additional information in respect of its Motion and requested that the Trial Chamber reconsider its Decision. Alternatively, it requested certification to appeal the 16 February 2004 Decision ("Impugned Decision") pursuant to Rule 73 (B) of the Rules of Procedure and Evidence.[3]

On 2 April 2004, the Trial Chamber acknowledged that the Defence "submit[ted] further details pertaining to each of the three witnesses" but nevertheless concluded that it would not issue subpoenas to witnesses "who are all expected to testify *viva voce* and be subject to cross-examination during trial". It therefore adhered to its previous Decision but certified the appeal.[4]

On 13 April 2004, the Defence filed its appeal whereby it requested the Appeals Chamber to reverse the Impugned Decision and to either issue the requested subpoenas or to direct the Trial Chamber to do so.[5] The Prosecution responded on 23 April 2004. It argued that the Impugned Decision was correct and therefore should be confirmed.[6]

Decision

The Appeals Chamber granted the Appeal in part and reversed the Impugned Decision. It directed the Trial Chamber to reconsider the Defence Motion in light of the principles set out in the present Decision and to issue subpoenas should its renewed examination disclose a need for the Defence to interview the witnesses. Judge Shahabuddeen appended a declaration and Judge Weinberg de Roca appended a dissenting opinion.

Reasoning

The Appeals Chamber identified the issue on appeal as to whether or not a Trial Chamber may reject a motion for a subpoena "merely because the proposed witnesses will in any event be called by the other party and so will be available for cross-examination by the moving party".[7]

Subpoenas: applicable law

Rule 54 of the Rules permits a Judge or Trial Chamber to make such orders or to issue such subpoenas as may be "necessary for the purposes of an investigation or for the preparation or conduct of trial".[8] This power makes it possible for a subpoena to be issued requiring a prospective witness "to attend at a

[1] *Halilovic*, IT-01-48-PT, Motion for Subpoenas ("Motion"), filed confidentially on 29 December 2004.
[2] *Halilovic*, IT-01-48-PT, Decision on Defence Motion for Subpoenas, 16 February 2004.
[3] *Halilovic*, IT-01-48-PT, "Motion for Reconsideration and, in the Alternative, Motion for Certification", filed confidentially on 24 February 2004.
[4] *Halilovic*, IT-01-48-PT, "Decision on Motion for Reconsideration, or Alternatively, Certification, 2 April 2004.
[5] *Halilovic*, Defence Appeal Concerning Issuance of Subpoenas, filed partly confidentially on 13 April 2004.
[6] *Halilovic*, IT-01-48-PT, Prosecution Response to Defence Appeal Concerning Issuance of Subpoenas, 23 April 2004.
[7] Para. 1.
[8] Rule 54 (General Rule) reads:
"At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

nominated place and time in order to be interviewed where that attendance is necessary for the conduct of the trial."[9]

An order or subpoena would become "necessary" for the purposes of Rule 54 where a legitimate forensic purpose for holding such an interview has been shown. An applicant for such an order or subpoena, before or during trial, would have to "demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to the forthcoming trial".[10]

The assessment of the chance that the prospective witness will be able to give information which will "materially assist" the Defence in its case will depend "largely upon the position held by the prospective witness in relation to the events in question, any relationship he may have (or have had) with the accused which is relevant to the charges, the opportunity which he may reasonably be thought to have had to observe those events (or to learn of those events) and any statements made by him to the prosecution or to others in relation to those events".[11]

Recourse to such a procedure should not amount to a "fishing expedition" whereby the applicant would be unaware of whether the particular person has any relevant information. The applicant shall not seek to interview that person merely in order to discover whether he/she has any such information.[12] The discretion rests with the Trial Chamber to decide whether or not to have recourse to such stringent procedure, which should not be abused: "Subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction".[13]

With regard to the issuance of subpoenas to war correspondents, the Appeals Chamber had already set a two-pronged test: "First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere."[14]

In the present case, the Appeals Chamber held:

> "In deciding whether the applicant has met the evidentiary threshold, the Trial Chamber may properly consider both whether the information the applicant seeks to elicit through the use of subpoena is necessary for the preparation of his case and whether this information is obtainable through other means. The background principle informing both considerations is whether, as Rule 54 requires, the issuance of subpoena is necessary 'for the preparation or conduct of the trial'. The Trial Chamber's considerations, then, must focus not only on the usefulness of the information to the applicant but [also] on its overall necessity in ensuring that the trial is informed and fair".[15]

Use of subpoenas

The Appeals Chamber held that as a "mechanism of judicial compulsion, backed up by the threat and the power of criminal sanctions for non-compliance, the subpoena is a weapon which must be used sparingly[16] [...] and where it would serve the overall interests of the criminal process, not where it would merely facilitate a party's task in litigation".[17]

Subpoenas to interview a witness of the opposing party

The Appeals Chamber held that "[w]hile a preparation for cross-examination is undeniably a part of the overall preparation for trial, it is not, in and of itself, a sufficient basis for an issuance of subpoena."[18] In its consideration, Trial Chambers should "guard against the subpoena becoming a mechanism used routinely as part of trial tactics" and resort to this instrument when it is "necessary to elicit information of importance to the case and to ensure that the defendant has sufficient means to collect information necessary for the preparation of an effective defence".[19]

The Appeals Chamber found that "[w]here the information the Defence seeks before trial from the opposing party's witness will, in any event, be presented at trial during that witness's examination-in-chief, there is no need to resort to a subpoena".[20] As the information "will be present both to the court and to the Defence" and as the Defence "will be able to test this information for veracity, accuracy and reliability during cross-examination", the Appeals Chamber held that "[i]n entertaining a request for a subpoena, a Trial Chamber is [...] entitled to take into account the fact that a witness whom a party seeks to subpoena is scheduled to testify during the trial, and to refuse the request where its sole rationale is to prepare for a more effective cross-examination".

Rationale

The Trial Chamber, in its 16 February 2004 Decision, found that the Defence "had not specified what aspects could be covered during the sought interviews of each of the witnesses that could not be adequately covered during cross-examination",[21] and therefore rejected the Motion. In its 2 April 2004 Decision, the Trial Chamber, having acknowledged that the Defence had presented further details in support of its request, stated that it would not issue subpoenas to witnesses "who are all expected to testify *viva voce* and be subject to cross-examination during trial".[22]

The Appeals Chamber found that the Trial Chamber, in its 16 February 2004 Decision, did examine whether the Defence's request for a subpoena "went beyond the scope of the issues on which the Prosecution witnesses were expected to testify", but did not do so in its 2 April 2004 Decision and therefore was "in error".[23] In the latter, as noted by the Appeals Chamber, the decision to deny the request for a subpoena was wrongly based on the "mere fact that the witness would be available for cross-examination".[24]

To conclude, the Appeals Chamber found that the Trial Chamber "erred in rejecting the Defence request for subpoenas [...] solely on the basis of the fact that the Defence will have the opportunity to cross-examine [the proposed] witnesses" and that the Trial Chamber "should have examined whether the Defence has presented reasons for the need to interview these witnesses which went beyond the need to prepare a more effective-cross examination".

To reach this conclusion, the Appeals Chamber addressed the following elements:

---

[9] *Krstic*, IT-98-33-A, Decision on Application for Subpoenas ("*Krstic* Subpoena Decision"), 1 July 2003, para. 10 (emphasis added), *Judicial Supplement* No. 43.
[10] *Krstic* Subpoena Decision, para. 10 (emphasis added).
[11] *Ibid.*, para. 11.
[12] *Ibid.*
[13] *Brdjanin and Talic*, IT-99-36-AR73.9, Decision on Interlocutory Appeal ("*Brdjanin* Decision"), 11 December 2002, para. 31, *Judicial Supplement* No. 38.
[14] *Ibid.*, para. 50.
[15] Para. 7, footnote 14 omitted. In footnote 15, the Appeals Chamber, referring to para. 46 of the *Brdjanin* Decision, further held: "in deciding whether a subpoena should issue, a Trial Chamber must take into account not only the interests of the litigants but the overarching interests of justice and other public considerations".
[16] See *supra* footnote 13 and text accompanying note.
[17] Para. 10.
[18] Para. 10.
[19] *Ibid.*
[20] *Ibid.*
[21] See *supra* under "Procedural Background".
[22] *Ibid.*
[23] Para. 11.
[24] *Ibid.*

Right of the parties to interview witnesses

In paragraph 12, the Appeals Chamber held:

"Where a witness is listed by one party as expected to testify on its behalf with respect to certain issues, it does not necessarily follow that this witness will have no information of value to the opposing party on other issues related to the case. The opposing party may have a legitimate expectation of interviewing such witness in order to obtain this information and thereby better prepare a case for its client. To deprive this expecting party of such ability would hand an unfair advantage to the opposing party, which would be able to block its opponent's ability to interview crucial witnesses simply by placing them on its witness list."

Avoiding delays

In paragraph 13, it further held:

> "[...] the party which placed the witness in question on its list of witnesses may then decide not to call the witness at all. While the other party, such as the Defence in this case, could subsequently petition the Trial Chamber for a subpoena to obtain information from the witness, that party would have lost valuable time in procuring this information and may therefore end up at an unfair disadvantage with respect to the preparation of its case."

