IT-99-36-T
D 8370 - D 8351
03 May 2002

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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-99-36-T
		Date:	3 May 2002
		Original:	English

BEFORE THE PRESIDING JUDGE OF TRIAL CHAMBER II

Before: **Judge Wolfgang Schomburg**

Registrar: **Hans Holthuis**

Decision of: **3 May 2002**

PROSECUTOR

v.

RADOSLAV BRĐANIN AND MOMIR TALIĆ

DECISION ON JOINT MOTION TO DISQUALIFY THE TRIAL CHAMBER HEARING THE BRĐANIN-TALIĆ TRIAL

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

Mr. John Ackerman and Ms. Tanja Radosavljevic for Radoslav Brđanin
Mr. Xavier De Roux and Ms. Natacha Ivanović Fauveau for Momir Talić

I. INTRODUCTION

1. I, Judge Wolfgang Schomburg, Presiding Judge of Trial Chamber II of the International Criminal 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"), being seised of a "Joint Motion to Disqualify the Trial Chamber Hearing the Brđanin-Talić Trial" (hereinafter the "Joint Motion"), filed jointly by the defence counsel for the accused Radoslav Brđanin and Momir Talić (hereinafter the "Defence"), pursuant to Rule 15(B) of the Rules of Procedure and Evidence, having considered the oral and written submissions of the Defence and the Office of the Prosecutor (hereinafter "Prosecution"), hereby render my decision.

II. BACKGROUND AND ARGUMENTS OF THE PARTIES

2. The trial against the accused Brđanin and Talić started on 23 January of this year. The trial relates to the alleged criminal responsibility of both accused for crimes committed in a number of municipalities in Bosnia-Herzegovina. The trial is a complex one.

3. It was agreed between the bench and the parties, that the evidence to be submitted by the Prosecution would be presented on a municipality-by-municipality basis and that the presentation of evidence in relation to each municipality would be preceded by a so-called "pre-municipality meeting". It was furthermore agreed that such meetings were to be presided over by the Senior Legal Officer in Trial Chamber II (hereinafter "SLO"). It was considered that this approach, based on the pre-trial conferences, organised under Rule 65 *ter* of the Rules of Procedure and Evidence, would facilitate co-operation between the parties and would contribute to an efficient and expeditious organisation of the trial.

4. On 28 February of this year, the SLO wrote a letter to the parties in which he elaborated the purpose of the pre-municipality meetings and the documentation required from the Prosecution to best serve that purpose (the letter is attached to this decision as Annex 1). He indicated, *inter alia,* that the Trial Chamber "would like to be in a position to carry out a preliminary assessment of the prosecution's case in order to make concrete recommendations for streamlining the proceedings, where appropriate". One of the considerations the Trial Chamber had in mind was to assess "whether the defence could reasonably be expected to agree upon, or not contest, specific facts". The Prosecution was then requested to provide the Chamber with the information required for carrying out such a preliminary analysis. One of the items requested was "the list of facts the prosecution suggests the defence could agree or not contest". The letter concludes by stating: "The Trial Chamber's analysis and subsequent recommendations would be carried out in a manner that avoids reaching or presenting any preliminary views on the evidence and would give the prosecution adequate flexibility in the presentation of its case".

5. The pre-municipality meeting for the second municipality for which the Prosecution would present evidence, Sanski Most, was scheduled to take place on Thursday 25 April 2002. In preparation for that meeting, a "List of potentially agreed facts" (hereinafter "List", attached to this decision as Annex 2) was prepared by the legal staff of the Chamber. This list was informally distributed to the parties by the legal staff on Wednesday 24 April 2002.

6. On 25 April 2002, the Defence filed the Joint Motion. In this Motion, it was stated, *inter alia,* that the List was handed over "by one of the legal officers for the Chamber" and that "the document stated that the Chamber had drafted the list. The Chamber, of course, are the Judges

hearing this case." According to this Joint Motion, "The only possible conclusion is that the Chamber has accepted the version presented by the Prosecutor in her Pre-Trial Brief as gospel truth and did not want to waste its time hearing the defence position." The Joint Motion also stated:

