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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-00-39&40-AR73.3

Date: 14 February 2002

Original: English

BEFORE THE APPEALS CHAMBER

Before: **Judge Asoka de Z. Gunawardana, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Decision of: **14 February 2002**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

DECISION ON INTERLOCUTORY APPEAL BY MOMČILO KRAJIŠNIK

Counsel for the Prosecutor:
Mr. Mark B. Harmon

Counsel for the Defence:
Mr. Deylan Ranko Brashich
Mr. Nikola Kostich

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 Tribunal"),

NOTING the "Decision on Motion from Momčilo Krajišnik to Open Hearing on Plavšić Motion for Provisional Release" of Trial Chamber III, issued on 16 August 2001 ("the Impugned Decision"), denying a request by the counsel for Momčilo Krajišnik ("Appellant") to attend the hearing scheduled for 29 August 2001 on co-accused Plavšić's motion for provisional release;

NOTING the "Notice of Motion for Leave to Appeal", filed by the Appellant on 17 August 2001;

NOTING the "Prosecution Response to 'Notice of Motion for Leave to Appeal' filed by Momčilo Krajišnik (Rule 73 (D) of Rules of Procedure and Evidence)", filed on 24 August 2001;

NOTING that, in its "Decision on Application for Leave to Appeal", filed on 18 October 2001, a Bench of the Appeals Chamber found that "the issue raised by the Defence, gives rise to the general question whether the co-accused and his counsel are entitled to be present at a hearing of an application for provisional release of the other co-accused, and is an issue of general importance to proceedings before the International Tribunal" and therefore granted leave for the Appellant to pursue an appeal;

BEING SEIZED of the "Appellant's Brief on Appeal", filed on 25 October 2001, in which the Appellant seeks a declaratory order that the Impugned Decision was in contravention of Rules 48, 79 and 82 of the Rules of Procedure and Evidence ("Rules"), and an order directing that the counsel for Krajišnik be granted attendance at all future hearings in this joint prosecution;

NOTING the "Prosecution's Response to Interlocutory Appeal by Krajišnik," filed on 5 November 2001;

NOTING that Article 21(4) of the Statute of the Tribunal provides that "[i]n the determination of any charge against the accused . . . , the accused shall be entitled to [certain] minimum guarantees, in full equality . . . (d) to be tried in his presence . . .";

CONSIDERING that Article 21(4) of the Statute of the Tribunal does not provide an accused and his counsel with a right to be present at a hearing of an application for provisional release of his co-accused, since an application for provisional release can not be construed as constituting proceedings in the determination of charges against the accused;

CONSIDERING that the Appellant has failed to show that, in law, a co-accused and his counsel are entitled to be present at a hearing of an application for provisional release of the other co-accused;

CONSIDERING that there was no breach of Rules 48 and 82(A) of the Rules, as the said Rules do not provide the Appellant with a right to attend the hearing of the application for provisional release by co-accused Plavšić ("the Plavšić hearing");

NOTING that the issue before the Appeals Chamber is not whether the Trial Chamber erred in ordering that the press and the public be excluded from the Plavšić hearing pursuant to Rule 79(A) of the Rules, but rather, whether in excluding the Appellant from the Plavšić hearing, the Trial Chamber correctly exercised its discretion under Rule 54 of the Rules;

FINDING that the hearing of the application by Biljana Plavšić for provisional release was a matter between Biljana Plavšić and the Prosecution and had no connection to the Momčilo Krajišnik trial;

FINDING that the decision by the Trial Chamber to exclude the Appellant from the Plavšić hearing, was a proper exercise of the Trial Chamber's discretionary power to control its proceedings, as contemplated under Rule 54 of the Rules;

FINDING that, in any event, the Appellant has not suffered any prejudice since he had full access to the Tribunal's jurisprudence in relation to applications for provisional release.

HEREBY DISMISSES this appeal.

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

Asoka de Z. Gunawardana
Presiding

Judge Shahabuddeen appends a Declaration to this decision.

Judge Pocar appends a Separate Opinion to this decision.

Dated this fourteenth day of February 2002
At The Hague,
The Netherlands.