Scope of cross-examination and proper preparation of the case

In paragraph 14, the Appeals Chamber held:

> "The Trial Chamber also seems to have overlooked the fact that during cross-examination, the party conducting cross-examination can elicit from the witness evidence exceeding the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness, provided that 'the witness is able to give evidence relevant to the case for the cross-examining party'.[25] Given that during cross-examination the Defence can elicit from the Prosecution witness information which is relevant to its own case and goes beyond the scope of the Prosecution's examination-in-chief, the Defence may have a legitimate need to interview this witness prior to trial in order to properly prepare its case."

The Appeals Chamber remitted the matter to the Trial Chamber, as the proper forum for the factual determination of the case in light of the "principles" given in the present Decision.[26]

Dissenting Opinion of Judge Weinberg de Roca

Judge Weinberg de Roca explained that, in her view, the majority of the Appeals Chamber misinterpreted the Trial Chamber's reasoning when it held that the Trial Chamber had denied the Defence Motion solely because the witnesses would be available for cross-examination. In her view the Trial Chamber did stress the need to exercise "due caution" in applying a mechanism as coercive as a subpoena.[27] She would have rejected the Defence Motion.

She stressed that the Appeals Chamber had previously recognised "the importance of balancing a witness's right to privacy against the duty to adjudicate thoroughly", and therefore had "exercised caution in applying the coercive power of subpoena, carrying as it does the threat of criminal sanctions".[28] She recalled that the Appeals Chamber had also previously recognised that "particular caution is needed where the Prosecution is seeking to interview a witness who has declined to be interviewed"[29] and stated that compelling an unwilling witness to submit to a pre-trial interview without "a clear showing that such a measure is necessary to the fair adjudication of the case", would be a "grave invasion of privacy indeed".[30]

Declaration of Judge Shahabuddeen

Judge Shahabuddeen addressed the question as to whether a Chamber may "step in" to compel a witness, who has refused to be interviewed by the Prosecution, to attend an interview and to answer questions by the parties.[31] He noted that the "wide" powers given to the Trial Chambers, pursuant to Rule 54, to "issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial", must be interpreted and applied "in accordance with the principle known to nations in the international community".[32] He expressed his doubts that those principles allow for the issuance of a subpoena to a potential witness to be interviewed by a party to a criminal matter, all the more so for witnesses who have refused to be interviewed. To illustrate, he envisages the situation of a person subject to the criminal sanctions of a subpoena for refusing an "out-of-court" meeting with a party, even though it could be that the person is never called as a witness in court.

He proposed that there should be a balance between the public interest of the right to one's privacy and the public interest in securing information needed for a criminal trial, which balance would be struck by "defining a line beyond which the privacy of a person can be encroached upon only where there is a countervailing and established legal duty, such as the duty of a person to testify before a process conducted by a judicial officer".[33] ■

[25] Footnote 22 of the original Decision. The Appeals Chamber referred to the wording of Rule 90(H)(i) of the Rules of Procedure and Evidence, which reads as follows:
"Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case."
[26] Para. 15.
[27] Dissenting Opinion of Judge Weinberg de Roca ("Dissenting Opinion"), para. 2.
[28] *Ibid.*, para. 4. Judge Weinberg de Roca referred *inter alia* to *Mrksic*, IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposing Party ("*Mrksic* Decision"), 30 July 2003.
[29] *Mrksic* Decision, para. 16.
[30] Dissenting Opinion, para. 4.
[31] In the *Mrksic* Decision, para. 15, the Appeals Chamber found that where "a person for any reasons declined to be interviewed, the Prosecution does not have the power to compel the person to attend an interview or to respond to questions posed by the Prosecution".
[32] *Ibid.*, para. 3.
[33] *Ibid.* para. 4.

TRIAL CHAMBERS

The Prosecutor v. Pavle Strugar

Case No. IT-01-42-T

Trial Chamber II (Judges Parker [Presiding], Thelin and Van Den Wyngaert)

"DECISION RE THE DEFENCE MOTION TO TERMINATE PROCEEDINGS"

26 MAY 2004

Fitness of an accused to stand trial: Applicable law - Legal test - Capacities of an accused - Assessment of the capacities - Burden of proof - Consequences.

Legal test: fitness to stand trial is a matter which, although undoubtedly connected with the physical and mental condition of an accused person, is not confined to establishing whether a given disorder is present. The issue is not whether the accused suffers from particular disorders, but rather is better approached by determining whether he is able to exercise effectively his rights in the proceedings against him.

- **Capacities of an accused:** to plead, to understand the nature of the charges, to understand the course of the proceedings, to understand the details of the evidence, to instruct counsel, to understand the consequences of the proceedings, and to testify.
- **Assessment of the capacities:** the threshold beyond which an accused is considered fit to stand trial is met when an accused has those capacities, viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for the accused to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights, i.e. to make his or her defence.
- **Burden of proof:** the burden of proving that the Accused is not fit to stand trial should be on the Defence, and the standard of that burden should be merely "the balance of probabilities".
- **Consequences:** the consequences of finding an accused unfit to stand trial are likely to vary according to the circumstances. There appears no statutory or other basis for a trial before this Tribunal to continue while an accused is unfit to stand trial. In cases where the unfitness to stand trial is a temporary condition, it may prove appropriate to merely adjourn the trial and to continue when the accused has sufficiently recovered. Other cases may require that the trial be abandoned. It may also be the case that an impairment of capacity is of such a nature that measures can be taken to sufficiently alleviate the impairment, or its effect, so that the trial can continue. An obvious example would be the provision of special technical equipment to enable an accused with a hearing impediment to follow the proceedings. In some cases, legal assistance to an accused may be a sufficient measure to compensate for any limitations of capacity of the accused to stand trial.

Procedural Background

● On 15 December 2003, at the final pre-trial conference, the Defence for Pavle Strugar ("Accused") requested that he be submitted to a medical examination pursuant to Rule 74 *bis* of the Rules of Procedure and Evidence ("Rules")[1] in order to *inter alia* assess his fitness to stand trial. The pre-trial Judge heard oral submissions from both parties, took into account the medical documentation relied upon by the Defence, and decided not to delay the start of the trial.

● On 16 December 2003, the trial started. The Defence requested that the Trial Chamber deal with its request and both parties made further oral submissions. The Chamber orally decided that there was nothing in the medical documentation that would require a delay in the commencement of the trial.

● On 19 December 2003, the Trial Chamber rendered its "Decision on the Defence Motion for a Medical Examination of the Accused Pursuant to Rule 74 *bis* of the Rules". Considering the written report of Dr. de Both, General Practitioner, dated 16 December 2003, and the medical record of the Accused, the Trial Chamber saw no reason to order further medical examination. It recalled that it was open to the Defence to commission a report on the health condition of the Accused. The Trial continued.

● On 3 February 2004, the Defence requested that the proceedings be terminated. It relied on the previous medical record of the Accused and on a medical report by Professor Lecic-Tosevski ("Defence's expert") filed confidentially the previous day.[2]

● At the 4 February 2004 hearing, the Prosecution submitted that the request of the Defence lacked adequate foundation and support, and should therefore be dismissed. The Trial Chamber invited the Defence to supplement the medical report and invited the Prosecution to arrange for its own medical examination of the Accused. It decided that the trial would continue pending determination of the issue.

● On 12 February 2004, the Defence filed confidentially a further report of its expert and requested a discontinuance of the trial.

● On 17 February 2004, the Trial Chamber issued, following a motion by the Prosecution, a confidential order for a magnetic resonance imaging scan ("MRI") of the Accused to facilitate the examination by Prosecution's experts (a MRI scan had been conducted in 2002 and the Defence's expert had relied on it).

● On 22 March 2004, the Prosecution filed a medical report of the Accused prepared by its experts Drs. B. Blum, V. Folnegovic-Smalc and D. Matthews ("Prosecution's experts").

● On 30 March 2004, the Trial Chamber heard oral submissions of the parties.

● On 28 and 29 April 2004, the Trial Chamber heard evidence from Professor Lecic-Tosevski and Drs Blum and Matthews. The parties filed written submissions which they supplemented on 6 May 2004 by brief oral submissions.

[1] Rule 74 *bis* (Medical Examination of the Accused) reads:
"A Trial Chamber may, *proprio motu* or at the request of a party, order a medical, psychiatric or psychological examination of the accused. In such a case, unless the Trial Chamber otherwise orders, the Registrar shall entrust this task to one or several experts whose names appear on a list previously drawn up by the Registry and approved by the Bureau."

[2] Defence Notice and Confidential Annex, 2 February 2004.

