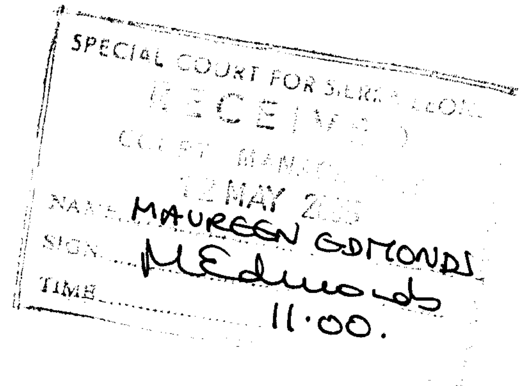
8653

262

SCSL-2004-16-T
(8653-8689)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER



Before: Judge Emmanuel Ayoola, Presiding
Judge George Gelaga King
Judge Renate Winter
Judge Geoffrey Robertson, QC
Judge A. Raja N. Fernando

Registrar: Mr Robin Vincent

Date filed: 12 May 2005

THE PROSECUTOR

Against

ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

CASE NO. SCSL – 2004 – 16 – T

PROSECUTION RESPONSE TO THE "JOINT DEFENCE APPEAL" DATED 3 MAY 2005

Office of the Prosecutor:
Luc Côté
Lesley Taylor
Christopher Staker

Defence Counsel for Alex Tamba Brima:
Kevin Metzger
Glenna Thompson
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Wilbert Harris
Mohamed Po-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan A. Knoops
Carry J. Knoops
A.E. Manly-Spain

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

THE PROSECUTOR

Against

ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

CASE NO. SCSL – 2004 – 16 – T

PROSECUTION RESPONSE TO THE "JOINT DEFENCE APPEAL" DATED 3 MAY 2005

I. INTRODUCTION

1. The Prosecution files this response to the following documents:

   — "Joint Defence Notice of Appeal on Decision on Independent Counsel", filed jointly on behalf of all three Accused in this case on 3 May 2005 (the "**Notice of Appeal**"),[1] and

   — "Joint Defence Appeal Against Decision on the Report of Independent Counsel Pursuant to Rules 77(C)(iii) and 77(D) of the Rules of Procedure and Evidence of 29 April 2005 by Trial Chamber II" (the "**Appeal Motion**"),[2] filed jointly on behalf of all three Accused on the same date in support of the Appeal Motion.

2. These documents purport to bring a joint interlocutory appeal against the Trial Chamber's "Decision on the Report of the Independent Counsel Pursuant to Rules

---

[1] Registry Pages ("**RP**") 8421-8426.
[2] RP 8427-8430.

77(C)iii and 77(D) of the Rules of Procedure and Evidence" of 29 April 2005 (the **"Impugned Decision"**).[3]

3. The Defence purports to bring this appeal pursuant to Rule 77(J) of the Rules of Procedure and Evidence of the Special Court (the **"Rules"**). For the reasons given below, the Prosecution submits that the Impugned Decision is a decision that is not subject to appeal (Section III below),[4] and, in the alternative, that the three Accused in this case have no standing to bring such an appeal against the Impugned Decision (Section IV below). For either of these reasons, this purported Defence appeal should be rejected at the threshold. In the further alternative, if the Appeals Chamber decides that it can entertain this appeal, the Prosecution submits that it should be rejected on its merits, for the reasons given in Section V below.

II. BACKGROUND

4. The Impugned Decision was given in the course of the same Rule 77 matter as an earlier oral decision given by the Trial Chamber 10 March 2005, against which all three Accused have also sought to appeal.[5]

5. In brief, the relevant facts are that:

   (i) During the trial proceedings on 10 March 2005, a protected witness, TF1-023, informed the Trial Chamber that on the previous day, when she was leaving the court by car, she had been threatened.[6]

---

[3] RP 8400-8411; as corrected by the Trial Chamber's "Corrigendum to the Decision on the Report of the Independent Counsel Pursuant to Rules 77(C)iii and 77(D) of the Rules of Procedure and Evidence", dated 2 May 2005 (RP 8412-8413).

[4] In this response, references made to the present Defence "appeal" should therefore be understood as meaning the present "purported appeal by the Defence".

[5] The documents relating to this other purported appeal are the "Joint Defence Appeal Motion Pursuant to Rule 77(J) on Both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii)", filed on 11 March 2005 (RP 6944-6953 (CONFIDENTIAL)); the "Additional Joint Defence Appeal Submissions Pertaining to Joint Defence Appeal Motion Pursuant to Rule 77(J) on Both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii) of March 11, 2005", filed on 14 March 2005 (RP 6954-6956 (CONFIDENTIAL)); the "Prosecution Response to the 'Joint Defence Notice of Appeal'", filed by the Prosecution on 4 April 2005 (RP 7015-7043 (CONFIDENTIAL)) and the "Joint Defence Reply to the Prosecution Response to the 'Joint Defence Notice of Appeal'", filed on 11 April 2005 (RP 7257-7262 (CONFIDENTIAL)). See also the "Order under Rule 117(A)" made by Judge Ayoola on 6 April 2005 (RP 7057-7058).

(ii) Counsel for the Prosecution then informed the Trial Chamber that the Prosecution had that morning received two written reports, relating to this and another incident, that the Prosecution had intended to draw to the attention of the Trial Chamber at the end of the testimony of witness TF1-023. The Prosecution counsel stated that these reports indicated that there was a prima facie case of contempt against five people: Brima Samura (the investigator of the Defence team for the Accused Brima) pursuant to rule 77(A)(ii), and Margaret Fomba, Neneh Binta Bah, Anifa Kamara and Ester Kamara pursuant to Rule 77(A)(iv). (These five people are referred to below as the "**five alleged contemnors**".) The Prosecution counsel submitted that in the circumstances it was appropriate for the Trial Chamber to make certain interim orders.[7]

(iii) After hearing counsel for all three Accused in relation to the Prosecution request,[8] the Presiding Judge gave the Trial Chamber's oral decision that the Registrar should appoint an independent counsel to investigate and to prosecute the five alleged contemnors. As interim measures, the Trial Chamber also ordered that Brima Samura be suspended from the Court and return all Court documents and information pending investigation and hearing, and that the other four persons be prohibited from entering the public gallery pending the investigation and hearing of this matter.[9]

(iv) On 11 March 2005, pursuant to that oral decision of the Trial Chamber, the Registrar appointed Mr Louis Tumwesige as Independent Counsel to conduct the investigation.[10] On 16 March 2005, Mr Tumwesige submitted the report of his findings to the Trial Chamber, pursuant to Rule 77(C)(iii).[11] That report is confidential, and has been provided neither to the Prosecution nor the Defence.

(v) On 29 April 2005, the Trial Chamber issued the Impugned Decision. In that decision the Trial Chamber found, having considered the Independent Counsel's

---

6 Transcript, 10 March 2005, pp. 2-4.
7 Transcript, 10 March 2005, pp. 4-8.
8 Transcript, 10 March 2005, pp. 8-15.
9 Transcript, p. 15 (line 11) to p. 16 (line 13).
10 Impugned Decision, preamble.
11 *Ibid.*

Report, that there were sufficient grounds to proceed against each of the five alleged contemnors. Pursuant to the second sentence of Rule 77(C)(iii), the Trial Chamber issued two orders in lieu of indictments[12]—one against Brima Samura, and the other against the other four of the five alleged contemnors—and directed the Independent Counsel to prosecute. In accordance with Rule 77(D) of the Rules, the Trial Chamber assigned the contempt proceedings to Trial Chamber I.

(vi) On 2 May 2005, the President of the Special Court formally assigned the proceedings relating to the two orders in lieu of indictments to Trial Chamber I or a single judge thereof, and these two sets of proceedings have respectively been allocated case numbers SCSL-05-1 (*Prosecutor v Brima Samura*) and SCSL-05-2 (*Prosecutor v Margaret Fomba Brima, Neneh Binta Bah Jalloh, Anifa Kamara and Ester Kamara*).[13] On the same day, the Presiding Judge of Trial Chamber I designated one of its members, Judge Boutet, as the single judge to deal as necessary with the two contempt cases.[14]

6. Thus (subject to the resolution of any outstanding appellate proceedings in relation to decisions of Trial Chamber II), the role of Trial Chamber II in respect of the Rule 77 proceedings against the five alleged contemnors has ended. There are now two contempt cases before Trial Chamber I, which are quite distinct from the trial proceedings before Trial Chamber II against the three Accused in the present case.

7. The Prosecution notes that there is another Defence application presently pending before the Appeals Chamber in relation to a decision of Trial Chamber II given in the course of this Rule 77 matter. Counsel for all three Accused in this case have sought to appeal against the Trial Chamber's original decision of 10 March 2005 to appoint the independent counsel to investigate this matter (see paragraph 5(iii) above). The

---

12 These are annexed as schedules to the Impugned Decision.

13 *Prosecutor v Samura*, *Prosecutor v Brima et al*, Case Nos. SCSL-05-1 and SCSL-05-2, "Order Assigning Cases to a Trial Chamber", President, 2 May 2005.

