IT-02-54-AR73.6
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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-02-54-AR73.6

Date: 20 January 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Decision of: **20 January 2004**

THE PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

DECISION ON THE INTERLOCUTORY APPEAL BY THE *AMICI CURIAE* AGAINST THE TRIAL CHAMBER ORDER CONCERNING THE PRESENTATION AND PREPARATION OF THE DEFENCE CASE

Counsel for the Prosecutor:
Ms. Carla Del Ponte
Mr. Geoffrey Nice
Mr. Dermot Groome

The Accused:
Slobodan Milošević

Amici Curiae:
Mr. Steven Kay, QC
Mr. Branislav Tapušković
Mr. Timothy L.H. McCormack

1. This appeal concerns the Trial Chamber's order granting the Accused three months to prepare his defence and requiring him to file, within six weeks of the adjournment, a list of witnesses and exhibits he intends to present.

Procedural Background

2. The Accused, Slobodan Milošević, was indicted on 24 May 1999 and transferred to the custody of the Tribunal on 28 June 2001.[1] The Accused pleaded not guilty, and his trial commenced on 12 February 2002.

3. On 2 September 2003, the Trial Chamber held a Status Conference to discuss the anticipated conclusion of the Prosecution's case and the necessary preparations for the presentation of the Defence case.[2] The Accused requested a continuance of over two years to prepare his defence, pointing to the fact that he is conducting his own defence, the complexity of the case, a large number of witnesses he anticipated to present, and the extensive material disclosed by the Prosecution which he must examine. Stressing the same considerations, the *amici* seconded the Accused's request for an adjournment of considerable duration, though they did not suggest a specific period. On 17 September 2003, the Trial Chamber issued its ruling, granting the Accused an adjournment of three months to prepare his defence and requiring him to file, within six weeks of the adjournment, a list of witnesses and evidentiary exhibits he intends to present.[3] Upon a request by the *amici*, the Trial Chamber certified its decision for an interlocutory appeal.[4] The Chamber noted that the request fell within the scope of the Trial Chamber's instructions that the *amici* act in any way they consider appropriate to secure a fair trial to the Accused and that it could be construed as a request for certification from the Accused's application for a two-year continuance.[5]

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[1] Additional indictments against the Accused were filed on 8 October 2001 and 22 November 2001.
[2] *See Prosecutor* v. *Milošević*, IT-02-54-T, Scheduling Order for a Status Conference, 2 July 2003; Transcript of the 2 September 2003 Status Conference.
[3] *Prosecutor* v. *Milošević*, IT-02-54-T, Order Concerning the Preparation and Presentation of the Defence Case, 17 September 2003 ("Order Concerning Preparation").
[4] *Prosecutor* v. *Milošević*, IT-02-54-T, Decision Granting Request by the *Amici Curiae* for Certification of Appeal Against a Decision of the Trial Chamber, 25 September 2003.
[5] *Ibid.*, at 3 (citing *Prosecutor* v. *Milošević*, IT-02-54-T, Order Inviting Designation of *Amicus Curiae*, 30 August 2001). For the Trial Chamber's additional instructions to the *amici*, see *Prosecutor* v. *Milošević*, IT-02-54-T, Order Concerning *Amici Curiae*, 11 January 2002; *Prosecutor* v. *Milošević*, IT-02-54-T, Order of Further Instruction to the *Amici Curiae*, 6 October 2003. The *amici* filed their appeal on 1 October 2003. *Prosecutor* v. *Milošević*, IT-02-54-T, Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case Dated 17 September 2003, filed on 1 October 2003 ("Appeal"). The Prosecution responded on 10 October 2003. *Prosecutor* v. *Milošević*, IT-02-54-T, Response to Interlocutory Appeal Filed by the Amici Curiae on 1 October 2003 Against the Trial Chamber's Order Concerning the Presentation and Preparation of the Defence Case Dated 17 September 2003, filed on 10 October 2003. On 22 October 2003 the Appeals Chamber,

Admissibility of Appeal

4. Rule 73 of the Rules of Procedure and Evidence, pursuant to which this appeal is brought, entitles "a party" to appeal a decision of the Trial Chamber after having requested and obtained certification. The rule does not confer such a right upon an *amicus curiae* appointed by a Trial Chamber pursuant to Rule 74. The *amici* do not act as representatives of the Accused at trial, but solely as assistants to the Trial Chamber.[6] Not being a party to the proceedings, the *amici* are not entitled to use Rule 73 to bring an interlocutory appeal. The fact that the *amici* were instructed by the Trial Chamber to take all steps they consider appropriate to safeguard a fair trial for the Accused does not alter this conclusion.