Decision

The Trial Chamber dismissed the motion of the Defence. It saw no grounds for either discontinuing the proceedings or adjourning them, did not find it necessary to consider the provision to the Accused of any special assistance on account of any limitations in his capacity to stand trial, found the Accused fit to stand trial, and held that this had been the position throughout the trial to the time of the present Decision.[3]

Reasoning

Applicable law

Tribunal's law

Neither the Tribunal's Statute nor the Rules contain provisions regulating the fitness or competence of an accused to stand trial. The Trial Chamber nevertheless found some support in the Report of the Secretary-General of the United Nations presenting the draft Statute of the Tribunal which addresses in paragraph 58 the possible personal defences:

> "The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations."[4]

Despite the lack of specific provisions, the Trial Chamber found "material assistance" in the Statute of the Tribunal, "by way of implication".[5] It referred to the procedural rights enshrined in Articles 20[6] and 21[7], the "enjoyment [of which] would appear to presuppose that an accused has a level of mental and physical capacity":

- confirmation by an accused, at the beginning of the trial, that he/she understands the indictment (Article 20(3));
- right of an accused to self-representation (Article 21(4)(d));[8]
- right of an accused to examine witnesses against him/her (Article 21(4)(e));
- right to have the free assistance of an interpreter if he/she cannot understand or speak the language used in the Tribunal (Article 21(4)(f)).[9]

With regard to the right to self-representation and the right to examine witnesses, the Trial Chamber found that it implies that accused persons:

- understand the purpose, including the consequences, of the proceedings;
- understand the course of the proceedings, including the nature and significance of pleading to the charges;
- understand the evidence;
- testify (should they so choose).[10]

With regard to representation by counsel, "a feature of trials before the Tribunal",[11] the Trial Chamber recognised that the availability of counsel "may certainly enable an accused to more adequately deal with the above matters, and in a particular case may well adequately compensate for any deficiency of a relevant capacity".[12] It found, however, that the use of counsel requires that the accused has the "capacity [...] to instruct counsel sufficiently [...]".[13]

The Trial Chamber found that the nature of the above-mentioned rights, as it non-exhaustively listed, "indicates that their effective exercise may be hindered, or even precluded, if an accused's mental and bodily capacities, especially the ability to understand, *i.e.* to comprehend, are affected by mental or somatic disorder".[14] In its view it follows from Articles 20 and 21 and their implications that an accused "will have these capacities or, with assistance of counsel, interpretation or otherwise, will be able to exercise these capacities [...] in a sufficient degree to enable the defence of the accused to be presented".[15]

The Trial Chamber added that the question of fitness to stand trial is, "by nature of the subject matter, one which may possibly change in the course of a long trial" and that, further, there are "some cases in which a temporary unfitness may be remedied with treatment so that the trial could continue after a delay or interruption".[16]

The Trial Chamber found itself competent to determine whether in the present case the Accused was competent or fit[17] to stand trial and found further legal arguments, both at the national and international levels, to justify its Decision.

National and international law

The Trial Chamber noted that while the "precise formulation, scope and operation of the law" with regard to fitness of an accused to stand trial "inevitably varies between national juris-

---

[3] On 2 June 2004, the Defence for General Strugar requested leave to appeal the present Decision. Its Motion was denied by the Trial Chamber on 17 June 2004 (Strugar, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004).

[4] Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), presented 3 May 1993, (S/25704). For an analysis of the law relating to diminished mental responsibility, see *Delalic* et al., IT-96-21-T, Judgement, 16 November 1998, *Judicial Supplement* No. 1, paras. 1156-1172.

[5] Para. 21.

[6] Article 20 (Commencement and conduct of trial proceedings) reads:
"1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence."

[7] Article 21 (Rights of the Accused) reads:
"1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g)not to be compelled to testify against himself or to confess guilt."

[8] On the issue of self-representation, see *Milosevic*, IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, 4 April 2003. See also *Seselj*, IT-03-67-T, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, 9 May 2002. Both decisions have been summarised in *Judicial Supplement* No. 41.

[9] Para. 21.

[10] Para. 22.

[11] Only two Accused are representing themselves before the Tribunal: Slobodan Milosevic and Vojislav Seselj. See *supra* note 8.

[12] Para. 22.

[13] *Ibid.*

[14] Para. 23.

[15] Para. 24 (emphasis added).

[16] Para. 27.

[17] The Trial Chamber used both terms interchangeably.

dictions", the "underlying principle appears to enjoy general acceptance".[18]

It *inter alia* referred to: the position of the Supreme Court of the United States of America according to which the right not to stand trial while incompetent was considered fundamental;[19] to the position in common law jurisdictions that a person may be tried for a criminal offence only where there is sufficient mental capacity to present a defence;[20] and also to the position of the European Court and the European Commission of Human Rights that, pursuant to Article 6 of the European Convention on Human Rights,[21] an accused has the right to "participate effectively in a criminal trial",[22] which presupposes that he is "capable, from a mental and physical point of view, of taking part in the criminal proceedings against him".[23]

The Trial Chamber observed that in a number of jurisdictions, such as Canada, the decisive factor for evaluation of an accused's fitness to stand trial is the presence of a mental disorder.[24] Nevertheless it noted that in some national jurisdictions the mental disorder factor has been interpreted widely, such as in *Reg. v Podola*,[25] to include physical and mental condition precluding an accused from following the proceedings and properly defending himself.

The Trial Chamber noted that the issue of the fitness of an accused to stand trial is not addressed in the Statutes of the International Criminal Tribunal for Rwanda ("ICTR") and of the International Criminal Court ("ICC"). The ICTR Trial Chamber in the *Nahimana* case did order that one of the Accused be submitted to a medical, psychiatric and psychological examination to determine whether he was fit to stand trial, but did not address the elements of such fitness.[26] Rule 135 of the ICC Rules of Procedure and Evidence, in paragraph 4, does envisage that a trial may be adjourned where an accused is unfit to stand trial, but does not expand on the definition of the underlying incompetence of the accused.

With specific reference to the proceedings before the Tribunal, the Trial Chamber noted that the fact that trials *in absentia* are not permitted "would appear to be devoid of any substance if it related to the mere physical presence of the accused in court".[27]

To complete its analysis, and before determining the legal test for fitness to stand trial, the Trial Chamber turned to the jurisprudence of "those many national jurisdictions" which place emphasis on a direct assessment of particular capabilities relating to an accused's participation in his trial.[28] In *Dusky v United States*, the United States Supreme Court held that "the test must be whether [the Defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him".[29] In English common law, as formulated in *Reg. v Pritchard*, the criteria is "[f]irst, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend[30] the course of proceedings [during] the trial, so as to make a proper defence – to know that he might challenge jurors to whom he might object – and to comprehend the details of the evidence."[31] In Australia, the capacity of an accused to understand the trial has been described as whether or not he comes up to "certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him",[32] and not whether he has an intelligence of a high order.

Legal test

The Trial Chamber held the following:

- "a mental disorder is not a prerequisite for finding a person unfit to stand trial [...];
- [...] fitness to stand trial is a matter which, although undoubtedly connected with the physical and mental condition of an accused person, is not confined to establishing whether a given disorder is present [...];
- [...] the issue is not whether the accused suffers from particular disorders, but rather is better approached by determining whether he is able to exercise effectively his rights in the proceedings against him."[33]

Capacities of an accused

The Trial Chamber drew the following non-exhaustive list of capacities from Articles 20 and 21 of the Statute:

- "to plead,
- to understand the nature of the charges,
- to understand the course of the proceedings,
- to understand the details of the evidence,
- to instruct counsel,
- to understand the consequences of the proceedings, and
- to testify."[34]

Assessment of capacities

The Trial Chamber noted that it is difficult to objectively measure the capacities of an accused and to set a threshold beyond which an accused is considered fit to stand trial. It further noted that such assessment is even more difficult when assistance of counsel is provided, and observed that the capacities will "vary considerably between individuals as a matter of nature and without the influence of any physical or mental disorder."[35] Nevertheless such an assessment remains necessary. The Trial Chamber held the following:

---

[18] Para. 29.
[19] *Copper v Oklahoma,* 517 US 348 (1996).
[20] *Dashwood v Reg.*, [1943] KB. 4.
[21] Article 6 of the European Convention on Human Rights reads :
"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and the facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."
[22] *Stanford v United Kingdom,* European Court of Human Rights, Judgement, 23 February 1994, Series No. 282-A, pp. 10-11, para. 26: "Article 6 (art. 6), read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general this includes, *inter alia*, not only his right to be present, but also to hear and follow the proceedings."
[23] *Mielke v Germany,* application No. 30047/96, European Commission of Human Rights, Decision, 25 November 1996.
[24] Under the Criminal Code of Canada, "unfit to stand trial" is defined as "means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel […]".
[25] *Reg. v Podola* (1960), 1 QB 325 at 353.
[26] *Nahimana* et al., ICTR-99-52-T, Judgement, 3 December 2003, para. 52.
[27] Para. 32.
[28] Para. 34.
[29] *Dusky v United States,* 362 US 402
[30] "Comprehend" meaning "understand" (*Reg. v Podola* (1960) 1 QB 325 at 354).
[31] *Reg. v Pritchard* (1836) 7 C. & P 303 at 304 (174 ER 135).
[32] *Ngatayi v The Queen* (1980) 147 CLR 9. See footnote 34 of the Decision for further details on the minimum standards set by the High Court of Australia.
[33] Para. 35, footnote omitted.
[34] Para. 36.
[35] Para. 37.