14 *Prosecutor v Samura*, *Prosecutor v Brima et al*, "Appointment of Independent Counsel", Case Nos. SCSL-05-1 and SCSL-05-2, Trial Chamber (Presiding Judge), 2 May 2005. Mr Louis Tumwesige having subsequently indicated that he was not available to prosecute these two cases, the Registrar appointed Ms Adelaide Whest as Independent Counsel to take over those prosecutions: *Prosecutor v Samura*, Case No. SCSL-05-1, and *Prosecutor v Brima et al* Case No. SCSL-05-2, "Appointment of Independent Counsel", Registrar, 2 May 2005.

Prosecution has submitted that this purported appeal should be rejected on the ground that there is no legal basis in the Rules for bringing such an appeal, and in the alternative, that it should be rejected on its merits.[15] Although this other purported appeal is technically separate to the present appeal, the decision in the present appeal may be affected by the Appeals Chamber's decision in relation to the Defence attempt to appeal against the Trial Chamber's oral decision of 10 March 2005.

III. THE IMPUGNED DECISION IS NOT SUBJECT TO APPEAL

8. Rule 77(C) of the Rules relevantly provides that:

> (C) When a Judge or Trial Chamber has reason to believe that a person may be in contempt of the Special Court , it may:
>
> ...
>
> iii. direct the Registrar to appoint an experienced independent counsel to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings. If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may issue an order in lieu of an indictment and direct the independent counsel to prosecute the matter.

9. The Trial Chamber's oral decision of 10 March 2005 was obviously a decision pursuant to the first sentence of Rule 77(C)(iii). The Impugned Decision, equally obviously, was a decision pursuant to the second sentence of Rule 77(C)(iii). The Prosecution submits that a decision of a Trial Chamber under either of these sentences is a decision that is not amenable to appeal.

10. Proceedings in relation to an alleged contempt of the Special Court are intended by the Rules, as far as is possible, to follow the same procedures that apply to a prosecution for a crime within the primary jurisdiction of the Special Court under Articles 2-5 of its Statute. This is made clear by Rule 77(E), which provides that

---

15 See the documents referred to in note 5 above.

"The rules of procedure and evidence in Parts IV to VIII shall apply, as appropriate, to proceedings under this Rule". Parts IV to VIII of the Rules are all of the provisions that govern investigations, indictments, pre-trial, trial, and post-trial proceedings, as well as service of sentence. Rule 77 does, however, add an additional safeguard to the ordinary procedures under the Rules. Where a contempt is alleged to have been committed in the course of a trial before the Special Court, the Prosecutor of the Special Court, as a party to that trial, will be potentially affected by the alleged contempt. Rule 77(C)(iii) therefore provides for an alleged contempt to be investigated and prosecuted by a specially appointed Independent Counsel, rather than by the Prosecutor of the Special Court who is a potentially affected party. The role of the Independent Counsel in contempt proceedings is thus the same as the role of the Prosecutor of the Special Court in proceedings within the primary jurisdiction of the Special Court. Accordingly, the provisions of Parts IV to VIII of the Rules should apply to the Independent Counsel in the same way that they apply to the Prosecutor.

11. Where an independent counsel appointed pursuant to the first sentence of Rule 77(C)(iii) reports to a Trial Chamber that there are sufficient grounds for instigating contempt proceedings, this serves the same purpose as, and should be treated in the same way as, the submission of an indictment by the Prosecutor pursuant to Rule 47(B).

12. Where a Trial Chamber, upon receipt of such a report from an Independent Counsel, decides to issue an order in lieu of an indictment and direct the independent counsel to prosecute the matter, this serves the same purpose as, and should be treated in the same way as, a decision of a designated Judge pursuant to Rule 47(E) to approve an indictment.

13. The Prosecution submits that there is no appeal from a decision of a designated Judge pursuant to Rule 47(E) to approve an indictment, and that accordingly, it follows that there should be no appeal against a decision of a Trial Chamber pursuant to the second sentence of Rule 77(C)(iii) to issue an order in lieu of an indictment and to order a prosecution to proceed. There is no express provision in the Rules for an

appeal against either type of decision. The general provision in Rule 108 of the Rules does not create a right of appeal against a decision of a judge under Rule 47.[16] A Trial Chamber of the ICTR has affirmed that "there does not exist any avenue of appeal against such decisions [under Rule 47] of confirmation of an indictment".[17] Additionally, a Trial Chamber of the ICTY affirmed that a Trial Chamber "has no power to review the actual decision of the confirming judge by way of appeal or in any other way".[18]

14. Admittedly, one Trial Chamber of the ICTY did contemplate, without deciding, an argument to the effect that "it is open to the Trial Chamber to determine whether the procedure laid down by the Tribunal's Statute and the Rules for the confirmation of an indictment has been followed".[19] However, this argument rested on the view that "the confirmation procedure is jurisdictional, and there can be no jurisdiction if that procedure [under Rule 47 for the confirmation of an indictment] is not properly followed".[20] The Prosecution submits that the Trial Chamber thereby left open (without deciding) the possibility that an indicted person might bring a preliminary motion under Rule 72 alleging lack of jurisdiction on the ground that there is no valid indictment, because the indictment confirmation procedure was not correctly followed. This decision is certainly no authority for the proposition that a person who has been indicted can appeal directly to the Appeals Chamber against a decision of the judge who confirms or approves an indictment. It is certainly no authority for the proposition that *a person other than the person who has been indicted* can appeal directly to the Appeals Chamber against such a decision.

---

[16] *Prosecutor v. Théoneste Bagasora and 28 Others,* Case No. ICTR 98-37-A, "Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagasora and 28 Others", Appeals Chamber, 8 June 1998, para. 51.

[17] *Prosecutor v Ndindiliyimana et al.,* Case No. ICTR-00-56-T, "Decision on the Defence Motion for Immediate Release and Stay of All Charges Against the Accused Ndindiliyimana Due to the Prosecutor's Non-Compliance With the Rules", Trial Chamber, 10 April 2002 (fourth last paragraph).

[18] *Prosecutor v. Brdjanin,* Case No. IT-99-36-PT, "Decision on Motion to Dismiss Indictment", Trial Chamber, 5 October 1999, paras. 21 and 23 (appeal dismissed: *Prosecutor v. Brdjanin and Talić,* Case No. IT-99-36-AR72, "Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed Under Rule 72", Appeals Chamber, 16 November 1999); see also *Prosecutor v. Talić,* Case No. IT-99-36-PT, "Decision on Motion for Release", Pre-Trial Judge, 10 December 1999, at esp. paras. 2(5) and 17.

[19] *Prosecutor v. Brdjanin,* "Decision on Motion to Dismiss Indictment", note 18 above, at para. 8.

[20] *Ibid.*, para. 6.

15. It is conceded that the Impugned Decision is a decision under Rule 77, and that Rule 77(J) states that "Any decision rendered by a Single Judge or Trial Chamber under this Rule shall be subject to appeal". However, the Prosecution submits that Rule 77(J), upon its correct interpretation, does not extend to a decision under the second sentence of Rule 77(C)(iii). For the reasons given above, a person who has been indicted with a crime under Articles 2-5 of the Statute cannot appeal to the Appeals Chamber against the decision of the designated Judge to approve the indictment. It would be illogical if a person who is prosecuted for contempt had any greater right of appeal in this respect, given that the maximum penalty for contempt is less than that of crimes within Articles 2-5 of the Statute.[21] Furthermore, for a person charged with contempt to have greater rights of appeal than a person charged with a crime under Articles 2-5 of the Statute would be inconsistent with the general principle embodied in Article 77 that the procedures for contempt trials should be as far as possible the same as the procedures for trials of crimes under Articles 2-5 of the Statute.[22]

16. Accordingly, the Prosecution submits that the words "decision rendered … under this Rule" in Rule 77(J) refer to a decision under Rule 77(A), (B) or (G), that is, the final decision of a Chamber finding a person to be, or not to be, in contempt of the Special Court, and imposing a penalty on that person. These words would also include a decision under Rule 77(I), following the final decision that a person is guilty of contempt. Thus, in relation to contempt proceedings, Rule 77(J) is the provision equivalent to Article 20 of the Statute of the Special Court, which confers a right of appeal against a final decision of a Trial Chamber convicting or acquitting a person charged with a crime within the Statute of the Special Court. As far as interlocutory appeals are concerned, the only interlocutory appeals that may be brought in Rule 77 proceedings are those provided for in Parts IV to VIII of the Rules, which apply to contempt proceedings by virtue of Rule 77(E).