DECLARATION OF JUDGE SHAHABUDDEEN

1. In giving leave for the appeal to be brought to the Appeals Chamber, the three-member bench, by majority, held "that the issue raised by the Defence gives rise to the general question whether the co-accused and his counsel are entitled to be present at a hearing of an application for provisional release of the other co-accused, and is an issue of general importance in proceedings before the International Tribunal". I respectfully agree: the issue at that stage was not whether the accused had the entitlement claimed; the issue was whether the question whether he had that entitlement was an issue of general importance to proceedings before the International Tribunal to warrant the giving of leave for the appeal to be pursued. I think it was.

2. However, I also agree with the answer now returned by the Appeals Chamber to the question of entitlement: there is no such entitlement. As some doubt has been expressed, I would like to explain my agreement.

3. I apprehend that the argument is that an interpretation of the Tribunal's Rules of Procedure and Evidence to the effect that a Trial Chamber has a power to exclude an accused and his counsel from the hearing of a bail application by a co-accused is inconsistent with internationally recognised human rights norms, that these norms have superior juridical force, and that accordingly such an interpretation is not permissible.

4. It is not necessary here to explore the question how far human rights norms apply to the work of the Tribunal without modifications appropriate to its circumstances; it is assumed that, for present purposes, they apply fully. The question then is whether they guarantee the entitlement in issue so as to lead to the suggested inconsistency.

5. Article 14(1) of the International Covenant on Civil and Political Rights ("ICCPR") requires "a fair and public hearing"; more particularly, article 14(3) provides that "[i]n the determination of any criminal charge against him, everyone shall be entitled ... (d) To be tried in his presence ...".[1] Referring to that article, the Secretary-General observed that a "trial should not commence until the accused is physically present before the International Tribunal. ... [The article] provides that the accused shall be entitled to be tried in his presence".[2] However, except by way of exegesis, it is

[1] For the origin of the words, due to an Israeli initiative, see Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (Strasbourg, 1993), pp. 258-259.
[2] Report of the Secretary-General, S/25704 of 3 May 1993, para. 101. See also para. 106.

unnecessary to resort to these provisions; their substance is to be found in the Statute of the Tribunal, which of course governs the Rules of Procedure and Evidence. Article 21(4) of the Statute provides:

> In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled ... (d) to be tried in his presence ...

6. From the opening words of that text, it is clear that the entitlement of the accused to be present is limited to cases in which the charge against him is being determined. It is equally clear that the determination of a bail application made by an accused is not a determination of the charge against him: the factors which are relevant to the determination of the bail application have nothing to do with the question whether he is guilty or innocent of the offence charged. The fact that he is jointly charged with another makes no difference: the question remains whether the determination of a bail application is the determination of the charge. It is not.

7. Accordingly, although in practice a bail application by an accused is often heard in the presence of his co-accused, the latter is not entitled as a matter of human rights to be present at the hearing. Indeed, it is easy to think of cases in which such presence is not required. For example, bail applications may be made by each of two co-accused in the presence of the other; one application may be granted, the other refused. A few weeks later the unsuccessful applicant re-applies, possibly on the basis of a change of circumstances. The other co-accused (who is already on bail) is not asked if he wishes to attend the hearing of the new application for bail.

8. There is domestic jurisprudence to the effect that the right to be tried in one's presence is limited to the determination of the charge. *Snyder v. Massachusetts*, 291 U.S. 97 (1934), concerned a viewing of the *locus in quo;* defence counsel was present but the accused was not allowed to attend despite his demand to be. Justice Cardozo delivered the opinion of the United States Supreme Court affirming the conviction. Distinguishing between a viewing and a trial, the court said:

> We assume in aid of the petitioner that in a prosecution for felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. ... (pp. 105-106).

> ... the presence of the defendant ... bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend. Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow ... (pp. 106-107).
>
> ... the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only (p.108).

9. There may be differences of opinion as to the concrete application of the principle,[3] but the principle itself seems to comport with the norms which were subsequently recognised internationally, namely, that there is a right to be present, but that the right exists only in relation to the determination of the charge against the accused. Many cases speak – and properly so - to the importance of the right, but they concern situations in which the charge against the accused was being determined.