5. However, as the Trial Chamber observed, there is an identity of interests between the *amici* and the Accused with respect to the issue presented in this appeal. After the Trial Chamber announced its decision to set the adjournment at three months, the Accused stated that he "categorically protest[s] against this ruling."[7] The Accused added: "Every decision or ruling can be re-examined and abolished, and that is my request and demand, that it be rethought."[8] These statements by the Accused, considered in context of his prior request for a continuance in excess of two years, indicate that the *amici*'s present request is aligned with that of the Accused, and that the Appeals Chamber's consideration of this appeal would not infringe his interests. Nor is there a danger of unfairness to the Prosecution. The Prosecution does not oppose the consideration of the appeal; in fact, the Prosecution represented to the Trial Chamber its willingness to accept the *amici* as a party for these purposes.[9] It is also to be noted that in this case the consideration of the appeal serves the interests of justice. In these circumstances, the Appeals Chamber decides to consider the appeal.

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on its own initiative, invited the Accused, if he so wishes, to file a brief in this appeal. *See Prosecutor* v. *Milošević*, IT-02-54-T, Order on the Schedule of Briefing, 22 October 2003. The Accused has not done so.

[6] *See Prosecutor* v. *Milošević*, IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, 4 April 2003, para. 3 ("the role of the *Amicus Curiae* would not be to represent the Accused, but to assist the court"); Transcript of the 30 August 2001 Status Conference, at 6–7.

[7] Transcript of the 17 September 2003 Hearing, at 4.

[8] *Ibid.*

[9] *Prosecutor* v. *Milošević*, IT-02-54-T, Prosecution Response to the Request by the *Amici Curiae* Dated 18 September 2003 for a Certificate Pursuant to Rule 73(B), 24 September 2003, para. 2.

Discussion

6. The *amici* argue that both periods set out by the Trial Chamber are unreasonably short for the Accused to prepare a meaningful defence, and ask the Appeals Chamber to replace them with "such longer period[s] that [are] both adequate and sufficient for the preparation of the Accused's case."[10] The *amici* argue that in reaching its decision the Trial Chamber failed to consider, or gave insufficient thought to, the following factors: (a) the relatively short period of time in which the case came to trial; (b) the considerable time available to the Prosecution to prepare its case; (c) the voluminous Prosecution disclosure; (d) the scope and number of issues raised in the indictment; (e) the ill health of the Accused; (f) the fact that the Accused represents himself and lacks resources comparable to the Prosecution; (g) the fact that the Prosecution has not yet completed its case; and (h) the fact that Prosecution intends to submit new witnesses.[11] As the *amici* point out, the Prosecution disclosed to the Accused a total of 350,000 pages, with extensive disclosure taking place during the last few months of the trial.[12] To support a showing of the Accused's ill health, the *amici* attach reports from examining physicians, who concluded that the Accused is suffering from high blood pressure exacerbated by fatigue.[13] The *amici* also argue that the Trial Chamber erred in relying on the fact that the Accused is assisted by two legal assistants, because it did not consider any evidence as to the nature and extent of that support.[14]

7. As the decisions of the Tribunal hold, and as the *amici* acknowledge, the Trial Chamber's order may be overturned only if the Chamber has erred in the exercise of its discretion in setting the time limits.[15] The *amici* must demonstrate that the Trial Chamber "has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion."[16] In examining whether the Trial Chamber has considered appropriate factors in sufficient measure, the Appeals Chamber is not limited to the text of the order issued by the Trial Chamber. While a Trial Chamber has an obligation to provide reasons for its decision, it is not required to articulate the reasoning in detail.[17] The fact that the Trial Chamber did not mention a