> Any accused must, and necessarily will, view such a request by the Chamber as a statement that it has determined in advance that these alleged facts are not capable of reasonable dispute. It is not possible for counsel explain in any way that can be understood by lay accused that such a document is not a determination in advance of important issues in this case.
>
> Both accused in this case have entered pleas of not guilty to the Prosecutor's indictment, putting in issue every allegation contained therein and do thus contest each and every material assertion.
>
> It is not possible for the Chamber to provide such a document to Defence counsel and expect that counsel should not share the document with the accused. The Chamber should have understood, in advance, the effect such a document would have upon lay accused and their sense and concept of whether the Chamber is willing or able to give them a fair trial.
>
> What is important about justice is not only that it be done, but that it appear to be done. There can be no justice when the appearance is that the Chamber, having heard two hours of testimony, has concluded that certain facts, not even a part of that testimony, have been established and that defence counsel and the accused should concede that as fact.
>
> While it is totally appropriate for the Prosecutor to suggest to Defence counsel that certain facts should in the interest of expediency, or even justice, be admitted, it is totally inappropriate for the Trial Chamber to do so. In doing so the Trial Chamber stands in the shoes of the Prosecutor and, in effect, becomes the accuser.
>
> More significant is this. While it is appropriate for the Prosecutor to suggest that certain facts should be admitted, it is likewise appropriate for the Defence to respectfully decline. The burden is completely and always on the Prosecutor. It is absolutely appropriate for an accused to refuse to admit any allegation in an indictment. A Trial Chamber may never even be aware of such negotiations.
>
> On the other hand when a Trial Chamber becomes the entity that demands the admission, the accused is put in an impossible position. If he agrees he has been, to some extent at least, compelled by a Trial Chamber to contribute to his own conviction. If he disagrees he understands and believes that he will feel the wrath of the Trial Chamber for insisting on his complete innocence, or (if found guilty) for prolonging a Trial.
>
> ...
>
> The appearance is that the Trial Chamber has assumed that witnesses will be and have been telling the truth. Otherwise such a document as that presented to defence counsel could not possibly exist.
>
> It must go virtually without saying that the Defence has not had the opportunity to present one witness or one significant argument at this stage of the proceedings.
>
> It is understood by counsel for the defence and the accused that the granting of this Motion would necessitate the re-starting of this trial at some unknown future date.
>
> There is no reasonable argument that expediency overrules propriety. No accused clamors for an unfair trial. No accused demands a proceeding that is or appears to be unfair. Every accused demands justice no matter the time that it takes for it to be delivered. The concept that accused before this Tribunal deserve to be speedily tried serves only expediency, not justice.

> By issuing or consenting to the issuance of the document referred to above in the name of the Trial Chamber, the Chamber brings into question its own impartiality and has created the appearance of impropriety.
>
> Because of the foregoing, Judges Agius, Janu and Taya must be recused for participating in further proceedings in this matter.
>
> This proceeding must be adjourned until the matters raised by this Motion have been fully determined.
>
> Rule 15(B) provides that the Presiding Judge should in appropriate cases refer the matter to the Bureau. Counsel suggest that is appropriate in this instance for the matter to be so referred.
>
> WHEREFORE, the accused herein, by and through their counsel and pursuant to Rule 15 of the Rules of Practice and Procedure (sic), request the Honorable Presiding Judge of Trial Chamber II, Wolfgang Schomburg, to assign this Motion to the Bureau for resolution of the recusal issue; should stay proceedings in this case pending resolution of the recusal issue; and order such other relief as may be deemed appropriate and necessary to protect the rights of the accused herein.

7. During the court hearing in *Brdanin and Talić* that afternoon, the parties submitted further observations on the issue raised in relation to the Joint Motion. Furthermore, the judges on that bench issued a formal statement. This statement provides:

> The three Judges composing this Trial Chamber in view of the joint motion of the accused filed earlier today seeking to disqualify the Trial Chamber hearing this case wish to make the following formal statement.
>
> The motion appears to be mainly based on the statement contained in the document given to the parties entitled "List of potentially agreed facts," to which the motion refers as being a list which the Chamber itself has drafted.
>
> The three Judges wish to state that the motion is obviously based on a misconception, in that none of us, the three Judges in this Trial, had anything to do with the compilation, let alone the drafting of the list of possible agreed facts for consideration. In fact, none of us, the three Judges, had even seen the said list before the present motion was filed.
>
> Having made this formal statement, the Trial Chamber wishes to state that it expects the parties to accept the assurance given by us, the three Judges composing it, namely - - I repeat that we had nothing to do with the compilation and the drafting of the so-called list of potentially agreed facts they have objections to.[1]

8. On 25 April 2002, I convened a meeting for 26 April 2002, 08:30 a.m. with Judges Agius, Janu and Taya, pursuant to Rule 15 (B) of the Rules of Procedure and Evidence. At this meeting, minutes were taken (attached to this decision as Annex 3).