10. One case may be mentioned. It is *Bailey v. Jamaica*, a decision adopted by the Human Rights Committee on 21 July 1999, No. 709/1996. Bailey was convicted of capital murder in 1993. Under legislation passed in 1992, his case was reclassified in 1993 as non-capital murder by a judge who set a non-parole period of 20 years as from the date of reclassification. The State did not contest Bailey's complaint that he had not been afforded an opportunity to make any submissions prior to the decision of the judge. In finding that, in the circumstances, there was a violation of article 14(1) and (3)(d) of the ICCPR, the Human Rights Committee was careful to say that the decision made by the judge "form[ed] an essential part of the determination of a criminal charge" (paragraph 7.5 of the decision). In other words, if the decision did not form an essential part of the determination of a criminal charge, there would have been no violation of the relevant human right.

11. In paragraph 15 of the Appellant's Brief on Appeal, filed on 25 October 2001 before the bench of three, the appellant pleaded: "The Krajišnik defense is mindful that it had no standing to be heard on Plavšić's provisional release motion. Nor did the Krajišnik defense intend to take any position on the motion had it been allowed audience". The appellant recognised that he had no

[3] A widely held opinion is that a "view is part of a criminal trial and, in the absence of exceptional circumstances, the presence of the accused at a view is as necessary as at any other part of his trial. His presence is important because he might be able to point out some matter of which his legal advisers were unaware or about which others on the view were mistaken". See *Archbold, Criminal Pleading, Evidence and Practice 2000* (London, 2000), para. 4-83. And see *Phipson on Evidence*, 15th ed., (London, 2000), para. 10-36, pp. 217-218, and *Blackstone's Criminal Practice*, 11th ed. (London, 2001) para. F8.35, p. 2091.

standing on the motion because he presumably appreciated that the determination of the motion was not part of the determination of the charge against him.

12. The appellant does not deny that, as a member of the public, he was free to collect the jurisprudential value of the decision. Extra advantages which might have been derived from personal attendance during closed sessions to obtain, as he said,[4] "the benefits of arguments or positions taken by the co-accused" did not rise to the level of a human right.

13. It seems pertinent to note that in one jurisdiction an "applicant for bail is not entitled to be present on the hearing of his application unless the Crown Court gives him leave".[5] So, if an applicant himself need not have an absolute right to be personally present at the hearing of his own bail application, it is not easy to see any basis on which he can assert a right to be present at the hearing of the bail application of his co-accused.

14. Human rights are of course important, and it is the duty of the Tribunal to uphold them in all circumstances in which they can reasonably apply. But to apply them in circumstances foreign to their nature is to substitute inflationary illegality for legitimate protection. *Nomen est omen*: care needs to be used to ensure against what Justice Cardozo called the "tyranny of labels" (*Snyder's* case, *supra,* p. 114). To label something a human right tyrannises inquiry into the question whether it is, but does not answer the question. I respectfully agree with the answer of the Appeals Chamber that the appellant and his counsel had no human right to be present at the hearing of the application of his co-accused for provisional release.

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

Mohamed Shahabuddeen

Dated this 14th day of February 2002
At The Hague
The Netherlands

[4] Appellant's Brief on Appeal, filed on 24 October 2001, para. 18.
[5] Archbold, *supra,* para. 3-16, giving the position in England.

SEPARATE OPINION OF JUDGE POCAR

I agree that this appeal should be dismissed, because the accused Krajišnik has not shown that he has been prejudiced by the Trial Chamber's decision to exclude him and his counsel from the hearing on Plavšić's motion for provisional release. It is my view that the appeal should have been dismissed on the basis of this ground alone, though without any finding being made as to whether a prejudice may have in fact occurred.

The Appeals Chamber, however, also found that the Statute of the International Tribunal and the Rules of Procedure and Evidence do not afford an accused and his counsel the right to be present at a hearing for the provisional release of a co-accused. It further found that the application by Plavšić for provisional release "was a matter between Biljana Plavšić and the Prosecution and had no connection to the Momčilo Krajišnik trial" and that the decision by the Trial Chamber to exclude Krajišnik from the hearing was a "proper exercise of [its] discretionary power to control its proceedings, as contemplated under Rule 54 of the Rules." On all of the above points, and for the reasons which follow, I cannot agree with the reasoning of this decision.