---

[21] The maximum penalty for contempt is seven years or a fine not exceeding 2 million leones, or both: Rule 77(G). The maximum penalty for any crime within Articles 2-5 of the Statute of the Special Court is imprisonment "for a specific number of years", which may be far greater than seven: Statute of the Special Court, Article 19(1); Rule 101(B).

[22] See paragraph 10 above.

17. The Prosecution therefore submits that this Defence appeal should be dismissed on the ground that the Impugned Decision is not a decision of a type that is subject to appeal.

IV. THE ACCUSED HAVE NO STANDING TO BRING THIS APPEAL

18. Even if the Appeals Chamber were to find, contrary to the primary submission of the Prosecution above, that it can entertain an appeal against a decision of a Trial Chamber under the second sentence of Rule 77(C)(iii), the Prosecution submits that only the parties to the contempt proceedings would have standing to bring such an appeal. The parties to the contempt proceedings are the five alleged contemnors who are being prosecuted, and the Independent Counsel who is conducting the Prosecution. The Prosecution submits that third parties cannot have standing to bring such an appeal, any more than a third party could have standing to appeal against a decision of a designated Judge under Rule 47(E) to approve an indictment (assuming, hypothetically, that such an appeal were possible).

19. For instance, suppose that the spouse of a person indicted with war crimes sought to appeal against the decision of the designated Judge to approve the indictment on the ground that the trial and possible subsequent imprisonment of the accused would cause hardship to the accused's family. Or, suppose that the employer of the accused sought to appeal against the decision of the designated Judge on the ground that the trial and possible subsequent imprisonment of the accused would cause hardship to the employer's business. The Prosecution submits that even if, hypothetically, it were possible for an accused to appeal against the decision of the approving judge, it would be unimaginable that third persons, such as a spouse or employer of the accused, would have standing to do so.

20. The same is true in the case of a person who is prosecuted for contempt under Rule 77(C)(iii). Even if, hypothetically, it were possible for the person charged with contempt to appeal against the decision of the Trial Chamber under the second sentence of Rule 77(C)(iii), it would be unimaginable that such third persons would have standing to do so.

21. The three Accused in this case are not the people who have been charged with contempt in Case Nos. SCSL-2005-1 and SCSL-2005-2. They are not parties to those proceedings. To the extent that the three Accused in the present case allege any interest in the contempt proceedings, it is that one of the five alleged contemnors was a Defence investigator and three are the spouses of the Accused, and that the prosecution of these alleged contemnors therefore causes difficulties for the Accused and Defence team in the present proceedings.[23] Their interest is effectively the same as the interest of a spouse or employer in the examples given above. It is not an interest that can give them standing to challenge the decision to prosecute another person.

22. If the three Accused in this case claim that they are facing particular difficulties as a result of the prosecution of the five alleged contemnors, the appropriate course is for them to move the Trial Chamber in their *own* case for appropriate accommodation, for instance, by requesting appropriate extensions of time, or adjournments, or additional resources. The Prosecution notes that the Trial Chamber in the Accused's case has in fact already granted one adjournment on this ground, and that the Accused have applied for leave to appeal against a decision of the Trial Chamber to refuse a second adjournment.[24] That application for leave to appeal will be determined by the Appeals Chamber in due course. However, the fact that the Accused may feel that they are facing difficulties in their *own* proceedings does not give them standing to intervene in *other* proceedings. The contempt prosecutions are proceedings against other people in other proceedings which are now pending before the other Trial Chamber.

23. The Prosecution therefore submits that this Defence appeal should be dismissed on the alternative ground that the three Accused in this case have no standing to challenge a decision under Rule 77(C)(iii) to prosecute certain other people for contempt.

---

[23] See the "Urgent Joint Defence Motion for Stay of the Contempt Proceedings" filed on 3 May 2005 by the three Accused in this case in *Prosecutor v Samura*, Case No. SCSL-05-1, and *Prosecutor v Brima et al.*, Case No. SCSL-05-2, at paras. 6-10. The three Accused in this case also claim that witnesses in their case could be "negatively influenced" by the contempt proceedings (*ibid.*, at para. 5).

[24] See paragraph 7(ii).

V. THE APPEAL SHOULD BE REJECTED ON ITS MERITS

24. In the event that the Appeals Chamber does not accept the Prosecution's primary and first alternative submissions above, the Prosecution submits that the present appeal should be rejected on its merits.

(1) The Accused's first ground of appeal

25. The Accused's first ground of appeal consists of a claim that the Trial Chamber erred in making a decision under the second sentence of Rule 77(C)(iii) without first disclosing the Independent Counsel's report to the three Accused in this case and allowing them to make submissions on it.[25] This ground of appeal must be rejected.

26. First, there is nothing in Rule 77, or in any other Rule, that would require the Trial Chamber to disclose the Independent Counsel's Report to the Defence in the case in which the contempt was committed before making a decision to allow a prosecution for contempt to proceed.

27. Secondly, the argument that the Independent Counsel' Report should have been disclosed is inconsistent with the general principle embodied in Rule 77 that the procedures for contempt trials should as far as possible be the same as the procedures for trials of crimes under Articles 2-5 of the Statute.[26]

28. In the case of a person charged with crimes under Articles 2-5 of the Statute, the judicial decision that the prosecution should proceed is taken by the designated Judge under Rule 47. Rule 47 proceedings are by their nature *ex parte* proceedings involving only the Prosecutor.[27] When deciding whether to approve an indictment

[25] Appeal Motion, paras. 10-17, especially the conclusion in para. 17.

[26] See paragraphs 10 and 15 above.

[27] *Prosecutor v. Delalić et al.,* Case No. IT-96-21-PT, "Decision on Application for Leave to Appeal by Hazim Deilć (Defects in the Form of the Indictment)", Trial Chamber, 6 December 1996 (see the final paragraph before the Disposition, holding that the argument to the effect that "the *ex parte* review of the Indictment under Rule 47 offends the principle of *audi alteram partem*" was an argument that did not "raise a 'serious cause' justifying the grant of leave to appeal under Rule 72"), *Prosecutor v. Simić et al.,*Case No. IT-95-9-PT, "Decision on (1) Application by Stevan Todorović to Re-open the Decision of 27 July 1999, (2) Motion by ICRC to Re-open Scheduling Order of 18 November 1999, and (3) Conditions for Access to

under Rule 47, the designated Judge is under no obligation to disclose the relevant material to the person against whom the indictment is brought, and to afford that person an opportunity to be heard. There is certainly no obligation on the designated Judge to disclose the material to any *third party* (such as a spouse or employer of the person indicted), and to afford such third parties an opportunity to be heard.

29. The same is true in respect of proceedings for contempt. In the case of a person charged with contempt under Rule 77(C)(iii) of the Rules, the judicial decision that the prosecution should proceed is taken by the Trial Chamber under the second sentence of that provision. Like Rule 47 proceedings, proceedings under the second sentence are by their nature *ex parte* proceedings involving only the prosecutor (who in this case, is the Independent Counsel, not the Prosecutor of the Special Court). There is no requirement that a person to be charged with contempt be provided with the Independent Counsel's report and be given the opportunity to make submissions before the Trial Chamber takes the decision to issue an order in lieu of an indictment against that person. Accordingly, none of five alleged contemnors was provided with the Independent Counsel's report before the orders in lieu of an indictment were issued in this case. There is certainly no requirement that any *third person* be provided with the Independent Counsel's report or be afforded the opportunity to make submissions on whether or not an order should be made under the second sentence of Rule 77(C)(iii). Accordingly, neither the Prosecutor of the Special Court, nor any of the Accused in the present case (none of whom have been charged with contempt) were provided with a copy of the Independent Counsel's Report. This was

---

Material", Trial Chamber, 28 February 2000, para. 40. See also see also *Prosecutor v. Kordić and Čerkez,* Case No. IT-95-14/2-PT, "Order Concerning Documents to be Transmitted by the Defence to the Judge Reviewing the Proposed Amended Indictment", President, 26 August 1998; *Prosecutor v. Meakić (The "Omarska Camp" Case),* Case No. IT-95-4-PT, *Prosecutor v. Sikirica (The "Keraterm Camp" Case),*Case No. IT-95-8-PT, "Order on the Prosecutor's Requests for the Assignment of a Confirming Judge", President, 26 August 1998; *Prosecutor v. Krnojelac,* Case No. IT-97-25-PT, "Decision on Prosecutor's Response to Decision of 24 February 1999", Trial Chamber II, 20 May 1999, paras. 10-12 and *Prosecutor v. Kolundžija,* Case No. IT-95-8-I and IT-98-30-PT, "Decision Rejecting Prosecutor's Request for Leave to Amend Indictments", Confirming Judge, 6 July 1999. Admittedly, in one ICTY case, the Confirming Judge expressed the view that "There is nothing inherent in the characteristics of a confirmation hearing which requires the accused to be actively excluded from it": *Prosecutor v. Milutinović et al.,* Case No. IT-99-37-I, "Decision on Application by Dragoljub Ojdanić for Disclosure of *Ex Parte* Submissions", Confirming Judge, 8 November 2002, para. 20. However, this observation is against the weight of authority, and in any event does not suggest that an accused has a *positive right* to participate in Rule 47 proceedings.

entirely consistent with the requirements of the Rules. The fact that one person may be affected by the prosecution of another person does not give the former standing, much less a *right*, to make submissions on whether or not the latter should be prosecuted.