9. A hearing was scheduled that Friday morning to hear arguments on the Joint Motion. The parties had heard the declaration of the Judges included in their formal statement[2] and had received copies of the minutes of my meeting with the Judges.

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[1] Transcript of the proceedings in *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-T (hereinafter "T), T. 4957 – 58.
[2] *See* paragraph 7 of this Decision.

10. At that hearing the Prosecution argued that it is clear that the List does not in any way represent the opinion of the Judges. Rather, that document, distributed even before the first witness was called to testify in relation to the Sanski Most municipality, set forth a list of facts, based on the submissions of the Prosecution to date, that would have formed the basis for discussion and possible agreement between the parties as to those facts. In the Prosecution's submission, it was clearly open to the Defence to contest the proposed facts. Moreover, the Prosecution submitted that it failed to see how an experienced defence counsel would have any difficulty in explaining the character of such a document to his client. Furthermore, the Prosecution contested the Defence submission that agreed facts cannot be suggested by the Trial Chamber or their staff. Although such agreed facts would normally be the outcome of discussions between parties, nothing prevents the Chamber from taking initiatives in this direction. The Prosecution concluded that the introduction of a motion aimed at the disqualification of the judges was an inappropriate response to the distribution of the List.

11. At the hearing, the Defence withdrew their Joint Motion in relation to Judge Janu and Judge Taya,[3] on the basis of the aforementioned minutes.[4]

12. Therefore, the only remaining issue is to decide upon the request to disqualify Judge Agius. It was undisputed that he did not know the contents of the List, as distributed. The Defence insisted on not withdrawing the Joint Motion on the basis of the new facts.

[3] T. 5029.
[4] T. 5025.

III. DISCUSSION

A. Applicable Law

13. Under Article 21 of the Statute of this Tribunal, the accused is entitled, *inter alia*, to a fair and public hearing, shall be presumed innocent until proved guilty, shall be tried without delay and shall not be compelled to testify against himself or to confess guilt.

14. The Rules of Procedure and Evidence have to be interpreted in light of these fundamental provisions in the Statute, emanating from human rights standards enshrined in Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights.[5]

Rule 15 (A) and (B) (on disqualification of judges) reads:

> (A) A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.
>
> (B) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question, and if necessary the Bureau shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

15. Rule 15 has only been invoked in a limited number of cases before this Tribunal. In *Prosecutor v. Anto Furundžija*, the Appeals Chamber set out clear guidelines for the interpretation of Rule 15. It based itself thereby on the practice in a number of common law and civil law countries and on the case-law of the European Court of Human Rights: "On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if: [...]

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[6]

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[5] International Covenant on Civil and Political Rights of 16 December 1966 and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

[6] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (hereafter "*Furundžija* Appeal Judgement"), para 189.

16. In the present case, the Defence do not allege actual bias on the part of Judge Agius. Rather, the Joint Motion aims at the application of the principle under B (ii) (unacceptable appearance of bias).

17. A "reasonable observer", in the sense of this jurisprudence, "must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."[7] This criterion was also formulated as "whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that [the judge in question] might not bring an impartial and unprejudiced mind to the issues arising in the case."[8]

18. The case-law developed until now in relation to this Rule, indicates that there is a presumption of impartiality in relation to the functioning of any Judge. In the *Prosecutor v. Delalić et al.*, the Appeals Chamber emphasised that, "as there is a high threshold to reach in order to rebut the presumption of impartiality and before a judge is disqualified, the reasonable apprehension of bias must be 'firmly established'. The reason for this high threshold is that, just as any real appearance of bias of the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias."[9]

B. Analysis

19. Applying these standards to the case at hand, the following observations need to be made in relation to the arguments presented by the defence counsel and - now - based on all facts presented.