- "[i]t would be entirely inappropriate, and unjustified, and antithetical to the application of international criminal law, to require that each of these capacities must be present at their notionally highest level, or at the highest level that a particular accused has ever enjoyed in respect of each capacity [...];
- [...] what is required is a *minimum* standard of overall capacity below which an accused cannot be tried without unfairness or injustice [...];
- [...] the threshold is met when an accused has those capacities, viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for the accused to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights, *i.e.* to make his or her defence."[36]

Burden of proof

The Trial Chamber held that "the burden of proving that the Accused is not fit to stand trial should be on the Defence, and the standard of that burden should be merely 'the balance of probabilities' [...]."[37]

Consequences

The Trial Chamber held that "the consequences of finding an accused unfit to stand trial are likely to vary according to the circumstances".[38] It noted the various possibilities when an accused is declared unfit to stand trial:

- discontinuance of the trial,
- appropriate treatment should the court become satisfied that he committed the charged acts,
- continuance of the trial with mandatory representation of the accused (European civil law).[39]

With respect to the proceedings before this Tribunal, the Trial Chamber held the following:

- "[...] there appears no statutory or other basis for a trial before this Tribunal to continue while an accused is unfit to stand trial [...];
- [...] in cases where the unfitness to stand trial is a temporary condition, it may prove appropriate to merely adjourn the trial and to continue when the accused has sufficiently recovered [...];
- [o]ther cases may require that the trial be abandoned [...];
- [i]t may also be the case that an impairment of capacity is of such a nature that measures can be taken to sufficiently alleviate the impairment, or its effect, so that the trial can continue. An obvious example would be the provision of special technical equipment to enable an accused with a hearing impediment to follow the proceedings [...];
- [i]n some cases, legal assistance to an accused may be a sufficient measure to compensate for any limitations of capacity of the accused to stand trial."[40]

In the present case, the Trial Chamber found the approach of the Prosecution "better directed and the result more persuasive" as the Prosecution focused not on the diagnosis of the mental and somatic disorders from which the Accused suffers but rather on the impact of the Accused's health on his capacities to stand trial.[41] The Trial Chamber referred to the criteria used by the Defence expert that an accused must "fully comprehend" the course of the proceedings in the trial. It found that the Defence had set "too high a standard of comprehension"[42] and had misquoted and misunderstood the New Oxford Textbook of Psychiatry which relevant part reads as follow:

> "In its traditional formulation the test of unfitness to plead is whether the defendant is of sufficient intellect to *comprehend* the course of the proceedings in the trial, so as to make a proper defence, to know that he might challenge jurors, and to *comprehend* details of the evidence. Specific considerations are whether the defendant understands what he is charged with, the nature of the prosecution evidence, and the difference between a plea of guilty and not guilty. The defendant should also be able to follow the proceedings and be able to instruct lawyers so that the defence case can be made. It should also be remembered that in some cases defendants will need to be able to give evidence themselves, and their ability to do so will need to be considered."[43]

The Trial Chamber turned to the assessment of the capacities relevant to the present case, as identified early in its Decision, and dismissed the motion of the Defence.

[36] *Ibid.*
[37] Para. 38 (footnotes omitted). The Trial Chamber referred in footnote 36 to an order in the *Delalic et al.* case (IT-96-21-T, Order on Esad Landzo's Submission Regarding Diminished or Lack of Mental Capacity, 18 June 1998) in which the Trial Chamber decided that "the Defence offering a special defence of diminished or lack of mental responsibilities carries the burden of proving this defence on the balance of probabilities."
[38] Para. 39.
[39] *Ibid.*
[40] *Ibid.*. Footnote omitted.
[41] At para. 48, the Trial Chamber held: "While they accepted for example that there was a level of dementia being experienced by the Accused, the Prosecution experts [...] sought to identify the effects and degree of that dementia, and were persuaded in the end that it was only minor in degree and effect."
[42] Para. 48.
[43] *Ibid.* New Oxford Textbook of Psychiatry, Oxford University Press, 2000 (emphasis added by the Trial Chamber).

TRIAL CHAMBERS

The Prosecutor v. Sefer Halilovic

Case No. IT-01-48-PT

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

"DECISION ON DEFENCE OBJECTION TO PROSECUTION CONTINUED DISCLOSURE"

7 MAY 2004

Procedural Background

On 12 March 2004, the Defence for Sefer Halilovic filed the "Defence Objection to Prosecution Continued Disclosure" whereby it complained about the continued disclosure of material by the Prosecution, pursuant to Rule 66(A)(ii)[1] and Rule 68[2] of the Rules of Procedure and Evidence ("Rules"), after the date set by the pre-trial Judge for completion of such disclosure. It sought an order from the Chamber that the Prosecution: 1. sign an undertaking or otherwise confirm that it has now disclosed all Rule 66(A)(ii) and Rule 68 material presently in its possession; and 2. stop any further investigation of the Prosecution's case.

The Prosecution filed its response on 23 March 2004, the Defence filed its reply on 30 March 2004, and the Prosecution filed a further reply on 6 April 2004.

Decision

The Trial Chamber expressed its willingness "to balance the need for expeditious preparation of the case pursuant to Rule 65 *ter* of the Rules, which requires that the Prosecution disclose all material subject to Rule 66 (A)(ii) and Rule 68 of the Rules within the time-frame set by the pre-trial Judge,[3] with the overriding interests of justice, which require that full and complete disclosure of all relevant material be made to the defence at whatever stage of the proceedings, provided that the defence has adequate time and resources to examine such material and prepare its case".[4]

The Trial Chamber granted the Motion in part and *inter alia* ordered the following:

1. the Prosecution shall provide the Trial Chamber with copies of all material disclosed to the Defence after 15 December 2003, setting out:
   (a) for each item disclosed pursuant to Rule 66 (A)(ii), the circumstances in which the additional material was obtained, the reason why the material was not disclosed within the time-frame set by the pre-trial Judge, and identifying any new material or allegations not already raised in other statements of the same witness already disclosed; and
   (b) for each item disclosed pursuant to Rule 68, identifying whether the material forms part of a collection of material made available to all Defence teams in electronic form and, if not, explaining why the material was not available for disclosure within the time-frame set by the pre-trial Judge;
2. unless otherwise agreed between the Prosecution and the Defence, any further disclosure shall only be made with the leave of the pre-trial Judge and the Prosecution shall, prior to such disclosure, provide him with the information set out in operative paragraph (1) above; and
3. the Prosecution shall provide the Defence with an index of material available for inspection pursuant to Rule 66 (B). ■

[1] Rule 66(A)(ii) (Disclosure by the Prosecutor) reads:
"(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands
[…]
(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses."

[2] Rule 68 (Disclosure of Exculpatory and Other Relevant Material) reads:
"(A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.
(B) Without prejudice to paragraph (A), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically.
(C) The Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (A) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.
(D) The Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.
(E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above."

[3] The Prosecution had been ordered to finish its Rule 68 disclosure by 15 December 2003.

[4] In the *Blaskic* case, the Appeals Chamber held on 26 September 2000 that the Prosecution has a continuing obligation to disclose exculpatory evidence at the post-trial stage (*Blaskic*, IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, *Judicial Supplement* No. 19).

TRIAL CHAMBERS

The Prosecutor v. Slobodan Milosevic

Case No. IT-02-54-T

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

"DECISION ON MOTION FOR JUDGEMENT OF ACQUITTAL"

16 JUNE 2004

Rule 98 *bis* test - Deportation, forcible transfer and cross border transfer – Definition of a State - Aiding and abetting genocide and complicity in genocide.

Rule 98 *bis* test: where there is some evidence, but it is such that, taken at its highest, a Trial Chamber could not convict on it, the Motion is to be allowed. This will be the case even if the weakness in the evidence derives from the weight to be attached to it, for example, the credibility of a witness. This is in accordance with the exception to the general principle in common law jurisdictions that issues of credibility and reliability must be left to the jury as the tribunal of fact.

Deportation, forcible transfer and cross border transfer: the distinction between deportation and forcible transfer is recognised in customary international law. Deportation relates to involuntary transfer across national borders, while forcible transfer relates to involuntary transfers within a state.

Definition of a State: the criteria of statehood are laid down by law. The law is reflected by the four criteria set out in the Montevideo Convention.

Aiding and abetting genocide and complicity in genocide: there is no authoritative decision within the Tribunal as to whether there is a difference in the *mens rea* for aiding and abetting genocide and complicity in genocide, either when the latter is broader than aiding and abetting, or indeed, when it is of the same scope as aiding and abetting.

Procedural Background

On 4 April 2003, the *Amici Curiae* filed a motion to seek directions on their future role in the trial, including the question as to whether they should file a motion for acquittal pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence ("Rules") at the close of the Prosecution case.[1]

On 27 June 2003, the Trial Chamber issued an order *inter alia* stating that the *Amici Curiae* "may submit a Motion pursuant to Rule 98 *bis* within seven days of the close of the Prosecution case".[2]

On 4 February 2004, the Prosecution filed a motion to object to the *Amici Curiae* filing a Rule 98 *bis* motion.[3]

On 5 February 2004, the Trial Chamber dismissed the Prosecution Motion. It held that "the filing by the *Amici Curiae* of a Motion pursuant to Rule 98 *bis* does not in any way prejudice the Prosecution, does not infringe the interests of the Accused, and that it is in the interests of justice as a whole for the Motion to be brought".[4]

On 25 February 2004, the Prosecution closed its case and the Trial Chamber ordered *inter alia* that any Rule 98 *bis* be filed by the Accused or the *Amici Curiae* by 8 March 2004 and that any response by the Prosecution be filed by 22 March 2004.

On 3 March 2004, the *Amici Curiae* filed their "*Amici Curiae* Motion for Judgement of Acquittal pursuant to Rule 98 *bis*" ("Motion").

On 23 March 2004, the Prosecution filed its confidential "Prosecution Response to *Amici Curiae* Motion for Judgement of Acquittal pursuant to Rule 98 *bis*" ("Response").