30. Accordingly, the Accused's first ground of appeal must be rejected.

(2) The Accused's second ground of appeal

31. The Accused's second ground of appeal is that the Trial Chamber erred in making its decision under the second sentence of Rule 77(C)(iii), without first awaiting the final disposal of the Accused's appeal against the Trial Chamber's oral decision of 10 March 2005,[28] and without first deciding on a motion filed by the Accused for disclosure of the Independent Counsel's Report. The Accused argue that the Impugned Decision was therefore "premature". The Prosecution submits that this argument is unfounded.

32. The Prosecution accepts that if the Accused's appeal against the Trial Chamber's decision of 10 March 2005 were to succeed, the consequence might potentially be to render void the Independent Counsel's appointment, and thus the Independent Counsel's report. If so, it may also follow that any decision under Rule 77(C)(iii) taken in pursuance of the Independent Counsel's report would also be rendered void. However, unless and until the Trial Chamber's decision of 10 March 2005 is reversed on appeal, it operates as a valid decision, and the Trial Chamber may proceed on that basis.

33. Although the Rules of the Special Court do not say so expressly, the Prosecution submits that the general position under the Rules of the Special Court (and under the Rules of the ICTY and ICTR) is the same as that embodied in Article 82(3) of the Statute of the International Criminal Court (dealing with interlocutory appeals), which provides that:

[28] See paragraph 7(i) above.

> An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence

In other words, an accused cannot, by filing an appeal or application for leave to appeal against an interlocutory decision of a Trial Chamber, force the trial proceedings to a halt until the interlocutory appeal is decided. Unless the Appeals Chamber otherwise orders, or unless the Trial Chamber otherwise decided, proceedings before the Trial Chamber may continue uninterrupted while an interlocutory appeal is pending on an issue in that case. In this particular instance, neither the Appeals Chamber, nor the Trial Chamber in this case (nor Trial Chamber I in Case Nos. SCSL-2005-1 and SCSL-2005-2) have decided to suspend the contempt proceedings pending the appeal against the Trial Chamber's decision of 10 March 2005. The course that they adopted was within their discretion.

34. The Prosecution does not understand the precise basis of the Accused's argument that the Trial Chamber should have decided upon the Accused's motion for disclosure of the Independent Counsel's report before giving the Impugned Decision. For the reasons given above, the Prosecution submits that the Accused have no *right* to receive the Independent Counsel's report. At most, the Accused could request the Trial Chamber, in its discretion, to order that this report should be disclosed to them. (The Prosecution has argued that the Trial Chamber should decline to exercise its discretion to order such disclosure.) Where a party files a motion requesting the Trial Chamber to exercise its discretion in a particular way, it is a matter for the Trial Chamber to determine when it will decide upon that motion. A party cannot, by filing such a motion, prevent the Trial Chamber from taking any action inconsistent with the ruling requested in the motion, until such time as the motion has been decided. In this instance, the Trial Chamber has by necessary implication determined that even if it does decide to order the disclosure of the report to the Defence (a matter which on which it has not yet pronounced its conclusion), it will not do so prior to issuing the orders in lieu of an indictment under Rule 77(C)(iii). It was within the discretion of the Trial Chamber to so decide.

35. Accordingly, the Accused's second ground of appeal must be rejected.

(3) The Accused's third ground of appeal

36. The Accused's third ground of appeal is that the Impugned Decision gives insufficient reasons for the Trial Chamber's conclusion that there were "are sufficient grounds to proceed" against the five alleged contemnors for the purposes of the second sentence of Rule 77(C)(iii). The Defence argues that the provision of sufficient reasons for the Impugned Decision "forms an essential part of the fairness of a contempt of court decision such as the Impugned Ruling of the honourable Trial Chamber, as only such disclosure may enable the Defence to challenge the legitimacy and legality of the Impugned Decision".[29]

37. This Defence argument is based on a misconception of the nature of a decision of a Trial Chamber under the second sentence of Rule 77(C)(iii). Such a decision is not a decision finding a person in contempt of court. The Prosecution accepts that the *final judgment* of a Trial Chamber finding a person to be or not to be in contempt of court must be "accompanied by a reasoned opinion in writing" (see Rule 88(C), which is applicable in contempt proceedings by virtue of Rule 77(E)). Such a reasoned opinion is necessary in order to enable the parties to decide whether to appeal, and to enable the Appeals Chamber, if called upon to do so, to review the Trial Chamber's judgment on appeal.[30]

38. However, for the reasons given above, a decision under Rule 77(C)(iii) to issue an order in lieu of an indictment is not a decision analogous to a final judgment under Rule 88(C), but rather, is analogous to a decision of a designated Judge under Rule 47 to approve an indictment. For the reasons given above, it is not possible to appeal such a decision of a designated Judge under Rule 47, and it is not possible to appeal such a decision of a Trial Chamber under the second sentence of Rule 77(C)(iii). As noted above, a decision of the ICTY has left open the question whether it is possible to challenge a decision to confirm an indictment on the ground that proper procedures were not followed. (Such a challenge would not, however, be an appeal, but would

---

29 Defence Appeal, para. 4.

30 See, for instance, *Prosecutor v. Kunarac et al.*, "Judgement", Case No. IT-96-23, IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 41.

be brought by way of preliminary motion before a Trial Chamber.) However, even these decisions make clear that it is not possible to challenge the *substance* of a decision under Rule 47 to confirm an indictment. For instance, it is clear that it is not possible to challenge a decision under Rule 47 of the Rules of the ICTY on the ground that there was insufficient evidence before the confirming judge to justify the confirmation of the indictment.[31] Because of this, there is no need for the designated Judge under Rule 47 proceedings to give reasons as to why the Judge is satisfied that the indictment should be approved. Nor has it been the practice of designated Judges to give such reasons when approving indictments under Rule 47.[32]

39. The Prosecution submits that the position is the same in respect of a decision to issue an order in lieu of an indictment under the second sentence of Rule 77(C)(iii). There is no possibility of appealing against such a decision on the ground that the evidence was insufficient to justify a prosecution. Accordingly, there is no need for the Trial Chamber when making a decision under this provision to give detailed reasons for its decision.

40. Accordingly, the Accused's third ground of appeal must be rejected.

V. CONCLUSION

41. For the reasons given above, this purported appeal by the Accused should be rejected.

---

[31] See the cases cited in notes 16-19 above.

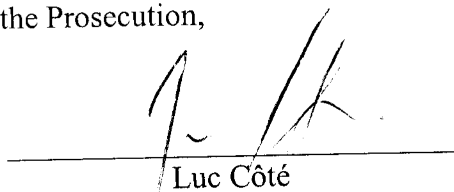
[32] See, for instance, *Prosecutor v. Norman*, Case No. SCSL-2003-08-I, "Decision Approving the Indictment and Order for Non-Disclosure", Designated Judge, 7 March 2003.

Dated the 12th day of May 2005.

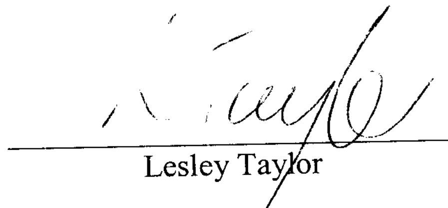
In Freetown,

Sierra Leone.

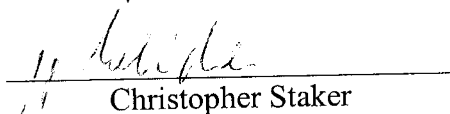
For the Prosecution,



Luc Côté



Lesley Taylor



Christopher Staker

PROSECUTION INDEX OF AUTHORITIES

Prosecutor v Samura, Case No. SCSL-05-1, "Urgent Joint Defence Motion for Stay of the Contempt Proceedings", 3 May 2005

Prosecutor v Brima et al., Case No. SCSL-05-2, "Urgent Joint Defence Motion for Stay of the Contempt Proceedings", 3 May 2005

Prosecutor v. Norman, Case No. SCSL-2003-08-I, "Decision Approving the Indictment and Order for Non-Disclosure", Designated Judge, 7 March 2003

Prosecutor v. Milutinović et al., Case No. IT-99-37-I, "Decision on Application by Dragoljub Ojdanić for Disclosure of *Ex Parte* Submissions", Confirming Judge, 8 November 2002
Copy annexed.