20. The first argument by the Defence, that the Chamber had determined that there were certain facts that counsel should concede, cannot be considered as anything other than a clear misconception and misunderstanding of the List. Although the introduction to the List could have benefited from a more precise formulation and a more sensitive compilation of potentially agreed facts, I fail to see how a fair-minded observer, with sufficient knowledge of the actual circumstances, could come to any other conclusion than that the list of facts presented in this document were to form the basis for a discussion, rather than the imposition of certain facts on any of the parties. It is for the Judges to promote co-operation between the parties and to encourage the

[7] *Id.*, para 190.
[8] *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 Feb. 2001, para 697.
[9] *Id.*, para. 707.

parties to reach agreement as to facts that are undisputed. Again, as far as the List provided to the parties might as such have led to any doubts on the part of defence counsel about the character of the document, it would have been appropriate for counsel to seek clarification on this issue, e.g. during the pre-municipality meeting itself.

21. Furthermore, it has to be stated that, on the basis of the facts provided at the end of the hearing on this Motion, it has become undisputed that the challenged Judge had no knowledge of the content of the List, as distributed.

22. The argument that defence counsel would have difficulty in explaining to a lay accused that the bench has not already made a determination of important issues in the case, needs equally to be rejected. The character of the document should have been clear to the defence counsel, being informed of the background of this trial in all its detail. In this respect, I would like to refer once again to the judgement of the Appeals Chamber in the case of *Prosecutor v. Anto Furundžija*, in which that Chamber held that in assessing whether certain doubts may exist in relation to the impartiality of a judge, "the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held objectively justified."[10] At the hearing on 26 April 2002, I asked both accused for their views on this matter. The accused Brdanin has provided his views. Although he did indeed express his doubts about the fairness of his trial in general, these doubts were not focused on the issue at hand, but related primarily to the recent discussions about the assignment of his co-counsel. The accused General Talić exercised his right to remain silent. Instead, his defence counsel expressed doubts as to the impartiality of the entire Chamber at a point in time when the Joint Motion had already been withdrawn in relation to two of the three Judges. There were no concrete allegations against the challenged Judge. Taking all these factors into account, I cannot agree with defence counsel on this point.

23. The argument that only parties may enter into the exercise of elaborating agreed facts and that it would even be inappropriate for a Chamber to take the initiative on such an issue has to be strongly rejected. Guaranteeing to the accused a fair trial also means providing an expeditious trial. The Trial Chamber not only has the right, but the obligation to use every opportunity to expedite proceedings. One instrument in this context is to encourage parties as much as possible to meet and to discuss whether there are facts to which both parties could agree, in order to have the presentation of evidence focused as much as possible on the core issues of the trial related to the criminal responsibility of individuals. The fact that, in preparing for the second pre-municipality meeting, the parties had not developed any agreed facts, nor were any possible agreed facts

[10] *Furundžija* Appeal Judgement, para 182.

suggested by the Prosecution, provided an additional argument for having a paper prepared for discussion at this meeting. The argument that, by so doing, a Chamber "stands in the shoes of the Prosecutor" is a misconception of a criminal procedure and of the duty of the Judges to guide the parties as closely as possible to the truth, knowing however that the ultimate goal – "The Truth" – will never be fully achieved. The practice of various Trial Chambers in a number of cases before this Tribunal clearly shows that the judges often take an active approach to controlling the case during pre-trial and trial. Parties are regularly requested to attempt to reach agreement as to undisputed facts. The Prosecution is sometimes requested to file a motion on adjudicated facts. The Prosecution is regularly asked to include in their Pre-trial briefs lists of facts that have been submitted to the defence as possible agreed facts or lists of facts on which agreement has been reached. Regularly, during pre-trial conferences, chaired by Senior Legal Officers, under Rule 65 *ter* of the Rules, discussions between parties take place aimed at reaching agreements between parties as to undisputed facts. Also, occasionally, parties are asked whether any pleas are negotiated or whether there are any developments in such plea discussions. By so doing, contrary to the allegation of the defence counsel, that the Trial Chamber "may never even be aware of such negotiations", the Chambers regularly take and have to take action aimed at getting such negotiations started. This practice follows directly from the tasks the Rules of Procedure and Evidence have elaborated for both the pre-trial Judges and the benches sitting on trials. Briefly, reference may be made to such provisions as Rule 65 *bis*, Rule 65 *ter*, Rule 73 *bis* and 73 *ter* during the pre-trial phase and Rule 82, Rule 85, Rule 90, Rule 92 *bis* and Rule 94 during the trial phase, and the settled jurisprudence of this Tribunal, especially the Judgement of the Appeals Chamber in *Prosecutor v. Zoran Kupreškić et al.*[11] From these, and other provisions, a clear pattern emerges: that the Judges have the power and that they need to exercise that power in order to control the proceedings to a substantial degree.

