

IN THE APPEALS CHAMBER

Before:

**Judge Mohamed Shahabuddeen, Presiding
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Patricia Wald
Judge Fausto Pocar**

Registrar:

Mr. Hans Holthuis

Order of:

27 March 2001

THE PROSECUTOR

v.

**BLAGOJE SIMIC
MILAN SIMIC
MIROSLAV TADIC
STEVAN TODOROVIC
SIMO ZARIC**

**ORDER ON REQUEST FOR REVIEW PURSUANT TO RULE 108bis OF DECISION ON
MOTION FOR JUDICIAL ASSISTANCE TO BE PROVIDED BY SFOR AND OTHERS DATED
18 OCTOBER 2000**

Representatives for NATO and the Relevant States

Counsel for the Prosecutor

Ms. Nancy Paterson
Mr. Graham Blewitt

Counsel for the Accused

Mr. Slobodan Zecevic, for Milan Simic
Mr. Igor Pantelic and Mr. Novak Lukic, for Miroslav Tadic
Mr. Deyan Ranko Brashich and Mr. Nikola Kostich, for Stevan Todorovic
Mr. Borislav Pisarevic and Mr. Aleksander Lazarevic, for Simo Zaric

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("the Appeals Chamber"),

NOTING the "Notice of Motion for Judicial Assistance" filed by the defence for Stevan Todorovic on 24

November 1999 (respectively, "the Motion for Judicial Assistance" and "the Defence");

NOTING the "Decision on Motion for Judicial Assistance to be Provided by SFOR and Others", issued by Trial Chamber III on 18 October 2000, in which the Defence request for disclosure of reports and documents from SFOR and North Atlantic Treaty Organization ("NATO") and for subpoenas to be issued to, *inter alia*, General Shinseki, was granted ("the Impugned Decision");

BEING SEIZED OF requests for review ("the Requests for Review") of the Impugned Decision pursuant to Rule 108bis of the Rules of Procedure and Evidence ("the Rules") filed by Canada, Denmark, France, Germany, Italy, The Netherlands, Norway, the United Kingdom and the United States of America ("the Relevant States") and NATO on 2 November 2000;

NOTING the Scheduling Order issued on 8 November 2000, whereby the Appeals Chamber decided *inter alia*, "pursuant to Rule 108bis(C) of the Rules, to suspend the execution of the Impugned Decision in its entirety, pending the final conclusion of a review by the Appeals Chamber", and the briefs submitted, pursuant to a request made in that Scheduling Order, by Canada, Denmark, Germany, Italy, The Netherlands, Norway, the United Kingdom, the United States and the Prosecutor;

NOTING that the accused Stevan Todorovic entered a guilty plea before a single Judge of Trial Chamber III on 13 December 2000 ("the Plea Agreement");

NOTING that the Plea Agreement was accepted by the full bench of Trial Chamber III on 19 January 2001;

NOTING the "Motion Pursuant to Rule 73 to Withdraw all Pending Motions &TC SsicC" filed by the Defence on 24 January 2001 ("the Motion to Withdraw") which requested that Trial Chamber III grant, *inter alia*, "leave to withdraw all pending motions relating to judicial assistance, evidentiary hearing regarding the circumstances of his arrest and return to country of refuge and specifically the Defense request for disclosure of reports and documents from SFOR and NATO and request for subpoenas issued to among others General Shinseki as well for an order granting the Defense leave to withdraw all allegations that his arrest was unlawful and that SFOR and NATO were involved in any unlawful activity in regard with the arrest of the Accused, without prejudice, and reserving the Defense's right to reinstate such motions and allegation should the Prosecutor deem the Accused not to have fully complied with the terms and conditions of the plea bargain agreement an SsicC reinstates Counts 2 through 27 of the indictment";

NOTING that in its "Decision on Prosecution Motion to Withdraw Counts of the Indictment and Defence Motion to Withdraw Pending Motions" dated 26 February 2001 (the "Decision on Motions for Withdrawal") the Trial Chamber ordered, *inter alia*, that "ScCounts 2 to 27 of the indictment against the accused, Stevan Todorovic, are withdrawn without prejudice and reserving the right of the Prosecution to apply to reinstate the counts should the accused fail to comply fully with the Plea Agreement; and all motions filed by the accused and currently pending before the Trial Chamber, as listed in Annex A to this Decision, are withdrawn without prejudice and reserving the right for the Defence to reinstate such motions should the Prosecution deem the accused not to have complied fully with the Plea Agreement" ;