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[10] Appeal, paras 2, 5, 19.
[11] *Ibid.*, para. 7.
[12] *Ibid.*, paras 12-15 and accompanying tables.
[13] *Ibid.*, para. 16 and confidential Annex A.
[14] *Ibid.*, para. 8.
[15] *Prosecutor* v. *Delalić*, IT-96-21-A, Judgment, 20 February 2001 ("*Čelebići* Appeal Judgment"), paras 292-293; Appeal, para. 6.
[16] *Prosecutor* v. *Milošević*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5 (citations omitted).
[17] *Prosecutor* v. *Kunarac*, IT-96-23, Judgment, 12 June 2002, para. 41 ("the Trial Chamber has an obligation to set out a reasoned opinion"); *Čelebići* Appeal Judgment, para. 481 ("A Trial Chamber is not required to articulate in its

particular fact in its written order does not by itself establish that the Chamber has not taken that circumstance into its consideration.[18] The verbal commentary by the Presiding Judge which accompanied the announcement of the ruling and the colloquy which took place during the preceding Status Conference are also relevant to the question of whether the Trial Chamber gave the issues involved due consideration.

8. The Trial Chamber's order expressly referred to the facts that the Accused is representing himself and that, being in detention, he has limited resources at his disposal.[19] In announcing the ruling, the Presiding Judge of the Trial Chamber, Judge May, also stated that the Trial Chamber has considered the duration of the trial and the time the Accused has already spent in detention.[20] With respect to the latter factor, Judge May noted that during this time (2 years and 3 months), the Accused "had the opportunity to consider and make preparations for his defence."[21] Judge May reiterated that the Chamber has considered the fact that the Accused "has elected to represent himself" and underscored that "the Tribunal should provide appropriate logistical assistance to enable the accused to prepare his defence whilst in detention."[22] In general, Judge May explained, in designing the order, the Trial Chamber has "balance[d] the need for the accused to have adequate time for the preparation of his case and the need for an expeditious trial."[23]

9. During the 2 September Status Conference, convened to discuss the preparation of the Defence case, the Trial Chamber mentioned similar considerations. Judge May noted that the Trial Chamber will consider how the applicable Rules of Procedure and Evidence of the Tribunal can be adapted "to take account of the fact that the accused is appearing in person."[24] He also indicated the Chamber will consider that "the accused must make the preparations for his defence while he is in custody," and "the resources which the Prosecution have as against the resources which he [the Accused] has."[25] Judge May added that the Chamber "will consider what is a reasonable amount of time for the accused to have to prepare his case" and "what

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judgement every step of its reasoning in reaching particular findings."); *Prosecutor* v. *Kupreškić*, IT-95-16-A, Appeal Judgment, 23 October 2001 ("*Kupreškić* Appeal Judgment"), para. 458 (same).

[18] *Kupreškić* Appeal Judgment, para. 458 ("failure to list in the Trial Judgement, each and every circumstance placed before [the Trial Chamber] and considered, does not necessarily mean that the Trial Chamber either ignored or failed to evaluate the factor in question").

[19] Order Concerning Preparation, at 2.

[20] Transcript of the 17 September 2003 Hearing, at 1 ("The Trial Chamber has [] taken into consideration the fact that the trial has already taken 19 months. The accused has been in detention for two years and three months....").

[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*

[24] Transcript of the 2 September 2003 Status Conference, at 1–2.

[25] *Ibid.*, at 6.

practical arrangements can be made in order for him to prepare witnesses and to prepare exhibits and generally to prepare his case."[26]

10. The lead counsel for the *amici*, Steven Kay, was asked to express his views on the time the Accused would need to prepare his case. He expressly identified many of the factors he now argues the Trial Chamber has failed to consider. First, he referred to the quick pace in which the case was brought to trial subsequent to the arrest of the Accused: "If we start from the date of his [the Accused's] arrest, which was in June 2001, he was very quickly at the trial stage by February 2002."[27] Mr. Kay argued that during that period the Accused could not have engaged in a "meaningful preparation of any defence because of the scale of the papers and the issues that had to be dealt with pre-trial."[28] Nor, in Mr. Kay's view, could the Accused have undertaken this preparation subsequent to the trial's commencement, because he was "continuously involved in dealing with the many issues that the case has provided."[29]