24. The last argument, presented by the defence counsel in their Joint Motion, is that the accused has been put in an impossible position and could feel forced to contribute to his own conviction. Also here, however, the present case does not differ much from the many other cases before this Tribunal in which Chambers are asking or advising parties to elaborate agreed facts. The mere fact that in this particular case a list of potentially agreed facts for discussion between parties was distributed by the legal staff of a Chamber, instead of by the Prosecution, does not alter the position of the accused. The accused's right to remain silent remains untouched. But this does not mean that the accused should never be asked to co-operate in such a way that facts should never be agreed upon between parties. It is for a competent defence counsel to demonstrate how to achieve a balance in a criminal procedure between on the one hand remaining silent and on the other hand

[11] Case No. IT-95-16-A, Appeal Judgement, 23 Oct. 2001.

(which forms the other side of the same coin) co-operating in such a way that the defence itself may benefit from such co-operation, be it because it leads to a more expeditious decision of an acquittal or be it because it leads to such co-operation being taken into account once the stage of sentencing is reached. Only with the guidance of a responsible defence counsel, will the accused receive a fair, and included in that, adequately expeditious, trial.

C. Conclusion

25. Having collected all the facts, the first impression created by the List may have been a wrong one. However, at the end of the day, the matters before me that need to be resolved are brought back to the right proportion. The first matter is whether the Presiding Judge should have insisted on endorsing the List himself prior to it being distributed to the parties or whether he should have taken care that such a paper would not have been distributed without the prior consent of the Bench. This can indeed be left open. The question is whether a reasonable defence counsel can - on behalf of his client – insist on a motion aimed at the disqualification of a judge based on such a poor remaining factual basis. On the basis of the settled jurisprudence, not only of this Tribunal, they should have known that the test to be applied is based on the knowledge of a fair minded observer with sufficient knowledge of the actual circumstances.[12] Neither defence counsel has been able to provide relevant substantial arguments on this remaining factual basis during the hearing. The final and decisive point then is that, taking all facts together, the Presiding Judge acted in good faith and did not, in any way, create even the slightest impression of being biased. No reasonable doubt remains as to his impartiality.

26. The Tribunal functions on the basis of a presumption of impartiality of any Judge sitting on the bench. The accused is entitled to challenge this impartiality, but he has to meet a high threshold. Having given the Joint Motion and all additional facts careful consideration, I have not been satisfied by the accused and their counsel that the reaction of a fair-minded, informed observer would be that Judge Agius might not bring an impartial and unprejudiced mind to any of the issues in this case. I fail to see any basis for a disqualification in the present case. Neither do I see the slightest need to refer the matter to the Bureau for its determination. Rule 15(B) should be read in light also of Rule 23(B) according to which only "all major questions relating to the functioning of the Tribunal" have to be discussed and decided upon on that level. The case before me is far from meeting this threshold.

[12] *Supra*, fn. 8.

IV. DISPOSITION

27. Accordingly, the Joint Motion to Disqualify the Trial Chamber Hearing the Brđanin-Talić Trial of 25 April 2002 is dismissed.

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

Judge Wolfgang Schomburg

Dated this third day of May 2002
At The Hague
The Netherlands

[Seal of the Tribunal]

Annex 1

United Nations
Nations Unies

International Criminal Tribunal for the Former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

IT-99-36-T
D 7858 - D 7857
28 FEBRUARY 2002

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The Prosecutor v *Brđanin and Talić*

28 February 2002

Ms. Joanna Korner and Mr. Andrew Cayley
Office of the Prosecutor

Mr. John Ackerman and Ms. Milka Maglov
Defence counsel for Mr. Radoslav Brđanin

Mr. Xavier de Roux and Ms. Natacha Ivanović Fauveau
Defence counsel for General Momir Talić

Dear Counsel

During the proceedings held on 18 February 2002, the Trial Chamber touched upon matters concerning preparations for the next pre-municipality meeting of the parties. In accordance with the undertaking given by the Presiding Judge in court, I write to provide you with further information about this.

Although it was not discussed during the last pre-municipality meeting of the parties, held on 6 February 2002, subsequent deliberations within the Trial Chamber about the preparations for the next pre-municipality meeting have culminated in the following proposal.