Prosecutor v. Kunarac et al., "Judgement", Case No. IT-96-23, IT-96-23/1-A, Appeals Chamber, 12 June 2002 – Available at
http://www.un.org/icty/kunarac/appeal/judgement/index.htm

Prosecutor v Ndindiliyimana et al., Case No. ICTR-00-56-T, "Decision on the Defence Motion for Immediate Release and Stay of All Charges Against the Accused Ndindiliyimana Due to the Prosecutor's Non-Compliance With the Rules", Trial Chamber, 10 April 2002 – Available at
http://www.ictr.org/ENGLISH/cases/Ndindiliyimana/decisions/100402.htm

*Prosecutor v. Simić et al.,*Case No. IT-95-9-PT, "Decision on (1) Application by Stevan Todorović to Re-open the Decision of 27 July 1999, (2) Motion by ICRC to Re-open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material", Trial Chamber, 28 February 2000 – Available at
http://www.un.org/icty/simic/trialc3/decision-e/00228PN511785.htm

Prosecutor v. Talić, Case No. IT-99-36-PT, "Decision on Motion for Release", Pre-Trial Judge, 10 December 1999 – Available at http://www.un.org/icty/brdjanin/trialc/decision-e/91210PR211399.htm

Prosecutor v. Brdjanin and Talić, Case No. IT-99-36-AR72, "Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed Under Rule 72", Appeals Chamber, 16 November 1999 – Available at
http://www.un.org/icty/brdjanin/appeal/decision-e/91116PM311052.htm

Prosecutor v. Brdjanin, Case No. IT-99-36-PT, "Decision on Motion to Dismiss Indictment", Trial Chamber, 5 October 1999 – Available at
http://www.un.org/icty/brdjanin/trialc/decision-e/91005DC29627.htm

Prosecutor v. Kolundžija, Case No. IT-95-8-I and IT-98-30-PT, "Decision Rejecting Prosecutor's Request for Leave to Amend Indictments", Confirming Judge, 6 July 1999 – Available at http://www.un.org/icty/kvocka/trialc/decision-e/90706AIV9316.htm

Prosecutor v. Krnojelac, Case No. IT-97-25-PT, "Decision on Prosecutor's Response to Decision of 24 February 1999", Trial Chamber II, 20 May 1999 – Available at http://www.un.org/icty/krnojelac/trialc2/decision-e/90520FI27429.htm

Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-PT, "Order Concerning Documents to be Transmitted by the Defence to the Judge Reviewing the Proposed Amended Indictment", President, 26 August 1998
Copy annexed.

Prosecutor v. Meakić (The "Omarska Camp" Case), Case No. IT-95-4-PT, *Prosecutor v. Sikirica (The "Keraterm Camp" Case),*Case No. IT-95-8-PT, "Order on the Prosecutor's Requests for the Assignment of a Confirming Judge", 26 August 1998 – Available at http://www.un.org/icty/sikirica/trialc/order-e/80826AJ46465.htm

Prosecutor v. Théoneste Bagasora and 28 Others, Case No. ICTR 98-37-A, "Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagasora and 28 Others", Appeals Chamber, 8 June 1998, para. 51 – Available at http://sim.law.uu.nl/SIM/CaseLaw/tribunals.nsf/0/f7250b1f199a7886c1256ab0002eb8de?OpenDocument

Prosecutor v. Delalić et al., Case No. IT-96-21-PT, "Decision on Application for Leave to Appeal by Hazim Deilć (Defects in the Form of the Indictment)", Trial Chamber, 6 December 1996 – Available at http://www.un.org/icty/celebici/appeal/decision-e/61206FI3.htm

UNITED
NATIONS

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

Case: IT-99-37-I

Date: 8 November 2002

Original: English

BEFORE A JUDGE OF THE TRIBUNAL

Before: Judge David Hunt, Confirming Judge

Registrar: Mr Hans Holthuis

Decision of: 8 November 2002

PROSECUTOR

v

Milan MILUTINOVIĆ, Nikola ŠAINOVIĆ & Dragoljub OJDANIĆ

DECISION ON APPLICATION BY DRAGOLJUB OJDANIĆ FOR DISCLOSURE OF *EX PARTE* SUBMISSIONS

Counsel for the Prosecutor:

Ms Carla del Ponte
Mr Geoffrey Nice

Counsel for the Defence:

Mr Tomislav Višnjić, Mr Vojislav Seležan & Mr Peter Robinson for Dragoljub Ojdanić

1. In May 1999, and pursuant to Rule 28(A) of the Rules of Procedure and Evidence ("Rules"), I was designated by the President of the Tribunal as a duty judge to determine an application by the Prosecutor to review an indictment brought against Slobodan Milošević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić and Vlajko Stojiljković.[1] My decision confirming the indictment was given on 24 May 1999.[2] In June 2001, as the case had not at that stage been assigned to a Trial Chamber, I determined an application by the Prosecutor for leave to amend that indictment and to confirm the indictment as amended.[3] My decision was given on 29 June 2001.[4] On that day, Slobodan Milošević was transferred into the custody of the Tribunal, and the President thereafter assigned the case to Trial Chamber III.[5]

2. Dragoljub Ojdanić ("applicant") was transferred into the custody of the Tribunal on 25 April 2002. He has now sought an order from me as the confirming judge "disclosing all *ex parte* submissions, written and oral, made by the Prosecutor in connection with confirmation of the indictment(s) in his case".[6] He requests that this material be made public.[7] It is true that only the prosecution was represented before me during the two confirmation hearings. This was necessarily the case, because the first hearing (in May 1999) was in advance of the commencement of the proceedings by the filing of an indictment, and the second hearing (in June 2001) was in advance of any accused being transferred into the custody of the Tribunal. In that sense only could those hearings be described as *ex parte* in nature. They were not *ex parte* in the usual sense that a party was *excluded* from the hearing.

3. The first application was, however, heard *in camera*, because the Prosecutor was seeking an order pursuant to Rule 53 that there be no public disclosure of the indictment, the accompanying material or the confirmation and orders made for a period of about seventy-two

---

1 Trial Chamber III, to which this case is now assigned, has granted leave to the prosecution to amend the indictment, by deleting from it both the charges against Slobodan Milošević (as those charges are now part of a new indictment [IT-02-54] upon which he is presently standing trial) and the charges against Vlajko Stojiljković (who is now deceased): (Substituted) Decision on Motion to Amend Indictment, 5 Sept 2002, pp 2-3.

2 Decision on Review of Indictment and Application for Consequential Orders, 24 May 1999 ("First Decision").

3 This was pursuant to Rule 50(A)(ii).

4 Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, 29 June 2001 ("Second Decision").

5 Ordonnance du Président Relative à l'Attribution d'une Affaire à une Chambre de Première Instance, 29 June 2001, p 2.

6 General Ojdanić's Application for Disclosure of *Ex Parte* Submissions, 31 Oct 2002 ("Motion"), par 1.

7 *Ibid*, par 4.

hours. This was to enable steps to be taken to protect persons who were then within the territories of the former Federal Republic of Yugoslavia and of the Republic of Serbia – staff members of the Office of the Prosecutor, members of a United Nations fact-finding mission and staffs of other United Nations and Governmental agencies and of humanitarian agencies – against whom there was a serious risk of reprisals and intimidation if the indictment were to be disclosed immediately.[8] The second application was also heard *in camera*, as the Prosecutor was seeking an order that the supporting material which accompanied both indictments should not be made public until the arrest of all of the accused.

4. It is recognised by the Rules that a hearing may take place *in camera*.[9] A hearing *in camera* was originally one conducted in the judge's private room, which is often called the judge's Chambers (latin, *camera*), rather than in a courtroom. It now means no more than a hearing in the absence of the public, as provided in Rule 79 ("Closed Sessions"). It does not necessarily mean an *ex parte* hearing, and closed sessions are frequently conducted *inter partes* during the course of trials in order to protect confidential information from becoming public.

5. At the first hearing, an order was made by me that, with a stated exception, there was to be no disclosure of the indictment, the review and confirmation of the indictment, the arrest warrants or "the Prosecutor's application dated 22 May 1999" during the period ending at 12 noon (The Hague time) on Thursday, 27 May 1999, unless otherwise ordered, and that there was to be no disclosure of the supporting material forwarded by the Prosecutor with the indictment until the arrest of all of the accused.[10] The only orders made in relation to disclosure at the second hearing were that the last of those orders made previously (that the supporting material forwarded by the Prosecutor with the indictment was not to be disclosed until the arrest of all of the accused) was to be continued, and that it was to apply also to the additional supporting material forwarded in relation to the amended indictment.[11] The disclosure referred to in each of those orders meant *public* disclosure.[12] An accused who has appeared before the

---

[8] First Decision, pars 30-33.
[9] See, for example, Rule 66(C).
[10] First Decision, p 12. The reference to "the Prosecutor's application dated 22 May 1999" would appear to a wrongly dated reference to the originating document, the "Presentation of an Indictment for Review and Application for Warrants of Arrest and for Related Orders", which is dated 23 May 1999. That was the first document filed.
[11] Second Decision, par 9(iii).
[12] The order at the second hearing expressly refers to all orders as being concerned with "public disclosure".