11. Mr. Kay also reminded the Chamber that the Accused "has very limited resources available to him and limited support."[30] The only "direct team" the Accused has had were "the services of two associates and whatever support they can muster."[31] Mr. Kay then asked the Chamber to bear in mind the disparity in resources between the Accused and the Prosecution as well as the complexity of the case confronting the Accused.[32] Mr. Kay also called upon the Chamber to "reflect as to the length of the time the Prosecutor has had for the preparation of their cases," and contrasted it with the fact that for the Accused, "it is a fresh case, and it is a case that he has to present with no previous history of litigation to draw upon."[33]

12. The colloquy between the bench and the lead *amici* counsel then turned to such factors as the convenience of the Trial Chamber or of the Tribunal. In arguing for a lengthy recess, Mr. Kay acknowledged that such a prolonged break "may be inconvenient for the system, and [] may be inconvenient for the life of this Tribunal."[34] Judge May responded: "You refer to the

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[26] *Ibid.*
[27] *Ibid.*, at 7.
[28] *Ibid.*
[29] *Ibid.*, at 7–8. The Accused similarly emphasized that, since the filing of the first indictment against him, the Tribunal had "all sorts of witnesses coming forward, depositions, statements, and so on, and some of them even go back to 1993, 1994, and 1995." *Ibid.*, at 3–4.
[30] *Ibid.*, at 8.
[31] *Ibid.*
[32] *Ibid.*, at 8–9.
[33] *Ibid.*, at 9.
[34] *Ibid.*, at 10.

convenience of the Tribunal or the Court. Those, of course, are totally irrelevant matters."[35] Instead, Judge May emphasized, the relevant considerations are, on one hand, the need for the criminal trial of the Accused to proceed and, on the other, the need "to ensure that there is a fair trial, and that does involve the accused in having an adequate time, which must be a matter of judgement, in order to present his case."[36]

13. During the Status Conference the Trial Chamber also ascertained, and the *amici* confirmed, that the Accused was able to obtain material relevant to the preparation of his defence, as evidenced by the detailed questions posed by the Accused on cross-examination.[37] Mr. Kay expressly acknowledged, in response to a query from Judge Robinson, that an adequate preparation of the defence case depends not only on the time the Accused is given to prepare but also on the facilities made available to him.[38] Mr. Kay stated that, where a defendant is given a period of time less than two years but is provided with significant facilities and resources, that may be sufficient to ensure adequate preparation.[39]

14. The Trial Chamber also addressed the matter of having the Accused prepare and present a list of witnesses he intends to call. As a part of the colloquy on this issue, Mr. Kay reminded the Chamber that the Accused may have difficulty in estimating how many witnesses he would wish to call.[40] The difficulty, in Mr. Kay's view, stemmed from the fact that "[t]he Prosecution case is still open, [and] we still have a large number of witnesses to come to court to be heard, and we know that that list is still not closed as far as they [the Prosecution] are concerned; there are new witnesses being added every week."[41]

15. Both the colloquy which took place during the Status Conference and the oral commentary on the order given by Judge May on 17 September show that the Trial Chamber was aware of every single one of the factors the *amici* now contend the Chamber failed to consider properly: (a) the short period of time in which the case came to trial; (b) the time the Prosecution had to prepare its case; (c) the amount of Prosecution disclosure; (d) the size and complexity of the indictment; (e) the health of the Accused; (f) the decision of the Accused to represent himself and the limited nature of his legal resources; (g) the fact that the Prosecution case was not yet

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[35] *Ibid.*, at 11.
[36] *Ibid.*
[37] *Ibid.*, at 12.
[38] *Ibid.*
[39] *Ibid.*, at 12–13.
[40] *Ibid.*, at 14.
[41] *Ibid.*

complete; (h) the fact that the Prosecution intended to present new witnesses. The Chamber either explicitly referenced these factors in the order itself and in the accompanying commentary or was informed about them by the *amici* during the Status Conference.