Before the trial moves on to a new municipality, the Trial Chamber would like to be in a position to carry out a preliminary assessment of the prosecution's case in order to make concrete recommendations for streamlining the proceedings, where appropriate. This would involve considering:

- any excessive overlap between the witnesses proposed for the upcoming municipality;
- the relationship between the proposed Rule 92 *bis* statements and the proposed *viva voce* witnesses;
- the relationship between the facts relating to the upcoming municipality and the facts already determined in other cases before the Tribunal, where appropriate;
- the exhibits for the upcoming municipality; and
- whether the defence could reasonably be expected to agree upon, or not contest, specific facts.

Approximately two weeks before the pre-municipality meeting, the prosecution will be asked to provide the Trial Chamber with the information required to carry out this preliminary analysis. This will include the prior statements of the proposed *viva voce* witnesses, any proposed Rule 92 *bis* statements, the exhibits for the municipality (together with an up-to-date list of the exhibits),

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and the list of facts the prosecution suggests the defence could agree or not contest. The Trial Chamber would also be greatly assisted if, at the same time, the prosecution could provide a written guide to the Chamber for the upcoming municipality, covering the facts in issue and how the proposed witnesses and exhibits relate to those facts. In addition, it would be helpful if this guide could include an indication as to how the case for the upcoming municipality may be related to other cases heard, or being heard, by the Tribunal.

The Trial Chamber's analysis and subsequent recommendations would be carried out in a manner that avoids reaching or presenting any preliminary views on the evidence and would give the prosecution adequate flexibility in the presentation of its case. Of course, as you would understand, this exercise would be carried out without prejudice to the Trial Chamber's right, pursuant to the Tribunal's Rules of Procedure and Evidence, to make formal decisions on issues such as adjudicated facts, should the Trial Chamber ultimately consider that to be necessary.

Please do not hesitate to contact me if you would like to further discuss any of the matters I have raised in this letter.

Yours sincerely

Herman von Hebel
Senior Legal Officer
Trial Chamber II

cc: Judge Carmel Agius, Presiding
Judge Ivana Janu
Judge Chikako Taya
Michelle Jarvis, Legal Officer

Annex 2

Exhibit A 8354

List of potentially agreed facts

In the letter sent to the prosecution on 28 February 2002, the Chamber has indicated that it values having a list of facts that the parties can agree on, or do not contest.
For the municipality of Sanski Most, the Chamber has drafted such a list. The parties are requested to consider the facts on this list for discussion in the pre-municipality meeting on 25 April 2002.

The facts for consideration are divided into general facts (not specifically related to Sanski Most, also applicable for other municipalities), facts concerning the political, historical and military background, and crime-based facts:

General facts:

- Radoslav Brđanin was president of the ARK Crisis Staff from 5 May 1992 onwards.

- Momir Talić was Commander of the JNA 5th Corps, later renamed 1st Krajina Corps of the army of the VRS from 19 March onwards. He was also a member of the ARK Crisis Staff from 5 May onwards.

Facts concerning the political, historical and military background:

- According to the 1991 census, the population of the municipality of Sanski Most consisted of 60.119 persons, of whom 28.285 (47.04%) were Bosnian Muslims, 25.372 (42.20%) were Bosnian Serbs, 4.267 (7.09%) were Bosnian Croats and 2.195 (3.64%) declared themselves none of the aforesaid.

- In 1995, approximately 38.000 people lived in Sanski Most, of which the percentage of Bosnian Mulsims was between 8% and 9 %, the percentage of Bosnian Serbs was between 88% and 89% and the percentage of Bosnian Croats was between 2% and 3%.

- Until 1991, relations between the various nationalities in Sanski Most were good. After 1991, tensions arose between the various ethnicities.

- Sanski Most is a municipality in the region Bosanska Krajina directly west of Banja Luka.

- The municipality of Sanski Most is part of Bosanka Krajina, which was, in 1992, meant to become a Serb Autonomous Region.

- On 16 April 1992 the Assembly of the Serbian People established the Serbian Municipality of Sanksi Most.

Crime based facts:

- On 17 April 1992 the police force of Sanski Most split up in a Serbian and a non-Serbian police force

- In April 1992 a Bosnian Serb Crisis Staff or War Presidency was established.

- On about 25 may 1992 there was an order for non-Serbs to hand in their weapons.

- In the spring of 1992, there were radio announcements that non-Serbs had to surrender their weapons. Upon that condition, they would be able to leave, otherwise, their villages would be shelled.