Decision

The Trial Chamber found "sufficient evidence to support each count in the three Indictments" but found that there is "no or insufficient evidence to support certain allegations relevant to some of the charges in the Indictments".[5] More specifically, the Trial Chamber *inter alia* held:

- Kosovo: there is sufficient evidence of an armed conflict in Kosovo at the relevant times for the purposes of Rule 98 *bis*.[6]
- Croatia: Croatia was a State by 8 October 1991 for the purposes of Rule 98 *bis*.[7]
- Bosnia: there existed a joint criminal enterprise, which included some members of the Bosnian Serb leadership, the aim and intention of which was to destroy a part of the Bosnian Muslims as a group, and that its participants committed genocide in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kljuc and Bosanski Novi. The Accused was a participant in that joint criminal enterprise (Judge Kwon dissenting). The Accused was a participant in a joint criminal enterprise, which included members of the Bosnian Serb leadership, to commit other crimes than genocide and it was reasonably foreseeable to him that, as a consequence of the commission of those crimes, genocide of a part of the Bosnian Muslims as a group would be committed by other participants in the joint criminal enterprise, and it was committed. The Accused aided and abetted or was complicit in the commission of the crime of genocide in that he had knowledge of the joint criminal enterprise, and that he gave its participants substantial assistance, being aware that its

[1] On the role of the *Amici Curiae*, see *Milosevic*, IT-02-54-T, Order Inviting Designation of Amicus Curiae, 30 August 2001, *Judicial Supplement* No. 26; and Order Concerning *Amicus Curiae*, 11 January 2002.

[2] *Milosevic*, IT-02-54-T, Order on Amici Curiae Request Concerning the Manner of their Future Engagement and Procedural Direction under Rule 98 *bis*", 27 June 2003.

[3] *Milosevic*, IT-02-54-T, Prosecution Motion under Rule 73(A) for a Ruling on the Competence of the *Amici Curiae* to Present a Motion for Judgement of Acquittal under Rule 98 *bis*, 4 February 2004. In its motion, the Prosecution relied on a Decision of the Appeals Chamber whereby it held that the *Amici Curiae* are not a "party to the proceedings" and that "the fact that the *amici* were instructed by the Trial Chamber to take all steps they consider appropriate to safeguard a fair trial for the Accused does not alter this conclusion" (*Milosevic*, IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and the Preparation of the Defence Case, 20 January 2004, para. 4, *Judicial Supplement* No. 47).

[4] *Milosevic*, IT-02-54-T, Decision on Prosecution's Motion under Rule 73(A) for a Ruling on the Competence of the *Amici Curiae* to Present a Motion for Judgement of Acquittal Under Rule 98 *bis*, 5 February 2004.

[5] Decision, para. 316.

[6] The Trial Chamber dismissed the *Amici Curiae* submission that there was no armed conflict in Kosovo in the Federal Republic of Yugoslavia ("FRY") prior to 24 March 1999 (commencement of the North Atlantic Treaty Organisation ("NATO") - bombing campaign).

[7] The Trial Chamber dismissed the *Amici Curiae* submission that Croatia only become a state some time between 15 January and 22 May 1992, and that consequently the conflict in Croatia was not international before that time.

aim and intention was the destruction of a part of the Bosnian Muslims as a group. The Accused was a superior to certain persons whom he knew or had reason to know were about to commit or had committed genocide of a part of the Bosnian Muslims as a group, and he failed to take the necessary measures to prevent the commission of genocide, or punish the perpetrators thereof.

Reasoning[8]

Rule 98 *bis* test

Applicable law

Rule 98 *bis* was adopted on 10 July 1998 in order to deal with a situation which by that time "had developed in every trial heard by the Tribunal", where the Accused applied at the close of the Prosecution case for a determination that there was "no case to answer" on one or more or all the charges in the Indictment.[9] Such applications, in the absence of a specific rule, were made pursuant to Rule 54, which allows a Trial Chamber to issue such orders as may be necessary for the conduct of the trial.[10] The test adopted in such situations was:

> "[...] whether as a matter of law there is evidence, were it to be accepted by the Trial Chamber, as to each count charged in the indictment which could lawfully support a conviction of the accused."[11]

Rule 98 *bis* (Motion for Judgement of Acquittal), as amended 17 October 1999, 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." (emphasis added)

The test for determining whether the evidence is "insufficient to sustain a conviction" was settled in the *Jelisic* case, in which the Appeals Chamber followed its previous holding in the *Delalic* Appeal Judgement that "[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"[12] and held:

> "The capacity of the prosecution 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 evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt."[13]

"No case to answer" procedure

Rule 98 *bis* has been found to have its origin in the common law "no case to answer" procedure. Nevertheless, as noted by the Trial Chamber in *Kordic and Cerkez*,[14] and cited with approval by the Appeals Chamber in the *Jelisic* Appeals Judgement,[15] Rule 98 *bis* must not necessarily be applied in the same way as proceedings for "no case to answer":

> "It is true that Rule 98 *bis* proceedings, coming as they do at the end of the Prosecution's case, bear a close resemblance to applications for no case to answer in common law jurisdictions. However, that does not necessarily mean that the regime to be applied for Rule 98 *bis* proceedings is the same as that which is applicable in the domestic jurisdictions of those countries. Ultimately, the regime to be applied for Rule 98 *bis* proceedings is to be determined on the basis of the Statute and the Rules, having in mind, in particular, its construction in the light of the context in which the Statute operates and the purpose it is intended to serve. That determination may be influenced by features of the regime in domestic jurisdictions with similar proceedings, but will not be controlled by it; and therefore a proper construction of the Rule may show a modification of some of those features in the transition from its domestic berth."

In the view of the present Trial Chamber, "[c]rucial to an understanding of the 'no case to answer' procedure in common law jurisdictions is the differing roles of the judges and jury in criminal trials: the judges being the tribunal of law and the jury, the tribunal of fact".[16] It referred to *R. v. Galbraith*,[17] in which it was held that "a balance has to be struck between on the one hand the usurpation of the jury's functions and on the other the danger of an unjust conviction",[18] as an illustration that "an essential function of the procedure is to ensure that at the end of the Prosecution's case the jury is not left with evidence which cannot lawfully support a conviction".[19] As to the balance between the functions of the judge and the jury, the Trial Chamber quoted the following passage from *R. v. Galbraith*:

> "(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which the jury could properly come to the

---

[8] Only those findings significant to the Tribunal's case law are addressed in the present summary. The full text of the Trial Chamber's Decision, including a Separate Opinion from Judge Robinson and a Dissenting Opinion from Judge Kwon, is available on the Tribunal's website at www.un.org/icty ("Judgements" page).

[9] *Kunarac* et al., IT-96-23-T & IT-96-23/1-T, Decision on Motion for Acquittal ("*Kunarac* Acquittal Decision"), 3 July 2000, para. 2, *Judicial Supplement* No. 18.

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

[11] *Tadic*, IT-94-1-T, Decision on Defence Motion to Dismiss Charges, 13 September 1996, p. 2. The same test was adopted in *Delalic*, IT-96-21-T, Order on Motions to Dismiss the Indictment at the Close of the Prosecutor's Case, 18 March 1998, p. 4: whether "[…] as a matter of law, there is evidence relating to each element of the offences in question which, were it to be accepted, is such that a reasonable Tribunal might convict."

[12] *Delalic* et al., IT-96-21-A, Judgement, 20 February 2001, para. 434 (emphasis in the original), *Judicial Supplement* No. 23. This test was previously stated in the *Kunarac* Acquittal Decision, para. 3.

[13] *Jelisic*, IT-95-10-A, Judgement ("*Jelisic* Appeals Judgement"), 5 July 2001, para. 37 (footnote omitted), *Judicial Supplement* No. 26.

[14] *Kordic & Cerkez*, IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal ("*Kordic* Judgement of Acquittal"), 6 April 2000, para. 9, *Judicial* Supplement No. 14.

[15] *Jelisic* Appeals Judgement, para. 33.

[16] Para. 11.

[17] *R. v. Galbraith*, 73 Cr. App. R. 124 (1981), at p. 127 (per Lord Jane, C.J.).

[18] *Ibid.*, at p. 125.

[19] Para. 11.

conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."[20]

The Trial Chamber then envisaged, *inter alia*, the following possibilities:

"- Where there is no evidence to sustain a charge, the Motion is to be allowed. [...]
- Where there is some evidence, but it is such that, taken at its highest, a Trial Chamber could not convict on it, the Motion is to be allowed. This will be the case even if the weakness in the evidence derives from the weight to be attached to it, for example, the credibility of a witness. This is in accordance with the exception to the general principle in common law jurisdictions that issues of credibility and reliability must be left to the jury as the tribunal of fact.[21]
- Where there is some evidence, but it is such that its strength or weakness depends on the view taken of a witness's credibility and reliability, and on one possible view of the facts a Trial Chamber could convict on it, the Motion will not be allowed. [...]"[22]

Deportation, forcible transfer and cross border transfer

The Accused is charged in the three Indictments[23] against him with deportation as a crime against humanity under Article 5(d) of the Statute,[24] forcible transfer as a crime against humanity (other inhumane acts) under Article 5(i) of the Statute,[25] unlawful deportation or transfer as a grave breach of the Geneva Conventions under Article 2(g) of the Statute.[26]

Trial Chambers have held in several judgements that deportation is defined as "the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, across a national border, without lawful grounds".[27] The crime of forcible transfer has been defined as a forced removal or displacement of people from one area to another which may take place within the same national borders.[28]

While the *Amici Curiae* submitted that deportation presumes transfer beyond borders, whereas forcible transfer relates to displacement within a State, the Prosecution submitted that deportation does not require border transfer. The Trial Chamber decided to examine "the history of the law on deportation and forcible transfer"[29] to facilitate an understanding of its development and status:

Nuremberg International Military Tribunal ("IMT")

The Trial Chamber found no reference to forcible transfer in the IMT case law but referred to the *United States of America v. Milch*[30] and held that the IMT dealt with deportation "as a crime involving cross border transfer".[31]

Geneva Conventions

The Trial Chamber first referred to paragraph 1 of the Commentary to Article 49 of the Geneva Convention IV,[32] which distinguishes between "forcible transfers" and "deportations". This paragraph reads:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

It then referred to Article 17 ("Prohibition of forced movement of civilians") of Additional Protocol II to the Geneva Conventions[33] and its commentary,[34] which reads:

"1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."