Tribunal is entitled to have all of the supporting material disclosed to him within thirty days of that appearance.[13]

6. As is usual, there was no transcript taken of either of the *in camera* hearings, both of which took place in my private room in the Tribunal building. A document entitled "Minute of Review of the Indictment", dated and filed 24 May 1999, contains a note of submissions made by the Prosecutor on 24 May 1999. It has been endorsed "Under Seal" – no doubt in order to protect it from disclosure during that seventy-two hour period of non-disclosure to the public. To that document I will return. No such Minute was prepared in relation to the second hearing. The only record I have in relation to the submissions made by counsel appearing for the Prosecutor on 29 June 2001 related to the agreement on her behalf, as a term of the confirmation, to include, in the description of the individual responsibility of each of the accused, a passage along these lines:

> By using the word "committed" in this indictment, the Prosecutor does not intend to suggest that any of the accused physically perpetrated any of the crimes charged, personally.

The contemporaneous (public) record appears in another decision, to which the agreement was relevant.[14] The phrase appeared in the amended indictment filed thereafter.[15]

7. The applicant relies upon a statement made by Mr Nice, Principal Trial Counsel for the prosecution at the trial, that:

> When confirmation of the original indictment, the amended indictment and the second amended indictment was sought in May 1999, June 2001 and October 2001, respectively, there were no "explanatory" filings (annotated indictment, memorandum or other) made to the confirming Judge(s). However, certain documents drafted with the goal of assisting the Confirming Judge(s) during the confirmation process were filed *ex parte*. These documents were intended to be guides for the Judge(s) at the confirmation stage, and were not intended to be part of the supporting material for the Indictment(s).[16]

A document was provided to me by the Prosecutor at the first hearing, in May 1999, which identified the particular statements upon which the Prosecutor relied for specific allegations in

[13] Rule 66(A)(i).

[14] *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision Varying Decision on Form of Further Amended Indictment, 2 July 2001, par 2; Leave to appeal refused: Decision on Application for Leave to Appeal Against the Decision of 2 July 2001, 31 July 2001.

[15] Amended Indictment, 29 June 2001, par 16.

[16] Letter to counsel for the applicant, 11 July 2002, Annex C to General Ojdanić's Motion to Require Full Compliance with Rule 66(A)(i) and for Unsealing of *Ex Parte* Materials, 23 July 2002 ("Motion to Trial Chamber"), p 3.

the indictment. A copy of the amended indictment was provided to me by counsel appearing for the Prosecutor at the second hearing, in June 2001, which identified in red the amendments which had been made to the original indictment, and which also identified by a series of numbers the particular statements upon which the Prosecutor relied for specific allegations in the additional material in the amended indictment.[17] This document was filed on a "confidential" basis, which means only that it may not be disclosed to the public without an order. On each occasion, there was an originating process filed: the "Presentation of an Indictment for Review and Application for Warrants of Arrest and for Related Orders" dated 23 May 1999, and the "Motion for Leave to File an Amended Indictment and Confirmation of the Amended Indictment" dated 26 June 2001.[18]

8. The applicant argues that, as the circumstances in which those hearings were conducted *in camera* no longer exist, disclosure of the submissions made by or on behalf of the Prosecutor during those hearings "will promote transparency in the work of the Tribunal",[19] and "will promote accountability of the Prosecutor and act as a deterrent to misleading or irresponsible statements to the confirming judge".[20] I do not believe that I am being unduly cynical when I express doubt that these are the true reasons for this application. If the true (but unstated) reason is to use the information sought in order to challenge the validity of the proceedings,[21] the applicant should note that both indictments which I confirmed have now been replaced by the Second Amended Indictment. In any event, I did not regard myself as being in any way limited by the documents provided to me by the Prosecutor for my assistance. The confirmation in each case was based solely upon the supporting material supplied.

9. The applicant has also referred, darkly, to the particular need for transparency in the present case because "the timing of the indictment during NATO's bombardment of the Federal

---

[17] It is perhaps unnecessary for me to determine whether this was indeed, contrary to Mr Nice's assertion, an "annotated" indictment.

[18] The application for the confirmation of the second amended indictment, which took place in October 2001, was determined by Trial Chamber III. It was not determined by me, and any application in relation to the submissions made by the prosecution in that confirmation hearing should be made to Trial Chamber III.

[19] Motion, par 10.

[20] *Ibid*, par 11.

[21] Compare the lack of success in such endeavours in *Prosecutor v Brđanin*, IT-99-36-PT, Decision on Motion to Dismiss Indictment, 5 Oct 1999; Interlocutory appeal dismissed as improperly filed: Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed Under Rule 72, 16 Nov 1999; *Prosecutor v Brđanin*, IT-99-36-PT, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, 8 Dec 1999; Leave to appeal refused: Decision on Application for Leave to Appeal, 23 Dec 1999.

Republic of Yugoslavia raised questions about the politicalisation [*sic*] of the Tribunal".[22] I draw his attention to what I said on this issue in the First Decision.[23] What I said was intended to make it clear that the timing of the presentation of indictments is a matter for the Prosecutor and not the Tribunal, and that the Tribunal was *not* acting on a political basis. I do not propose to debate the veiled, but unfounded, suggestion to the contrary now made by the applicant.

10. The Prosecutor's first response is that, as the confirming judge, I am *functus officio* as the Trial Chamber is "seized of all matters in the case".[24] Secondly, the Prosecutor submits that the Motion before me is an abuse of process, in that the applicant "seeks a review of the Trial Chamber's Decision by remitting the matter to the Confirming Judge".[25] Thirdly, the Prosecutor says that there is no basis under the Tribunal's Statute or Rules for the disclosure to the accused of any material before the confirming judge other than the supporting material which accompanied the indictment (and which is dealt with by Rule 66(A)(i)).[26]

11. The applicant recently sought from Trial Chamber III orders to the Prosecutor:

> [...] to fully comply with Rule 66(A)(i) by disclosing to General Ojdanić all supporting materials which accompanied the indictment(s) including (A) pleadings and other documents submitted by the Prosecutor which accompanied the indictment(s); and (B) materials pertaining to each co-accused [...] [and] for disclosure of *ex parte* submissions made in connection with the confirmation of the indictment(s) and regulating future *ex parte* submissions.[27]

The Trial Chamber ordered the Prosecutor to disclose to the applicant all of the supporting material which accompanied the indictment when confirmation was sought, including material

---

22 Motion, par 10.

23 Paragraph 35 reads: "No submission has been made that the impact of such disclosure on the current attempts to resolve the armed conflict in the Kosovo Province is a relevant matter to be considered in determining whether it is in the interests of justice to order non-disclosure. The safety of those personnel involved in the attempts to resolve that armed conflict is a legitimate consideration in relation to the interests of justice, but the possible political and diplomatic consequences of the indictment are not the same thing. There is a clear and substantial distinction to be drawn between what may be relevant to the well known and accepted discretion of prosecuting authorities as to whether an indictment should be presented and what may be relevant to this Tribunal's discretion as to whether an order should be made for the non-disclosure of that indictment once it has been presented and confirmed. In view of the opinion which I have already expressed, that a non-disclosure order for a short period is justified to enable security measures to be taken in relation to those at risk of intimidation or reprisals, it is unnecessary for me to determine whether the impact of the public disclosure of the indictment upon the peace process itself is also a consideration which is relevant to the exercise of my discretion to make a non-disclosure order pursuant to Rule 53. It is sufficient for me to say that such impact is not a matter which I have considered in determining the application made for non-disclosure in this case."

24 Prosecution's Response to "General Ojdanić's Application for Disclosure of *Ex Parte* Submissions", 6 Nov 2002 ("Response"), pars 5-8.

25 *Ibid*, par 6.

26 *Ibid*, par 9.

27 Motion to Trial Chamber, par 31.

relating to the co-accused, or to apply to the Trial Chamber for leave not to disclose certain material.[28] It refused all the other relief sought. In relation to the material before me when confirming the first and second indictments other than the supporting material, however, the Trial Chamber did not refuse relief on the merits. It ruled that, as the proceedings for the confirmation of an indictment are by their very nature *ex parte*, it was within the sole control of the confirming judge to determine what material should be made public pursuant to Rule 53.[29]

12. In its context of ordering the Prosecutor to comply with Rule 66, that particular ruling concerning the material remaining within the sole control of the confirming judge must be interpreted as being limited to any material used in the review process other than the supporting material. Clearly, once the case has been assigned to a Trial Chamber, further orders in relation to the supporting material forwarded with the indictment for review fall within the jurisdiction of that Trial Chamber,[30] and the confirming judge has no further responsibility in relation to the disclosure of that material. The applicant has not sought to have me deal with the supporting material in any way. The Prosecutor's submission that the applicant is seeking to have me review the Trial Chamber's decision is therefore misconceived. I reject the Prosecutor's second submission.