- The village Hrustovo was shelled in May/June 1992. The area Mahala in Sanski Most was shelled in May 1992. The village Lukavice was shelled in August 1992.

- The mosques in Donji Kamengrad, Kukavice and Lukavice were destroyed or damaged in 1992.

- In the spring of 1992, checkpoints were established in Sanski Most.

- During the times relevant to the indictment, a group called SOS was active in Sanski Most that blew up, shelled and looted buildings and houses of non-Serbs and intimidated non-Serbs.

- On 31 May 1992 soldiers took non-Serb men to the Vrhpolje bridge in Sanski Most. A few men were killed en route to the bridge, some more were killed as they were forced to jump of the bridge.

- On about 31 May 1992 a massacre took place in the garage of Ibrahim Merdanović in the hamlet of Merdanovići in the village Hrustovo in which approximately 20 women, children and elderly were killed.

- On or around 14 May 1992, the municipal building, which was occupied by the SDA leadership and the Muslim police, was shelled.

- The Manjaća camp belonged to the 1st Krajina Corps[1].

- Some transports to Manjaća camp took place in trucks. During these transportations, men died as a result of the conditions on those trucks.

- During the transport of prisoners from Betonirka camp to Manjaća camp on 7 July 1992, 18 persons died. During the transport of prisoners from Krings camp to Manjaća camp on 4 July 1992, approximately 20 persons died. During the transport of prisoners from the sports hall in Sanski Most to Manjaća camp on 7 July 1992, approximately 18 persons died.

- In the Manjaća camp, mistreatments, beatings and killings took place.

- In the Betonirka camp, mistreatment and beatings took place.

- In 1992, Emir Mulalić, Ejup Mašić, Omer Filipović and Esad Bender died in the Manjaća camp

[1] In Talić's Objections regarding the 92 *bis* statements he writes: "General Talić's Defence does not dispute that Manjaća camp belonged to the 1st Corps. Nonetheless, in this situation, testimony regarding Manjaća directly implicates General Talić".

Annex 3

United Nations
Nations Unies

International Criminal Tribunal for the Former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

26 April 2002

Minutes of the meeting judge Schomburg held with the judges Agius, Janu and Taya on the motion for disqualification of the bench, submitted by Defence for Brdanin and Talic

1. The three judges were aware that a pre-municipality meeting was scheduled for 25 April 2002, chaired by the Senior Legal Officer.
2. Judges Janu and Taya had not been involved in any discussion as to the agenda of that meeting.
3. Judges Janu and Taya had not been informed by their own staff of the agenda of that meeting.
4. Judges Janu and Taya had never seen the "list of potential agreed facts" prior to the pre-municipality meeting.
5. The bench at no point prior to the pre-municipality meeting discussed the agenda of that meeting.
6. The bench at no point prior to the pre-municipality meeting discussed the question of whether draft agreed facts should be presented and at no point discussed the list distributed.
7. Judge Agius knew that the legal staff, working on this case, had prepared an agenda for this meeting and knew the issues to be discussed.
8. Judge Agius instructed the staff to consult with parties, through this pre-municipality meeting, to try to identify with the parties facts on which they could possibly agree. This would possibly avoid witnesses to testify upon such facts.
9. Judge Agius consulted, prior to the pre-municipality meeting, with the Senior Legal Officer, about the pre-municipality meeting. During this meeting, the focus was on methods to speed up the trial as much as possible.
10. Judge Agius knew that there was a list prepared.
11. Judge Agius was not involved in the drafting of the list.
12. Judge Agius never saw the distributed list prior to the pre-municipality meeting but was aware that it was distributed amongst parties one day before the pre-municipality meeting by the legal staff.
13. Judge Agius was provided a memo on the pre-municipality meeting one day before that meeting. That memo included also a possible list of agreed facts but was not identical to the one distributed to the parties. Inter alia the heading of the document distributed did not appear in the memo provided to judge Agius.
14. If Judge Agius would have seen the document prior to its distribution, he would not have agreed with certain parts of the text. The parts he would not have agreed upon include, inter alia, the introduction to the list, the paragraph on the criminal responsibility of the accused, the paragraph on the composition of the population of Sanski Most in 1995 and the paragraph stating that the Manjaca camp belonged to the 1st Krajina Corps.
15. Also judges Janu and Taya would not have agreed to this version of the list being distributed.

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