It noted that its first paragraph covers "displacements of the civilian population as individuals or in groups within the territory of a Contracting Party where a conflict [...] is taking place"[35] and that its second paragraph refers to the displacement of civilians (either individually or in groups) across a state border.[36]

The Trial Chamber inferred that "although Additional Protocol II does not deal with the crimes of deportation and

---

[20] *R. v. Galbraith*, at p. 127.

[21] Footnote 24 of the Decision: "*See* R. Watson, *Criminal Law* (New South Wales) (1996), at p. 5740 (expressing this exception with great clarity: 'On a submission of no case the judge is concerned with the question whether there is evidence which is legally capable of leading to a conviction and not with the question whether the evidence is so lacking in weight that a conviction based upon it would be unsafe or unsatisfactory, except where the evidence is so inherently incredible that no reasonable person would accept its truth.')." In the *Kordic* Judgement of Acquittal, the Trial Chamber held: "[…] generally the Chamber would not consider questions of credibility and reliability in dealing with a motion under Rule 98 *bis*; leaving those matters to the end of the case. However, there is one situation in which the Chamber is obliged to consider those matters; it is where the Prosecution's case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of a witness that the Prosecution is left without a case". See also *Kvocka* et al., IT-98-30/1-T, Decision on Defence Motion for Acquittal, 15 December 2000, para. 17, *Judicial Supplement* No. 21; *Galic*, IT-98-29-T, Decision on the Motion for the Entry of the Acquittal of the Accused Stanislav Galic, 3 October 2002, para. 11, *Judicial Supplement* No. 37.

[22] Para. 13.

[23] The three Indictments are available on the Tribunal's website on the "Indictments" page ("Kosovo Indictment", IT-99-37-PT; "Croatia Indictment", IT-02-54-T; "Bosnia Indictment", IT-02-54-T). On 13 December 2001, the Trial Chamber ordered *inter alia* that the Croatia and Bosnia Indictments be joined and be given a common case number (*Milosevic*, IT-99-37-PT, IT-01-50-PT, IT-01-51-PT, 13 December 2001, Decision on Prosecution's Motion for Joinder, *Judicial Supplement* No. 30). On 1 February 2002, the Appeals Chamber ordered *inter alia* that the three Indictments "be tried together in the one trial" and that the case against the Accused be given a single number (see *Press Release* No. 657).

[24] Count 1 of the Kosovo Indictment, Count 14 of the Croatia Indictment, Count 16 of the Bosnia Indictment.

[25] Count 2 of the Kosovo Indictment, Count 15 of the Croatia Indictment, Count 17 of the Bosnia Indictment.

[26] Count 16 of the Croatia Indictment, Count 18 of the Bosnia Indictment.

[27] *Simic*, IT-95-9-PT, Judgement ("*Simic* Trial Judgement"), 17 October 2003, para. 122, *Judicial Supplement* No. 45; *Naletilic & Martinovic*, IT-98-34-T, Judgement, 31 March 2003, para. 670, *Judicial Supplement* No. 42; *Krnojelac*, IT-97-25-T, Judgement ("*Krnojelac* Trial Judgement"), 15 March 2002, paras. 474 & 476, *Judicial Supplement* No. 31 *bis*; *Krstic*, IT-98-33-T, Judgement ("*Krstic* Trial Judgement"), 2 August 2001, paras. 521, 531 and 532, *Judicial Supplement* No. 27.

[28] *Krnojelac* Trial Judgement, para. 474. The *Krstic* Trial Judgement, at its paragraph 521, defines both deportation and forcible transfer as "the involuntary and unlawful evacuation of individuals from the territory in which they reside".

[29] Paras. 47-79.

[30] Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1952) Vol. 6, at 681: "Displacement of groups of persons from one country to another is the proper concern of international law in as far as it affects the community of nations. International law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime […]." (emphasis added)

[31] Para. 52.

[32] Commentary to Article 49 of the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 ("Geneva Convention IV" or "Fourth Geneva Convention"), at para. 1, p. 278.

[33] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[34] C. Pilloud, *et al.*, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987) ("Commentary").

[35] Commentary, at pp. 1472-1473.

[36] Article 17 covers "expulsion of groups of civilians across the boundaries by armed forces or armed groups because of military operations" and "territory" refers to "the whole of the territory of a country" (Commentary, at p. 1474).

forcible transfer in express terms, Article 17, paragraph 1 may be construed as referring to forcible transfer within the territory of a state, *i.e.*, internal displacement, and paragraph 2 may be interpreted as referring to deportation outside the territory of a state, *i.e.*, external displacement".[37]

International Law Commission ("ILC")

The Trial Chamber referred to the commentary to Article 18(g) ("arbitrary deportation or forcible transfer of population") of the 1996 Draft Code Against the Peace and Security of Mankind, which distinguishes between deportation and forcible transfer:

> "Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State."[38]

Tribunal case law

The Trial Chamber noted that the case law of the Tribunal is "not uniformly consistent" in relation to the element of a "cross border movement" and found that "the preponderance of case law favours the distinction based on destination".[39]

The Trial Chamber first referred to para. 474 of the *Krnojelac* Trial Judgement, in which it was held, by reference to the *Krstic* Trial Judgement, that "[d]eportation requires the displacement of persons across a national border, to be distinguished from forcible transfer which may take place within national boundaries". It then referred to the *Stakic* Trial Judgement, in which the Trial Chamber held that deportation pursuant to Article 5(d) of the Statute "must be read to encompass forced population displacements both across internationally recognized borders and *de facto* boundaries, such as constantly changing frontlines, which are not internationally recognized", and defined deportation "as the forced displacement of persons by expulsion or other coercive acts for reasons not permitted under international law from an area in which they are lawfully present to an area under the control of another party".[40] The Trial Chamber finally referred to the *Simic* Trial Judgement, in which the Trial Chamber held that "[t]o establish deportation under Article 5 of the Statute, the crossing of a national border needs to be shown".[41]

The Trial Chamber noted that the *Stakic* Trial Judgement "is the only case in which transfer across national border is not to be treated as a requirement for the crime of deportation".[42]

Statute of the International Criminal Court ("ICC")

The Trial Chamber noted that, in the ICC Statute, the terms deportation and forcible transfer "appear to be given the same meaning". Article 7(2)(d) of the ICC Statute provides:

> "Deportation or forcible transfer of population means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."

It referred to one commentator of this article, who took the view that in light of the common distinction between deportation as involving cross-border transfer, and forcible transfer as relating to movement within a country, it is likely that the common distinction between the two crimes was intended,[43] and to two other commentators, who were involved in the preparatory work of the ICC Statute and Elements of Crimes, who assert that "'Forcible transfer of population' was added as an alternative to 'deportation' so as to encompass large-scale movements within a country's borders".[44]

The Trial Chamber expressed its view that if the drafters of the ICC Statute intended such distinction, "it would be in line with customary international law", and recognised that "the correctness of this interpretation must be a matter of dispute, since it contradicts what appears to be the plain meaning of Article 7(2)(d)".[45]

Conclusion

The Trial Chamber held:

> "[...] the distinction between deportation and forcible transfer is recognised in customary international law. Deportation relates to involuntary transfer across national borders, while forcible transfer relates to involuntary transfers within a state. Article 7(2)(d) of the ICC Statute, if it conflates the two crimes, does not reflect customary international law."[46]

It adhered to the finding of the Trial Chamber in the *Simic* Trial Judgement that both crimes protect the same values, namely "the right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location"[47] and to the finding of the Appeals Chamber in the *Krnojelac* Appeals Judgment:

> "The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent."[48]

As both crimes protect the same values, the Trial Chamber held:

> "[t]here is no detriment to a victim if the crime of deportation is confined to transfer across borders, because if it is established that he has not been so transferred, then he is protected by the prohibition against forcible transfer, which applies to involuntary movements within national borders."[49]

Definition of a State

The Trial Chamber had to determine whether Croatia was a State or became a State on 8 October 1991, as argued by the Prosecution, or whether it only became a State at some time

---

[37] Para. 56.
[38] International Law Commission Draft Code 1996, Article 18, Commentary (13).
[39] Para. 58.
[40] *Stakic*, IT-97-24-T, Judgement ("*Stakic* Trial Judgement"), 31 July 2003, para. 679, *Judicial Supplement* No. 43. *See* also *Krnojelac*, IT-97-25-A, Judgement ("*Krnojelac* Appeal Judgement"), 17 September 2003, Separate Opinion of Judge Schomburg, para. 15, *Judicial Supplement* No. 45.
[41] *Simic* Trial Judgement, para. 129.
[42] Para. 674.
[43] C. Hall, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999), at p. 136.
[44] H. von Hebel and D. Robinson, "Crimes Within the Jurisdiction of the Court", in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (1999), at p. 99.
[45] Para. 67. In the *Stakic* Trial Judgement, the Trial Chamber noted in paragraph 680: "According to the Elements of Crimes for the International Criminal Court, the first element of this crime against humanity is that '[t]he perpetrator deported or forcibly transferred, without grounds under international law, one or more persons *to another State or location*, by expulsion or other coercive acts.' [footnote 1338: "Assembly of State Parties to the Rome Statute of the International Criminal Court, 1st session, 3-10 Sept. 2002, Part II.B. Elements of Crimes, ICC-ASP/1/3 (Emphasis added)."] While such simultaneous use of both terms (deportation and forcible transfer) might create terminological confusion in the law, it is clear that the Statute of the International Criminal Court does not require proof of crossing an international border but only that the civilian population was displaced."
[46] Para. 68.
[47] *Simic* Trial Judgement, para. 130.
[48] *Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 218, *Judicial Supplement* No. 45. In *Krnojelac*, the Appeals Chamber found in the same paragraph that the "acts of forcible displacement underlying the crime of persecution punishable under Article 5(h) of the Statute are not limited to displacements across a national border".
[49] Para. 69.

between 15 January 1992 and 22 May 1992, as contended by the *Amici Curiae*.