NOTING that the Trial Chamber in its Decision on Motions for Withdrawal stated "that the Defence request for disclosure of reports and documents from SFOR and NATO and request for subpoenas issued to, *inter alia*, General Shinseki, is no longer pending before the Trial Chamber as it has been determined by this Trial Chamber in its Decision of 18 October 2000, which Decision was stayed by the Appeals Chamber of the International Tribunal by order of 8 November 2000";

NOTING the Scheduling Order issued on 9 March 2001 whereby the Appeals Chamber gave "liberty to the Relevant States, NATO, the Prosecutor and the Defence for the co-accused Milan Simic, Miroslav Tadic, Stevan Todorovic and Simo Zaric, to submit briefs within ten days as to the effect of the Hearing

of 19 January 2001 and the Decision on Motions for Withdrawal, on the continuance of the proceedings relating to the Requests for Review, including in particular the question of whether there is still need to consider the order made by Trial Chamber III dated 18 October 2000 for judicial assistance from NATO and SFOR and the issue of a subpoena in due course to General Shinseki requiring him to provide evidence in an evidentiary hearing";

NOTING that, pursuant to this Scheduling Order, the Prosecutor submitted her brief on 15 March 2001, while Canada, France, Germany, Italy, The Netherlands, Norway, the United Kingdom, the United States and NATO filed their briefs on 19 March 2001 ("the briefs");

NOTING that no party to these proceedings is asking that the proceedings should continue with a view to a ruling being given on the Requests for Review;

NOTING FURTHER that the briefs are in substance agreed that-

1. the proceedings have become moot,
2. the Impugned Decision should be vacated;

NOW, THEREFORE, the Appeals Chamber hereby:

1. declares that the Requests for Review have become moot;
2. vacates the Impugned Decision, inclusive of the order made pursuant to the Motion for Judicial Assistance;
3. otherwise dismisses the Requests for Review.

Judge Shahabuddeen appends a declaration to this order.

Done in English and French, the English text being authoritative.

Judge Mohamed Shahabuddeen
Presiding

Dated this twenty-seventh day of March 2001
At The Hague,
The Netherlands.

[Seal of the Tribunal]

DECLARATION OF JUDGE SHAHABUDDEEN

I have supported today's order for the reason that no party to these proceedings is interested in pursuing them to a final ruling. But for that circumstance, I should have had a difficulty, which I would like to explain.

As is shown by today's order, the order made by the Trial Chamber on 26 February 2001 stated that counts "2 to 27 of the indictment against the accused, Stevan Todorovic, are withdrawn without prejudice and reserving the right of the Prosecution to apply to reinstate the counts should the accused fail to comply fully with the Plea Agreement". I understand the reservation to mean that, if there is no compliance with the Plea Agreement, the prosecution can apply to resume the case as from the stage where it was left off, that is to say, without the need to commence it *de novo*. Thus, the present position is that the case has not

completely expired.

That being so, it is open to argument whether the "substratum"¹ of the Rule 108*bis* requests for review has fallen out²; alternatively, if it has, whether the Appeals Chamber, pursuant to exceptions³ in the field, may nevertheless proceed to give a ruling, one way or another, on issues of importance, without assuming an advisory jurisdiction.

True, the mere presence of factors of importance will not suffice; there must be "the additional ingredient of social cost in leaving the matter undecided".⁴ In determining this, the Appeals Chamber could take into consideration that the Tribunal is a temporary body, that its mandate relates to matters of consequence to the international community, that it has no coercive machinery of its own, and that it is largely dependent on other mechanisms for apprehending accused persons. It might assist these mechanisms to operate correctly if the matter were clarified.

But, as the context in which the Tribunal is operating is adversarial and as nobody wants the case to go on, I agree that it should not.

Mohamed Shahabuddeen

Dated this 27th day of March 2001
The Hague
The Netherlands

[Seal of the Tribunal]

1. *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 357, stating the test as whether "the substratum of [the] appeal has disappeared". The term "moot", as used in the order of the Appeals Chamber, belongs of course to American legal terminology. See *Northern Cameroons, I.C.J.Reports 1963*, 15 at 97, footnote 1, separate opinion of Judge Fitzmaurice. It may mean something different in English law.

2. See, generally, *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U.S.498 (1911); *Boise City Irrig. & Land Co. v. Clark* (C.C.App. 9th C.) 65 C.C.A. 399, 131 Fed. 415, per Ross, Circuit Judge, delivering the opinion of the Court of Appeals, Ninth Circuit; *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911), at 452; and *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

3. *Ibid.*

4. *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 362.