16. Given that the Trial Chamber has considered all the relevant factors, the issue becomes whether its analysis of these factors was so deficient as to constitute an error in the exercise of discretion. It must be noted that a Trial Chamber has discretion with respect to the scheduling of a trial and, in particular, with respect to the determination of the time required for a trial.[42]

17. The Trial Chamber here has solicited from the Accused, the *amici* and the Prosecution a sizeable body of information as to how long the Accused would need to prepare his case and at what point he may be in a position to produce a list of witnesses. On the basis of this information, the Trial Chamber concluded the required time to be three months. In reaching this decision, the Trial Chamber explicitly stated that it was considering both the necessity to safeguard a fair trial for the Accused and the need to ensure an expeditious trial proceeding.[43] The Trial Chamber also made clear that it was not guided by inappropriate considerations, such as the desirability, for the convenience of the Tribunal, of a rapidly progressing trial.[44]

18. The authority best placed to determine what time is sufficient for the Accused to finish preparing his defence in this admittedly complex case is the Trial Chamber which has been conducting his trial for over two years. The Trial Chamber's decision was informed both by sufficient factual information and by the appropriate legal principles, and did not take into account any impermissible factor. The Chamber has made that determination with proper regard to the importance of ensuring a fair trial for the Accused and with an explicit disclaimer of such inappropriate considerations as the completion target for the Tribunal's work. The *amici*, who bear the burden of demonstrating that the Trial Chamber has erred in the exercise of its discretion, have not presented evidence sufficient to substantiate their claim.

19. There is no doubt that, by choosing to conduct his own defence, the Accused deprived himself of resources a well-equipped legal defence team could have provided. A defendant who decides to represent himself relinquishes many of the benefits associated with representation by counsel. The legal system's respect for a defendant's decision to forgo assistance of counsel

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[42] *Čelebići* Appeal Judgment, paras 291-293.
[43] See the above discussion of the statement made by Judge May during the Status Conference. Note 10, *supra* (discussing Transcript of the 2 September 2003 Status Conference, at 11).
[44] See the above discussion of the statement made by Judge May during the Status Conference. *Ibid*

must be reciprocated by the acceptance of responsibility for the disadvantages this choice may bring.[45] Where an accused elects self-representation, the concerns about the fairness of the proceedings are, of course, heightened, and a Trial Chamber must be particularly attentive to its duty of ensuring that the trial be fair.

20. In this case, the Trial Chamber indicated that it will ensure that the Accused be provided with resources sufficient to prepare his defence.[46] The Trial Chamber, moreover, expressed willingness to consider additional ways to provide the Accused with time to prepare, such as decreasing the hours of court time.[47] The Trial Chamber acted with proper sensitivity to the concerns of a self-representing defendant, and there is no violation of the Accused's right to a fair trial by the time limits imposed.[48] The Trial Chamber has, of course, a continuing obligation to ensure a fair trial to the Accused. As a part of that obligation, the Trial Chamber may consider allowing additional adjournments in the future if a showing is made that the Accused lacks sufficient time or resources for the preparation of his defence.

Disposition

21. The appeal is dismissed.

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

Judge Theodor Meron
Presiding

[45] This principle is firmly enshrined in jurisdictions which recognize a defendant's right to self-representation. *See, e.g.*, *Regina* v. *Walton*, [2001] E.W.C.A. Crim. 1771 (C.A.), para. 50 ("[T]he right to defend oneself is acknowledged by the E[uropean] C[onvention] on H[uman] R[ights] Article 6(3)C. The exercise of that right may bring advantages and disadvantages. If a man chooses to exercise that right, whilst he may benefit from the advantages, he cannot pray in aid the ordinary and anticipated disadvantages of his choice in support of the argument that there was inequality of arms[.]"); *Martinez* v. *Court of Appeal*, 528 U.S. 152, 162 (2000) ("the trial judge is under no duty . . . to perform any legal 'chores' for the [self-representing] defendant that counsel would normally carry out") (citation omitted); *Regina* v. *Fabrikant*, (1995) 67 Q.A.C. 268 (C.A. Que.), para. 80 ("[A]n unrepresented accused enjoys no particular privilege."); *Regina* v. *Peepetch*, 2003 SKCA 76, para 66 ("[A defendant] cannot demand the right to represent himself and at the same time demand the right to effective assistance of counsel. Having decided to represent himself he must live with the consequences and cannot later complain that his conduct of the trial did not reach the level of a competent lawyer.").