The Trial Chamber noted that the "best known definition of a state is the one provided by Article 1 of the Montevideo Convention".[50] This article reads:

> "The State as a person of international law should possess the following qualifications:
> (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."[51]

It found that those four criteria have been used "time and again" in questions related to statehood and that "reliance on them is so widespread that in some quarters they are seen as reflecting customary international law".[52] To support its finding, the Trial Chamber relied on one commentator who referred to the Montevideo Convention as a "crystallization of the state of customary international law" and as having exercised "great influence on the way in which the legal characteristics of statehood have been understood since".[53]

In the present case, the Trial Chamber did not find necessary to determine whether those criteria have the status of customary international law but nevertheless felt "sufficiently confident" to rely on them as "reflecting well-established core principles for the determination of statehood". It concluded that "the criteria of statehood are laid down by law"[54] and that the law, in its view, "is reflected by the four criteria set out in the Montevideo Convention".[55] The Trial Chamber, using these criteria, found that "there is sufficient evidence that Croatia was a State by 8 October 1991 for the purposes of Rule 98 *bis*".[56]

Aiding and abetting genocide and complicity in genocide

The question arose in the present case as to whether the Accused aided and abetted in the commission of the crime of genocide in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina and Bosanski Novi, or was complicit in its commission.

The Trial Chamber first referred to the *Krstic* Appeals Judgement, in which the Appeals Chamber *inter alia* held the following:

> "[t]he conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal";[57]
> there is authority to the effect that the conviction of complicity in genocide, "where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group;"[58]

The Trial Chamber observed that the Appeals Chamber convicted *Krstic* as an aider and abettor in the crime of genocide but noted that the Appeals Chamber's finding was "*obiter dicta*" as it was "confined to the facts of that case".[59] As to the Appeals Chamber's finding that complicity in genocide can strike broader than the offence of aiding and abetting, the Trial Chamber noted that the Appeals Chamber took no position as to the *mens rea* of complicity,[60] and therefore found that "there is [...] no authoritative decision within the Tribunal as to whether there is a difference in the *mens rea* for aiding and abetting genocide and complicity in genocide, either when the latter is broader than aiding and abetting, or indeed, when it is of the same scope as aiding and abetting".[61] It found that "[i]n the absence of anything to indicate that complicity in genocide is broader than aiding and abetting in the circumstances of this case, [...] there is merit in the Prosecution's submission that the two are essentially the same".[62]

The Trial Chamber then referred with approval to the *Stakic* Trial Judgement, in which the Trial Chamber held that complicity in genocide under Article 4(3)(e) is the *lex specialis* in relation to liability under Article 7(1).[63] It refused as a result to confine itself, as suggested by the Prosecution, to a determination of the Accused's responsibility as an aider or abetter. It found that the Accused's form of liability "may be complicity in genocide" but refused to determine this matter at this stage of the trial, leaving such determination, "if necessary", to the judgement phase.[64]

Separate Opinion of Judge Patrick Robinson

Judge Robinson commented on the part of the Decision devoted to the degree of proof necessary under Rule 98 *bis*. He analysed the function of the Rule in the specific context of the Tribunal where Trial Chambers perform the "dual function of tribunal of law and tribunal of fact"[65] and where the charges are "multilayered to a degree that is generally not present in indictments at the domestic level".[66]

In his view, "the time has come to evaluate the operation of Rule 98 *bis* so as to determine whether changes are needed to make it a more beneficial instrument in the work of the Tribunal".[67] He proposed that consideration be given to "confining motions under Rule 98 *bis* to submissions that: (a) are designed to eliminate a charge or count rather than individual allegations of fact [...]; (b) that allege that there is no evidence, as distinct from insufficient evidence, to sustain a charge [...]".[68] In respect of the latter, he further suggested that the Prosecution should be required to list the charges for which it has adduced no evidence, that the Accused comment on the list so provided, and that the Trial Chamber should consider any disagreement on that list at the judgement phase, as a submission that there is insufficient evidence.[69]

---

[50] Para. 85.
[51] Montevideo Convention on Rights and Duties of States, signed 26 December 1933 ("Montevideo Convention").
[52] Para. 86.
[53] C. Warbrick, "States and Recognition in International Law", in M.D. Evans (ed.), *International Law* (2003), at p. 221.
[54] The Trial Chamber referred in its footnote to I. Brownlie, *Principles of Public International Law* (2003), at pp. 86-88; J. Crawford, *The Creation of States in International Law* (1979), at p. 17.
[55] Para. 87.
[56] Para. 115. For a complete application of these criteria to the present case, see paras. 94 to 114 of the Decision.
[57] *Krstic*, IT-98-33-A, Judgement ("*Krstic* Appeals Judgement"), 19 April 2004, para. 140, *Judicial Supplement* No. 49.
[58] *Krstic* Appeals Judgement, para. 142.
[59] Para. 295 and footnote 761: "*Prosecutor v. Krstic*, Case No. IT-98-33-A, "Judgement", 19 April 2004, at para. 139 ("The Appeals Chamber concludes that the latter approach [*i.e.*, characterising Krstic's responsibility as aiding and abetting under Article 7(1) of the Statute] is the correct one in this case".)."
[60] In footnote 247 of the *Krstic* Appeals Judgement, the Appeals Chamber held: " As it is not at issue in this case, the Appeals Chamber takes no position on the *mens rea* requirement for the conviction for the offence of complicity in genocide under Article 4(3) of the Statute where this offense strikes broader than the prohibition of aiding and abetting."
[61] Para. 296.
[62] Para. 297 (emphasis added).
[63] See *Stakic* Trial Judgement, para. 531: "The Trial Chamber considered the relationship between Article 7(1) and complicity in genocide under Article 4(3) in its Decision on 98 *bis* Motion for Judgement of Acquittal [Stakic, IT-97-24-T, Decision on Rule 98bis Motion for Judgement of Acquittal, 31 October 2002, para. 47]. Noting the overlap between Articles 7(1) and 4(3), the Trial Chamber concluded that two approaches are possible. Article 4(3) can either be regarded as *lex specialis* in relation to Article 7(1) (*lex generalis*), or the modes of participation under Article 7(1) can be read into Article 4(3)."
[64] Para. 297.
[65] Separate Opinion of Judge Patrick Robinson, para. 11.
[66] *Ibid.*, para. 16.
[67] *Ibid.*, para. 14.
[68] *Ibid.*, para. 17.
[69] *Ibid.*

Dissenting Opinion of Judge O-Gon Kwon

Judge Kwon disagreed with the majority that there is, under the first category of joint criminal enterprise, sufficient evidence upon which a Trial Chamber could find beyond reasonable doubt that the Accused had the specific intent to destroy the Bosnian Muslims as a group in whole or in part. In his view, taking the Prosecution's evidence as its highest, "the furthest that a Trial Chamber could infer in relation to the *mens rea* requirement is the knowledge that genocide was committed in the specified municipalities in Bosnia Herzegovina, but not the genocidal intent of the Accused himself".[70]

[70] Dissenting Opinion of Judge O-Gon Kwon, para. 3.

TRIAL CHAMBERS

The Prosecutor v. Mirko Norac

Case No. IT-04-76-I

Trial Chamber I (Judges Liu [Presiding], El Mahdi and Orie)

"DECISION ON THE PROSECUTOR'S MOTION TO OPPOSE THE INITIAL APPEARANCE OF MIRKO NORAC"

30 JUNE 2004

Right of the Accused to understand the Indictment.

The formal charges are brought against the Accused during the initial appearance, and it is only at this moment that the Chamber, in accordance with Article 20(3) of the Statute can satisfy itself that the Accused understands the Indictment and that his rights are respected. The right to understand the Indictment is an essential prerequisite for the Accused to exercise his rights of defense.

Procedural Background

On 11 May 2004, the Prosecutor filed an indictment ("Indictment") against Mirko Norac ("Accused"). That same day, the President of the Tribunal assigned Judge Liu to review the Indictment.