When it decides to join proceedings brought against two accused, a Trial Chamber indicates that such proceedings will be treated as a single one[1] (unless and until they are severed by the Trial Chamber itself). Thus, from the moment that the co-accused are joined in a single prosecution (bearing a single case number[2]), all of the rights of each co-accused attach, and each co-accused should have the right to attend all of the proceedings in the case. This would include hearings relating to the provisional release of a co-accused.

The Appeals Chamber appears to base its different conclusion on the English version of Article 21(4) of the Statute, which provides:

> [i]n the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: ... (d) to be tried in his presence, and to defend himself in person or through legal assistance

[1] *See Prosecutor v. Slobodan Milošević*, "Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder," 1 Feb. 2002, p. 3: "The Appeals Chamber HEREBY ALLOWS the Prosecution's appeal and ORDERS as follows:

1. The Three Indictments shall be tried together in the one trial.
2. For the purposes of that one trial, the Three Indictments shall be deemed to constitute one Indictment.
3. The case against the Accused shall be given a *single case number* (emphasis provided).

[...]"

[2] *See supra* note 1.

> of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require....

The Appeals Chamber then considers that "Article 21(4) of the Statute of the Tribunal does not provide an accused and his counsel with a right to be present at a hearing of an application for provisional release of his co-accused, since an application for provisional release cannot be construed as constituting proceedings *in the determination of charges against the accused.*"[3] It thus appears that the decision makes the operation of the rights set forth in Article 21(4) dependent on whether the proceedings involve the determination of charges against the accused. Furthermore, it appears that, as far as the right to be present set forth in Article 21(4)(d) is concerned, such a determination would take place at trial.

I appreciate that, through the use of the words "in the determination of any charge against the accused," the English text of Article 21(4) of the Statute may be interpreted as accentuating the distinction between the pre-trial phase of a case, and the trial phase, when the charges against the accused are determined. It is this very phrase which the text of this decision relies upon for its reasoning. However, the remainder of Article 21(4)(d) refers to the assignment of legal assistance to the accused. It is accepted, both in international law and in national laws, that the right to counsel attaches from the moment of arrest.[4] This right is not provided solely "in the determination of a charge" against the accused, but is provided much earlier in the criminal process, at its outset. Therefore, it cannot be said that part (d) of Article 21(4) relates only to proceedings involving the determination of charges against the accused. As a result, the decision of the Appeals Chamber gives rise to an inconsistency with respect to the interpretation of Article 21(4). Indeed, the decision construes the phrase "in the determination of any charge against the accused" strictly with regard to the first part of Article 21(4)(d)—the accused's right to be tried in his presence. However, the phrase cannot be construed so strictly with respect to the latter part of Article 21(4)(d), the right to counsel. Thus, the approach taken in the decision leads to an inconsistent application of the provision.

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[3] Emphasis provided.

[4] This view is supported by the current interpretation of Article 14 of the International Covenant on Civil and Political Rights (ICCPR), paragraph (1) of which provides that "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Nowak's Commentary explains that "[t]he claim to a fair trial in court on a criminal *"charge"* ("accusation") does not arise only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned. This is usually the first official notification of a specific accusation, but in certain cases, this may also be as early as arrest." Manfred Nowak, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY, Keln, N. P. Engel, 1993, p. 244.

What is more, account should be taken of the French version of Article 21(4), which, by contrast, reads:

> *Toute personne contre laquelle une accusation est portée* en vertu du présent statut a droit, en pleine égalité, au moins aux garanties suivantes: ... (d) à être présente au *procès*....[5]

This wording, and its import, is quite different from the English text.[6] While the English text may appear to support the view that the rights of the accused attach in the determination of charges against him, the French text provides a different emphasis and context, stating that the rights attach to any individual against whom a charge is brought under the Statute. The distinction between the pre-trial and trial phases is, unlike the English text, minimized. Furthermore, the word "*procès*", employed in the French text, incorporates a broader notion in that language than the trial alone. In light of these factors, the French text would support a conclusion providing for higher guarantees to the accused, including the right to be present at any proceeding in the case. Which text is to be preferred?