13. It is anything but clear just how far the confirming judge retains control of any material used in the review process other than the supporting material once the case has been assigned to a Trial Chamber, after which time the confirming judge has no further contact with the case. Prior to the amendment of Rule 50 in July 2000 to permit the Trial Chamber itself to grant leave to amend an indictment which was already before it, the confirming judge did retain some contact with the case up until the presentation of evidence in the trial commenced. That is no longer the situation. In my respectful opinion, the Trial Chamber to which the case has been assigned does have power to deal with this issue itself, just as it clearly has power at that stage to vary any orders made by the confirming judge (other than the confirming order itself).[31] This must be so, as the confirming judge may no longer be a judge of the Tribunal by the time the

---

[28] Decision on Defence Motion to Require Full Compliance with Rule 66(A)(i) and for Unsealing of *Ex Parte* Materials, 18 Oct 2002 ("Trial Chamber Decision"), p 4.

[29] *Ibid*, p 4. Rule 53(A) provides that a judge or a Trial Chamber may, in exceptional circumstances and in the interests of justice, order the non-disclosure to the public of any documents or information until further notice. Rule 53(B) permits the judge confirming the indictment to order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.

[30] Rule 66(A).

[31] *Prosecutor v Hadžihasanović et al*, IT-01-47-PT, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 Oct 2001.

accused is transferred into the custody of the Tribunal and the case is assigned to a Trial Chamber.

14. I am nevertheless satisfied that I also retain power to deal with matters which were before me where they do not deal with Rule 66 material. And, whether for reasons of deference or comity or anything else, the fact is that the Trial Chamber has invited the applicant to apply to me as the confirming judge to deal with the issue. It would be ludicrous to accede to the Prosecutor's submission that I have no power to deal with it, thus forcing the applicant to appeal against the Trial Chamber's decision that only I have the power to do so. The Rules of Procedure and Evidence were intended to be the servants and not the masters of the Tribunal's procedures,[32] and an acceptance of the Prosecutor's submission would produce such a bizarre situation as to destroy public confidence in the administration of justice. Accordingly, I reject the Prosecutor's first submission.

15. The Prosecutor claims that her third submission – namely, that there is no basis under the Tribunal's Statute or Rules for the disclosure to the accused of any material before the confirming judge other than the supporting material which accompanied the indictment – has already been upheld by the Trial Chamber.[33] The issue here, of course, is *not* whether there is a specific provision in either the Statute or the Rules which permits the disclosure of the material before me as the confirming judge other than the supporting material which accompanied the indictment. The Tribunal's powers are not limited to those which are specifically provided in the Statute and the Rules. The Tribunal also has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done.[34] In any event, the Prosecutor's claim that her submission has already been upheld by the Trial Chamber is not supported by a proper reading of the Trial Chamber's Decision.

---

32 *Kendall v Hamilton* (1879) 4 App Cas 504 at 525, 530-531. In *The Matter of an Arbitration Between Coles and Ravenshear* [1907] 1 KB 1, Sir Richard Henn Collins, the Master of the Rolls, said in the Court of Appeal (at 4): "Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

33 Response, par 9.

34 *Prosecutor v Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, par 13, following *Prosecutor v Blaškić*, IT-95-14-AR108*bis*, Judgment on Request of Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997 ("*Blaškić Subpoena Decision*), footnote 27 (par 25), and *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999 ("*Tadić* Conviction Appeal Judgment"), par 322.

16. The application for disclosure of the submissions made by the Prosecutor before the confirming judge was put upon two bases before the Trial Chamber: first, that such submissions constituted part of the supporting material which accompanied the indictment in the confirmation process and thus fell within Rule 66(A)(i);[35] and, secondly, that the applicant was entitled to them as part of his right to a fair and public hearing under Article 21 of the Tribunal's Statute.[36] The Trial Chamber rejected both arguments,[37] in my respectful opinion correctly so. The Trial Chamber did, however, expressly state that the confirming judge retained control of the confirmation process,[38] thereby inviting the applicant to apply to me as the confirming judge for the relief sought. It is against that background that other statements made by the Trial Chamber in its decision must be interpreted.

17. There appear to be two relevant passages in the Trial Chamber's Decision. The first is in these terms:[39]

> **CONSIDERING** therefore that there is no obligation upon the Prosecution to disclosure [*sic*] material other than that 'upon which the charges are based', which material has been identified by the prosecution and provided to the accused [...].

That statement is clearly directed only to the obligations of disclosure under Rule 66(A). The second passage is in these terms:[40]

> **CONSIDERING** that, contrary to the argument advanced by the Defence, Article 21, paragraph 2, of the Statute does not grant the accused any right to disclosure, and that there is no right of access under the Statute or the Rules to material that is not supporting material [...].

Insofar as that statement is limited to the absence of any specific provision in either the Statute or the Rules giving such a right of disclosure, it is literally correct. But the Prosecutor seeks to find in it support for her submission that the applicant is not entitled to relief because there is no such specific provision in the Statute or the Rules permitting such access. That is not what the Trial Chamber was saying. The Trial Chamber was concerned only with the arguments which the applicant had placed before it. It was not being asked to order access to material pursuant to a power which the Tribunal possesses as part of its inherent jurisdiction, and that statement should not be interpreted as going beyond the issues which the Trial Chamber had to determine. If it

---

35 Motion to the Trial Chamber, pars 6, 10.
36 *Ibid*, par 19.
37 Trial Chamber Decision, pp 3, 4.
38 *Ibid*, p 4.
39 Trial Chamber Decision, p 3.
40 *Ibid*, p 4.

were to be taken literally, as the Prosecutor seems to be submitting, the statement would be clearly wrong.

18. Trial Chambers and the Appeals Chamber have for some years now regularly ordered access to be given to accused persons to material in the possession of the prosecution or confidential material tendered in other cases where a legitimate forensic purpose has been demonstrated for such access. Although such applications involve an application pursuant to Rule 75(D) for the variation of protective measures ordered in relation to confidential material, the access is granted despite the absence of any specific provision in either the Statute or the Rules which permit it. In a recent decision, the Appeals Chamber said:[41]

> Access to confidential material may be granted whenever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case. A party is always entitled to seek material from *any* source to assist in the preparation of his case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown.

I do not interpret the second quoted statement of the Trial Chamber as denying access by an accused to material beyond that referred to in Rule 66(A). If I am wrong in my interpretation of that statement, then I would, with the greatest of respect to the Trial Chamber, entirely disagree with it.

19. Before considering whether the Prosecutor's third submission should nevertheless be upheld even though the Trial Chamber has not supported it, it is necessary to point out that, other than the Minute still under seal, there is no order presently in effect which prevents the disclosure to the applicant of anything which happened during either of the *in camera* hearings before me, although there may be references in what happened to the source of Rule 70 material (which cannot be subject to disclosure unless the provider agrees). What the Prosecutor is saying, therefore, is that an accused person who, as of necessity, is not present at the time the indictment against him is being confirmed, but who has not been *excluded* from being present (as in the usual *ex parte* situation), *cannot* be given access to the material presented during the confirmation process – in relation to which no order has been made that it is *not* to be disclosed to him – unless it falls within the terms of Rule 66(A)(i). Such a proposition has only to be stated to demonstrate its illogicality.

---

[41] *Prosecutor v Blaškić*, IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the Prosecutor v Blaškić, 16 May 2002, par 14.

20. Had the confirmation proceedings taken place at a time when the applicant was available to attend the hearing (for example, if he had been in custody in relation to another indictment), it need not, in my view, have been necessary for those proceedings to have been conducted *ex parte*, although it would still be appropriate for them to be conducted *in camera* where an order is sought for the non-disclosure to the public of the supporting material. There is nothing inherent in the characteristics of a confirmation hearing which requires the accused to be actively *excluded* from it. That is recognised by the provisions of Rule 50(A), prior to its amendment in July 2000, which expressly gave the accused the opportunity to be heard during the confirmation of an indictment which had been amended after the presentation of evidence had commenced.[42] The Prosecutor's third submission is accordingly rejected.