On 20 May 2004, the Bureau decided, pursuant to Rule 28 of the Rules of Procedure and Evidence ("Rules"),[1] to admit the Indictment for review by a Judge.

On 22 May 2004, Judge Liu confirmed the Indictment pursuant to Rule 47 (E) and (F) of the Rules.[2]

On 27 May 2004, the Prosecution filed its "Motion for Joinder" whereby it sought to join the case against the Accused with the case against Rahim Ademi.[3]

On 23 June 2004, the President assigned the case against the Accused to the present Trial Chamber.

On 24 June 2004, the Prosecution filed its "Motion Opposing Decision for First Appearance" ("Prosecution's Motion"), whereby it argued that an initial appearance was not necessary because the case against the Accused could, at the Prosecution's subsequent request, be referred by the Trial Chamber to the Courts of the Republic of Croatia pursuant to Rule 11 *bis* of the Rules.[4]

Decision

The Trial Chamber found that the Accused had to be called to enter a plea to the charges raised against him in the Indictment, in accordance with Article 20 of the Statute and Rule 62 of the Rules, and dismissed the Prosecution's Motion.

[1] Rule 28 (Reviewing and Duty Judges) reads in its relevant part:
"(A) On receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. If the Bureau determines that the indictment meets this standard, the President shall designate one of the permanent Trial Chamber Judges for the review under Rule 47. If the Bureau determines that the indictment does not meet this standard, the President shall return the indictment to the Registrar to communicate this finding to the Prosecutor."

[2] Rule 47 (Submission of Indictment by the Prosecutor) reads in its relevant part:
(E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 19, paragraph 1, of the Statute, whether a case exists against the suspect.
(F) The reviewing Judge may:
(i) request the Prosecutor to present additional material in support of any or all counts;
(ii) confirm each count;
(iii) dismiss each count; or
(iv) adjourn the review so as to give the Prosecutor the opportunity to modify the indictment."

[3] The two cases were joined on 30 July 2004. See the *Ademi & Norac* case information sheet (IT-04-78), available on the Tribunal's website (www.un.org/icty) under "The ICTY at a Glance".

[4] Rule 11*bis* (Referral of the Indictment to Another Court) reads:
"(A) If an indictment has been confirmed, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a Trial Chamber for the purpose of referring a case to the authorities of a State:
(i) in whose territory the crime was committed; or
(ii) in which the accused was arrested,
so that those authorities should forthwith refer the case to the appropriate court for trial within that State.
(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard.
(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall, in accordance with Security Council Presidential Statement S/PRST/2002/21, consider the gravity of the crimes charged and the level of responsibility of the accused.
(D) Where an order is issued pursuant to this Rule:
(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;
(ii) the Chamber may order that protective measures for certain witnesses or victims remain in force;
(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;
(iv) the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf.
(E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred to trial.
(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Trial Chamber may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.
(G) Where an order issued pursuant to this Rule is revoked by the Trial Chamber, the Chamber may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal and the State shall accede to such a request without delay in keeping with Article 29 of the Statute. The Trial Chamber or a Judge may also issue a warrant for the arrest of the accused."

Reasoning

The Trial Chamber first noted that the Prosecution's Motion was in any case unfounded since no order for an initial appearance had been issued by the Chamber or the Pre-Trial Judge at the time of the Motion. Such order, scheduling the initial appearance for the 8th of July 2004, was issued on the 30th of June 2004.[5]

With regard to the "Motion for Joinder", the Trial Chamber held that the Accused "has to be given an opportunity to enter a plea before the Tribunal" prior to any decision on the Motion for Joinder since, if the Accused pleads guilty, such motion becomes "redundant". In fact, the core legal issue addressed by the Trial Chamber pertains to the need for an initial appearance and to the right of the Accused to understand the charges brought against him:

Right of the Accused to understand the Indictment

The Trial Chamber first referred to its obligation, pursuant to Article 20(3) of the Statute, to "read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea". It then held:

> "[...] the formal charges are brought against the Accused during the initial appearance, and that is only at this moment that the Chamber, in accordance with art. 20(3) of the Statute can satisfy itself that the accused understands the Indictment and that his rights, including his right to counsel as explicitly expressed in Rule 62,[6] are respected".

With respect to the right to understand the Indictment, the Trial Chamber held that such right is an "essential prerequisite for the accused to exercise his rights of defense, including the right to challenge the jurisdiction of the Tribunal under Rule 72 of the Rules".

[5] *Norac*, IT-04-76-I, Scheduling Order for an Initial Appearance, and Request for the Detention of Mirko Norac and his Surrender to the Netherlands, 30 June 2004.

[6] Rule 62(i) (Initial Appearance of the Accused) reads: "Upon transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber. The accused shall be brought before that Trial Chamber or a Judge thereof without delay, and shall be formally charged. The Trial Chamber or the Judge shall: (i) satisfy itself, himself or herself that the right of the accused to counsel is respected; [...]".

AUGUST 2004

SUMMARIES OF ICTY CASE-LAW IN MAY-JUNE 2004

JUDICIAL SUPPLEMENT

Nº 50

AVAILABLE DOCUMENTS
- MAY/JUNE 2004 -

Name: .....

Institution: .....

Address:.....

Zip Code: ..... **Country:** .....

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

Public Information Services:
Fax: +31 (0)70 512-8668

DATE	CASE	NO.	DOCUMENT NAME	
04/05/04	MRKSIC	IT-95-13/1	REVISED DECISION OF THE REGISTRY ON THE EXTENT TO WHICH THE ACCUSED IS ABLE TO REMUNERATE COUNSEL	
07/05/04	HALILOVIC	IT-01-48	DECISION ON DEFENCE OBJECTION TO PROSECUTION CONTINUED DISCLOSURE	
12/05/04	MILUTINOVIC *ET AL.* (INTERLOCUTORY)	IT-99-37-AR72.2	DECISION ON INTERLOCUTORY APPEAL	
26/05/04	SESELJ	IT-03-67	DECISION ON MOTION BY VOJISLAV SESELJ CHALLENGING JURISDICTION AND FORM OF INDICTMENT	
26/05/04	CERMAK & MARKAC	IT-03-73	DECISION RELATING TO PROSECUTOR'S DISCLOSURE OBLIGATIONS	
26/05/04	STRUGAR *ET AL.*	IT-01-42	DECISION RE THE DEFENCE MOTION TO TERMINATE PROCEEDINGS	
27/05/04	BLAGOJEVIC *ET AL.*	IT-02-60	DECISION ON VIDOJE BLAGOJEVIC'S REQUEST FOR THE ISSUANCE OF SUBPOENAS AD TESTIFICANDUM AND SUPPORTING DOCUMENTATION, AND SUBSEQUENT REQUEST TO THE GOVERNMENT OF THE NETHERLANDS	
02/06/04	KOVACEVIC	IT-01-42/2	DECISION ON PROVISIONAL RELEASE (RE. MR. KOVACEVIC)	
08/06/04	MILUTINOVIC *ET AL.* (INTERLOCUTORY)	IT-99-37-AR72.2	REASONS FOR DECISION DISMISSING INTERLOCUTORY APPEAL CONCERNING JURISDICTION OVER THE TERRITORY OF KOSOVO	
14/06/04	MILOSEVIC	IT-02-54	FINAL DECISION ON THE ADMISSIBILITY OF INTERCEPTED COMMUNICATIONS	
16/06/04	MILOSEVIC	IT-02-54	DECISION ON MOTION FOR JUDGEMENT OF ACQUITTAL	
18/06/04	ORIC	IT-03-68	DECISION OF THE REGISTRY ON ASSIGNMENT OF COUNSEL AND THE EXTENT TO WHICH THE ACCUSED IS ABLE TO REMUNERATE COUNSEL	
21/06/04	STRUGAR *ET AL.*	IT-01-42	DECISION ON DEFENCE MOTION REQUESTING JUDGEMENT OF ACQUITTAL PURSUANT TO RULE 98 BIS	
21/06/04	HALILOVIC (INTERLOCUTORY)	IT-01-48-AR73	DECISION ON THE ISSUANCE OF SUBPOENAS	
23/06/04	MILUTINOVIC *ET AL.*	IT-99-37	FINAL ASSESSMENT OF THE ACCUSED ABILITY TO REMUNERATE COUNSEL	
24/06/04	SIMIC *ET AL.*	IT-95-9	DECISION OF THE PRESIDENT ON THE APPLICATION FOR PARDON OR COMMUTATION OF SENTENCE OF MIROSLAV TADIC	
29/06/04	STANISIC & SIMATOVIC	IT-03-69	DECISION OF THE REGISTRY ON ASSIGNMENT OF COUNSEL AND THE EXTENT TO WHICH THE ACCUSED IS ABLE TO REMUNERATE COUNSEL	
30/06/04	NORAC	IT-04-76	DECISION ON THE PROSECUTOR'S MOTION TO OPPOSE THE INITIAL APPEARANCE OF MIRKO NORAC	

JUDICIAL SUPPLEMENT

www.un.org/icty
No. ISSN 1020-7406

United Nations
International Criminal Tribunal for the former Yugoslavia

A Publication of the ICTY's Registry

Editor:.....Christian Chartier
Associate Legal Officer: .....Vincent Sautenet
Language Editor:.....Alice Tosic-Copple, ...CLSS
Lay-out: .....Leslie Hondebrink-Hermer
Reproduction: .....Franklin Kereway/Phil Winton
Distribution: .....Zeljko Mikanovic