

IT-99-36-AR73.8
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20 JUNE 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 the Former Yugoslavia
Since 1991

Case: IT-99-36-AR73.8

Date: 20 June 2002

Original: English

BEFORE A BENCH OF THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Asoka de Zoysa Gunawardana
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 20 June 2002

PROSECUTOR

v.

**RADOSLAV BRĐANIN
MOMIR TALIC**

**DECISION ON APPLICATION FOR LEAVE TO APPEAL AGAINST
JUDGE SCHOMBURG'S DECISION ON THE DISQUALIFICATION
OF A JUDGE DATED 3 MAY 2002**

Counsel for the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Applicant Talić:

Mr. Slobodan Zečević
Ms. Natacha Fauveau Ivanović

Counsel for the Accused Brđanin

Mr. John Ackerman
Mr. Milan Trbojević

Case: IT-99-36-AR73.8

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A handwritten signature in black ink, appearing to be 'Oz'.

20 June 2002

THIS BENCH of the Appeals Chamber (“the Bench”) 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”),

BEING SEISED of the “Application for Leave to Appeal Against Judge Schomburg’s Decision on the Disqualification of a Judge Dated 3 May 2002” (“the Application”) filed by counsel for the accused Momir Talić (“the Applicant”) on 10 May 2002 pursuant to Rule 73(D)(i) and (ii) of the Rules of Procedure and Evidence (“the Rules”);

NOTING the “Decision on Joint Motion to Disqualify the Trial Chamber Hearing the Brđanin-Talić Trial” (“the Impugned Decision”) rendered on 3 May 2002 by the Presiding Judge of Trial Chamber II, Judge Wolfgang Schomburg, which dismissed the Defence’s joint motion to disqualify the Trial Chamber, and in particular, Presiding Judge of the present trial, Judge Agius;

NOTING that the Prosecution has not filed a response to the Application as required by the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal (IT/155 Rev. 1);

NOTING that the Rule 73 (D) of the Rules states that “Decisions on all other motions are without interlocutory appeal save with the leave of a bench of three Judges of the Appeals Chamber which may grant such leave (i) if the decision impugned would cause such prejudice to the case of the party seeking leave as could not be cured by the final disposal of the trial including post-judgement appeal; (ii) if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally”;¹

NOTING that the Applicant submits that Judge Agius should be disqualified from this case because he knew of the existence, though not the exact contents, of a document entitled “List of potentially agreed facts” (“the List”), which was drafted by the staff of the Trial Chamber and provided to the parties in preparation for a pre-municipality meeting, presided over by a Senior Legal Officer;²

¹ Rule 73 of the Rules was amended on 1 May 2002 and entered into force on 8 May 2002. Since the Impugned Decision was rendered on 3 May 2002, prior to the entry into force of the amendment of the Rule, the old version of Rule 73 (IT/32 Rev.22/Corr.1) will therefore apply to the instant case.

² The Trial Chamber and the parties had agreed that the Prosecution would submit the evidence on a municipality-by-municipality basis, which would be preceded by a “pre-municipality meeting”. See *Impugned Decision*, para. 3.

NOTING that the Applicant also submits that Judge Agius's knowledge of the existence of the List has created an appearance of bias that is prejudicial to the Applicant's case, which cannot be cured by the final disposal of the trial including post-judgement appeal, and that the Impugned Decision raises an issue of general importance to the Tribunal;³

RECALLING that, on 28 February 2002, prior to the distribution of the List, the Senior Legal Officer wrote a letter to the parties stating, in relevant part, that 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 be carried out without prejudice to the Trial Chamber's right ... to make formal decisions on issues such as adjudicated facts ...".⁴ In this regard, the Bench finds that this letter confirms that the List was created to facilitate a discussion on matters of fact during the pre-municipality meeting, and, therefore, did not reflect Judge Agius's, or the Trial Chamber's, preliminary findings on the facts;

CONSIDERING that the Applicant has failed to adequately show how the Impugned Decision would cause incurable prejudice to the Applicant's case, and that the Applicant has failed to adequately show that the Impugned Decision has raised an issue of general importance to proceedings before the Tribunal or in international law generally, as required by Rule 73(D)(i) and (ii) of the Rules respectively;

FINDING that the Applicant has not demonstrated that an error was made by Judge Schomburg in rendering the Impugned Decision and, as such, the Application is frivolous under Rule 46(C) of the Rules;

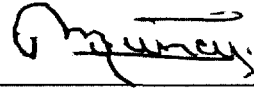
HEREBY REJECTS the Application; and

DIRECTS the Registrar not to pay any fees or costs associated with the Application.

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

³ The Application, page 7.

Dated this 20th day of June 2002,
At The Hague,
The Netherlands.



Judge Mehmet Güney
Presiding

[Seal of the Tribunal]

⁴ *Impugned Decision*, Annex 1, page 2 and para. 4.