Guidance on this question should be sought in Article 33 of the Vienna Convention on the Law of Treaties.[7] Article 33 concerns the interpretation of treaties authenticated in two languages and provides that when a "comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." It is indisputable that the object and purpose of Article 21 of the Statute is to establish the minimum guarantees for the accused. It follows that when two versions of the text may allow for different standards of protection, the higher must apply, in accordance with the purpose and object of the treaty. Having regard to the Vienna Convention, therefore, the English text of Article 21(4) must be interpreted as incorporating the French text. In sum, the higher guarantees allowed by the French text should have been taken into account in determining whether a co-accused has the right to attend a hearing on the provisional release of another co-accused. The failure to take them into account is in my view legally incorrect.

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[5] Emphasis provided.

[6] Both texts find their origins in the ICCPR. In the English version, Article 14(3) of the ICCPR reads: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (d) To be tried in his presence..." The French version reads: "Toute personne accusée d'une infraction pénale a droit, en pleine égalité, au moins aux garanties suivantes : ... (d) A être présente au procès..."

[7] The Appeals Chamber has, in the past, referred to the Vienna Convention on the Law of Treaties when considering matters relating to the interpretation of the Statute. *See Prosecutor v. Delalić et al*, Case No. IT-96-21-A, Judgement, 20 Feb. 2001, paras 67-70; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 Mar. 2000, para. 98; *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 300.

Furthermore, the Rules of Procedure and Evidence do not support the view expressed in the decision. Rule 48 provides that "persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried." Rule 82(A) provides that "in joint trials, each accused shall be accorded the same rights as if such accused were being tried separately." According to the decision, "there was no breach of Rules 48 and 82(A) of the Rules, as the said Rules do not provide the Appellant with the right to attend the hearing of the application for provisional release by co-accused Plavšić." However, while the rules do not grant a particular right to the accused, they do not prevent the granting of additional rights, and in light of the wording of Article 21(4), could not do so.

The decision ultimately defers to the discretion afforded the Trial Chambers by Rule 54. However, it is difficult to understand how this discretion has properly been exercised in this case. First, in exercising its discretion, the Trial Chamber did not take into account the correct interpretation of Article 21(4) of the Statute, and in doing so, committed an error of law which vitiated the exercise of its discretion.[8] Second—even assuming there was no error of law—the Trial Chamber initially decided to exclude the Defense from the hearing without giving a reasoned decision, and moreover, with no trace of its decision on the record. Later on, in the impugned decision rendered on 16 August 2001 ("Decision on Motion from Momčilo Krajišnik to Open Hearing on Plavšić Motion for Provisional Release"), the Trial Chamber merely stated that "the Trial Chamber had previously decided that the Defence for Krajišnik was not permitted to attend the hearing ... and that this decision had been communicated to the Defence for Krajišnik;" it further stated that "the application by [Plavšić] for provisional release is a matter between [Plavšić] and the Office of the Prosecutor and has no connection to the Momčilo Krajišnik case." It then considered that there was no reason to revisit its prior (unreasoned) decision.

However, doing so, the Trial Chamber failed to give a reasoned explanation for the exercise of its 'discretion'. Since it was exercising its discretion as to whether to grant what in its view was an additional right to the accused—the granting of which was allowed by the Statute—and since it did not grant this right, its motivation should have been clear and detailed. In this context, it is not evident that the application for provisional release had no connection to the Krajišnik case; if such a conclusion was reached, it should have been motivated. Simply

[8] On the impact of an error of law on the exercise of discretion, see *Prosecutor v. Slobodan Milošević*, "Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder," 1 Feb. 2002, p. 2.

stating that the Plavšić provisional release application was a matter between the Applicant and the Prosecution surely does not serve this purpose.

In conclusion, I consider that the Trial Chamber in this case erred in excluding Krajišnik and his counsel from the hearing on Plavšić's motion for provisional release. Finding otherwise runs the danger of providing a Trial Chamber with the discretion to select, in cases of joinder of the accused, certain proceedings in which it will allow all accused to be present, and other proceedings in which it will exclude one or more co-accused, in contradiction with its own decision to join their cases and to deal with them as a single one.

Judge Fausto Pocar

Done on the 14th of February 2002,
At The Hague,
The Netherlands.