21. The issue then arises as to whether the Prosecutor would have been entitled to a order expressly *excluding* the applicant from the confirmation hearings if he had been available to attend at that time. There are many occasions where *ex parte* applications (in the sense of a hearing in which a party has been *excluded* from the hearing) *are* appropriate, but they are warranted only where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.[43]

22. Such applications are to some extent justified by Article 20.1 of the Tribunal's Statute, which requires that a trial is to be fair and to be conducted with due regard for the protection of victims and witnesses.[44] Sight should not, however, be lost of the accompanying requirement that the trial also be conducted with full respect for the rights of the accused. The Tribunal's

---

[42] Prior to that amendment, and once the presentation of evidence had commenced, Rule 50(A) permitted the Prosecutor to amend the indictment only with the leave of the Trial Chamber and after having heard the parties. If a confirmation was necessary, this was to be performed by the Trial Chamber, and this was done in the presence of the accused. Prior to the amendment to Rule 50(A) in November 1999, a further confirmation by the Trial Chamber was always required. The present Rule 50(A) provides that an indictment amended after the assignment of the case to a Trial Chamber need no longer be confirmed – which is a recognition that an application to amend an indictment by pleading additional charges or material facts involves the same process as a confirmation.

[43] *Prosecutor v Simić et al*, IT-95-9-PT, Decision on (1) Application by Stevan Todorović to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 Feb 2000 ("*Simić* Case"), par 39; *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 Oct 2000 ("*Brđanin & Talić* Case") par 11.

[44] See also Article 22 ("Protection of victims and witnesses").

Rules refer expressly or by necessary implication to various circumstances in which *ex parte* proceedings are appropriate. Rule 47 requires the prosecution to submit an indictment to a confirming judge for review before an arrest warrant may be issued. As I have already said, this is ordinarily an *ex parte* application as a matter of necessity. Rule 50 requires the prosecution to return to the confirming judge in order to obtain leave to amend the indictment whenever leave to amend is sought (and if further confirmation is required) at any time before the case is assigned to a Trial Chamber. This is also ordinarily an *ex parte* procedure, for the same reason.[45] Rule 54*bis* enshrines the procedure first discussed in the *Blaškić Subpoena Decision*[46] for hearing a State *in camera* and *ex parte* to enable submissions to be made in relation to national security interests concerning the issue of a subpoena. Rule 66(C) permits the prosecution to provide the Trial Chamber (and only the Trial Chamber) with information which should otherwise be disclosed to the defence but which is sought to be kept confidential. Rule 69 permits the Trial Chamber to consult with the Tribunal's Victims and Witnesses Section before determining the nature of the protective measures to be provided for a witness. This is clearly intended to be on an *ex parte* basis. As a matter of practice, and in accordance with common sense, applications by either party for protective orders are determined on the basis of some material provided to the Trial Chamber *ex parte* where the persons to be protected would otherwise be identified.[47] Rule 77 permits any party to bring to the notice of a Trial Chamber the conduct of a person which may be in contempt of the Tribunal, with a view to an investigation of that conduct and/or prosecution. Such a procedure recognises that the notification to the Trial Chamber will ordinarily be *ex parte*. Rule 108*bis* has been amended to remove the previous entitlement of the party in the proceedings who was not a party to an application pursuant to Rule 54*bis* to be heard in a State Request for Review of the decision made in that application.

23. But those provisions of the Rules do not exhaust the circumstances in which it may be appropriate to communicate with a judge or a Chamber *ex parte,* or for the judge or the Chamber to deal with a matter *ex parte*. It is neither possible nor appropriate to define the circumstances

---

[45] *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 20 May 1999, par 11; *Prosecutor v Talić*, Case IT-99-36-PT, Decision on Motion for Release, 10 Dec 1999, par 9.

[46] *Prosecutor v Blaškić*, Case IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997, at par 68.

[47] The respondent to an application for protective measures is nevertheless entitled to have the arguments advanced to justify the protective measures sought set out in such a way that the basis for the application is disclosed as far as possible without revealing the identity of the particular witness for whom the protection is sought: *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 Oct 2000, par 14.

in which such motions are appropriate by any limiting definition. The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in the circumstances already stated: where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.[48]

24. The fact that applications had been made for the indictments to be confirmed has already been made public, in the Decisions which I gave and which were made public at the time. The Prosecutor has not sought to argue that disclosure *to the accused* of the information conveyed during the confirmation process would be prejudicial to her or to any person – the sources of Rule 70 material of course excepted. Whatever the true reason may be for this application, nothing which has been put forward by the Prosecutor persuades me that it would be inappropriate to permit the disclosure *to the applicant* of the material which I have described, other than references to Rule 70 material which identify its source. Indeed, the document accompanying the original indictment, entitled "Presentation of an Indictment for Review and Application for Warrants of Arrest and for Related Orders" and dated 23 May 1999, is available on the ICTY Intranet, so that it is already available to the applicant. The other material should similarly be made available to the applicant and to his co-accused who has appeared before the Tribunal (Nikola Šainović).

25. That does not mean that the material is to be made public. Because the material presented to me identifies the supporting material which accompanied the indictments and which remains the subject of orders that it not be made public until the arrest of all the accused, and because there is one accused who has not yet appeared before the Tribunal (Milan Milutinović), it would not be appropriate for that material to be made public. It will remain confidential, in that disclosure will be limited to the parties. As the purpose for which the Minute prepared in relation to the first hearing was endorsed "Under Seal" no longer applies, that document is to be unsealed, but disclosure of that document, too, will be limited to the parties and thus remain confidential, for the same reason.

---

[48] See, generally, *Simić* Case, pars 38-43; *Brđanin & Talić* Case, pars 8-11.

Disposition

26. The following orders are made:

(1) The Registrar is directed to disclose to both accused who have appeared before the Tribunal (Nikola Šainović and Dragoljub Ojdanić), on a confidential basis, all material placed before me by the Prosecutor during the confirmation hearings in relation to the original indictment (in May 1999) and the amended indictment (in June 2001), other than the supporting material accompanying the indictments.

(2) Such material consists of the documents which I have described in par 7 of this Decision.

(3) If any of this material has not been filed, the Prosecutor is directed to file that material on a confidential basis so that these orders may be complied with.

(4) The Registrar is directed also to unseal the Minute of Review of Indictment, filed on 24 May 1999 "Under Seal", and to disclose it to both accused who have appeared before the Tribunal, on a confidential basis.

(5) Prior to the Registrar executing those directions, the Prosecutor is entitled to redact from such material anything which identifies the source of Rule 70 material.

(6) The Prosecutor must carry out that redaction within seven days of this Decision, and the Registrar is to execute those directions within seven days thereafter.

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

Dated this 8th day of November 2002
At The Hague
The Netherlands

Judge David Hunt

[Seal of the Tribunal]

UNITED
NATIONS

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

Case No. IT-95-14/2-PT

Date: 27 August 1998

Original: ENGLISH

Before: **Judge Gabrielle Kirk McDonald**

Registrar: **Dorothee de Sampayo Garrido-Nijgh**

Order of: **27 August 1998**

The Prosecutor

v.

Dario Kordi}
Mario]erkez

ORDER CONCERNING DOCUMENTS TRANSMITTED BY THE DEFENCE TO THE JUDGE REVIEWING THE PROPOSED AMENDED INDICTMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Ms. Susan Somers
Mr. Patrick Lopez-Terres
Mr. Kenneth Scott

Counsel for the Accused:

Mr. Mitko Naumovski
Mr. Bo`idar Kova~i}

I, Gabrielle Kirk McDonald, Judge 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 ("International Tribunal"),

NOTING the Decision on the Prosecutor's Motion for Leave to Amend the Indictment, issued by Trial Chamber I of 29 July 1998, in which the Trial Chamber instructed the Prosecutor to refer its application to amend the Indictment against Dario Kordi} and Mario]erkez to the Judge who confirmed the application or to any other Judge designated by the President (Registry Page (RP) 1-3/3163 *bis*),

NOTING the letter from the Office of the Prosecutor to the President of the International Tribunal requesting the designation of a Judge to review the proposed amended Indictment ("Letter") (Official Record at Registry Page ("RP") 3210),

NOTING the *ex parte* response of the President to the Letter, notifying the Office of the Prosecutor that, pursuant to Rule 50 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") (RP 3223), I would review the proposed amended Indictment,

FURTHER NOTING the Opposition to the Prosecutor's Motion for Leave to Amend Indictment, Opposition to the Proposed Amendments and Motion for Access to the Confirmation Material", transmitted to me by Defence counsel on 21 August 1998 ("Defence Documents") and not filed with the Registry,

CONSIDERING Rules 47 and 50, which envisage that hearings on the review of Indictments shall be *ex parte* proceedings,

HEREBY ORDER that the Defence Documents shall be made a part of the record of the proceedings,

HEREBY DIRECT the Registry to file the Defence Documents accordingly,

HEREBY DECLINE to consider the Defence Documents during the review of the proposed amended Indictment.

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

____

Gabrielle Kirk McDonald
Judge

Dated this twenty-sixth day of August 1998
At The Hague,
The Netherlands.

[Seal of the Tribunal]