



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-95-9-T  
Date: 11 March 2003  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Florence Ndepele Mwachande Mumba, Presiding  
Judge Sharon A. Williams  
Judge Per-Johan Viktor Lindholm

**Registrar:** Mr. Hans Holthuis

**Decision of:** 11 March 2003

**PROSECUTOR**

v.

**BLAGOJE SIMIĆ  
MIROSLAV TADIĆ  
SIMO ZARIĆ**

**REASONS FOR DECISION ON PROSECUTION'S MOTION TO  
USE TELEPHONE INTERVIEWS**

**The Office of the Prosecutor:**

Mr. Gramsci Di Fazio  
Mr. Philip Weiner  
Mr. David Re

**Counsel for the Accused:**

Mr. Igor Pantelić and Mr. Srdjan Vuković for Blagoje Simić  
Mr. Novak Lukić and Mr. Dragan Krgović for Miroslav Tadić  
Mr. Borislav Pisarević and Mr. Aleksandar Lazarević for Simo Zarić

**TRIAL CHAMBER II** 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 (“Tribunal”),

**NOTING** the oral decision of the Trial Chamber on 20 February 2003 (“Oral Decision”)<sup>1</sup> which denied the oral motion of the Office of the Prosecutor (“Prosecution”) on the same day seeking leave to cross-examine the accused Miroslav Tadić as to his credibility with regard to inconsistencies contained in three telephone interviews given by the accused to the Prosecution on 26 and 29 April, and 22 May 1996, and his oral testimony (“Oral Motion”),

**NOTING** the Trial Chamber’s “Decision on Prosecutor’s Request to Add Further Exhibits to the Confidential Prosecution Exhibit List Filed on the 9<sup>th</sup> of April 2001” of 11 September 2001 (“September 2001 Decision”), in which the Trial Chamber denied the request of the Prosecution to admit the transcripts of the said telephone interviews into evidence,

**HEREBY GIVES ITS REASONS:**

1. In its Oral Motion, the Prosecution argued, *inter alia*, that (i) the said telephone interviews were given voluntarily, (ii) a lawyer was present during the said telephone interviews, (iii) they were conducted in accordance with Rule 43 of the Rules of Procedure and Evidence (“Rules”), (iv) the accused knew he had the right to remain silent, (v) the said telephone interviews were not illegally obtained, and that, (vi) the Prosecution would not use the alleged inconsistencies as evidence of consciousness of guilt. The Prosecution also submitted, *inter alia*, that the reasoning of the Supreme Court of the United States of America in *Walder v. United States*, 347 U.S. 62 (1954), and in *Viven Harris v. New York*, 401 U.S. 222 (1971) supported its Oral Motion.

2. The Defence argued, *inter alia*, that (i) the accused had not been informed in detail about the charges against him prior to the said telephone interviews, (ii) the Prosecution tried to go around Article 21 (4) (a) of the Statute of the Tribunal (“Statute”) as the said telephone interviews had been irregularly taken and the accused had not been able to appreciate fully the seriousness of the indictment, (iii) the oral evidence of the accused before the Trial Chamber could only be compared to the contents of the said telephone interviews if these were admissible, and that, (iv) the Prosecution did not appeal the September 2001 Decision and thus accepted it.

3. In the September 2001 Decision, the Trial Chamber held that it was “not satisfied that effective service of the Indictment was made prior to any of the telephone interviews, and [...] that

<sup>1</sup> T. 15580.

the accused did not fully appreciate the seriousness of the Indictment at the material time nor understand fully the nature of the Indictment and the proceedings”.<sup>2</sup>

4. The Trial Chamber has considered the persuasive value of *Walder v. United States* and *Viven Harris v. New York* and found that there is no basis for a comparison of the legal issues raised therein with those of the present case. In neither of the cases, had petitioners given statements at a time when they were already indicted without having been fully informed about the content of the indictments.

5. The Statute and the Rules under which the charges against the accused have been brought provide the Prosecution with obligations on the valid service of the indictment on the accused. The jurisprudence of the Tribunal has clearly established that these obligations cannot be derogated from. The Prosecution has to undertake every step to explain fully the indictment to the indicted person prior to making an interview with him.

6. The Trial Chamber took into account Article 21 (4) (a) of the Statute, pursuant to which an accused is entitled to be informed promptly and in detail, in a language that he understands, of the nature and cause of the charge against him. This right not only means that he shall be informed about the legal qualification of the charge against him, but also about the facts underlying the charge, in order to enable him to prepare adequately for his defence. These procedural safeguards allow an accused effectively to exercise his privilege against self-incrimination. As the indictment had not been served in full on the accused prior to the said telephone interviews, his consent to conduct the said telephone interviews was not informed.

7. The Trial Chamber also took into consideration Rule 85 (C) of the Rules, which provides that an accused, if he so desires, has the right to appear as a witness in his defence. The free exercise of this right would be fettered, however, if it exposed him to the risk that evidence obtained prior to the oral testimony given in court and in disregard of the minimum guarantees pursuant to Article 21 (4) of the Statute may be considered for impeachment purposes to undermine the credibility of the accused's trial testimony.


8. The Trial Chamber considered that impeaching the credibility of the accused in this way would, in turn, affect issues of criminal responsibility. Thus, the Trial Chamber was of the view that it is improper to allow the use of such evidence even for purposes of impeaching the credibility of the accused, doing so would not be in accordance with the principles of fundamental justice. The use of the said telephone interviews, having been excluded as direct evidence, would damage the overall fairness and integrity of the trial. Further, the Trial Chamber considered that to allow the

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<sup>2</sup> September 2001 Decision, p. 3.

introduction of the said telephone interviews at this stage of the proceedings would be in effect to condone the fact that the accused had not been fully appraised of the charges against him in the indictment at the time before the said telephone interviews took place. Evidence may only be admitted or used at any stage in the trial when gathered in accordance with the Statute and the Rules.

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



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Florence Ndepele Mwachande Mumba,  
Presiding

Dated this eleventh day of March 2003,  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**