[46] Order Concerning Preparation, at 2.

[47] *See* Transcript of the 2 September 2003 Status Conference, at 11. In fact, subsequent to the issuance of the Order Concerning Preparation, the Trial Chamber, in light of the health of the accused, has limited its sittings to three days per week. *See Prosecutor* v. *Milošević*, IT-02-54-T, Decision on Prosecution's Request for Variation of the Trial Chamber's Order Regarding the Trial Schedule, 2 October 2003.

[48] *See, e.g.*, *Prosecutor* v. *Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999, para. 47 ("as a minimum, a fair trial must entitle the accused to adequate time and facilities for his defence").

Dated this 20th day of January 2004,
At The Hague,
The Netherlands.

Judge Shahabuddeen appends a separate opinion.

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

Preliminary

1. I agree with the decision of the Appeals Chamber to dismiss this interlocutory appeal. The dismissal has been ordered on the ground that there has been a failure to demonstrate that there is any basis for appellate interference with the way in which the Trial Chamber has exercised its discretion. I agree that there has been a failure to make out such a case. But I do not consider that the Appeals Chamber was called upon to go so far; there is a preliminary reason for the dismissal.

2. The dismissal involves an exertion of appellate supervision over the work of the Trial Chamber. In principle, the work of the Trial Chamber should not be deprived of the benefit of that supervision. But that supervision is not exercised by superior magisterial authority acting *sua sponte*. It is exercisable only at the request of a party. The question in this case is whether the supervision of the Appeals Chamber is sought to be exercised at the request of a party.

3. It is proposed to consider the question in relation to (a) the *amici curiae*, (b) the accused acting by himself, and (c) the accused acting through the *amici curiae* as counsel.

(a) Whether the amici curiae *are a party*

4. The name of the interlocutory appeal, as given on the cover page of the appeal, is "Interlocutory Appeal by the *Amici Curiae...*". Nothing to the contrary appearing in the text, the interlocutory appeal is an appeal brought by the *amici curiae.*

5. The question, therefore, is whether an *amicus* is a party and so competent to bring the appeal. There could be argument as to what is a party;[1] but it is not necessary to debate that point. However wide may be that term, it clearly does not include an *amicus.* Paragraph 4 of today's decision correctly recognises that, "[n]ot being a party to the proceedings, the *amici* are not entitled to use Rule 73 to bring an interlocutory appeal." That paragraph rightly adds that the "fact that the

[1] It includes a witness who is challenging a subpoena. See *Prosecutor v. Radoslav Brđanin and another* (the "Randall" case), IT-99-36-AR73.9, of 11 December 2002. There, of course, it was not suggested that the appeal had not been authorised by Mr Randall.

amici were instructed by the Trial Chamber to take all steps they consider appropriate to safeguard a fair trial for the Accused does not alter this conclusion."

6. Paragraph 5 of today's decision notes that "the Prosecution represented to the Trial Chamber its willingness to accept the *amici* as a party ...". It suffices to observe that the Tribunal is a criminal court. The jurisdiction of the Appeals Chamber cannot be expanded by consent. The Prosecution cannot by consent make the *amici* a party. Despite the Prosecution's concession, the *amici* remain a non-party.

(b) Whether the appeal was brought by the accused acting by himself

7. While the decision of the Appeals Chamber is clear that the *amici* are not a party and thus could not bring the appeal, the decision does not present any other satisfactory basis for bringing the appeal. So, the matter has to be pursued by asking other questions.

8. One question is whether the appeal can be said to have been brought by the accused acting by himself, he being of course qualified to be a party. There is a suggestion that the bringing of the appeal is linked to him, but the suggestion falls short of saying that he has brought it.

9. Paragraph 3 of the Appeals Chamber's decision notes that the Trial Chamber stated that the request for certification "could be construed as a request for certification from the Accused's application for a two-year continuance". There could be argument that that interpretation might show that the accused could be treated as having authorised the bringing of the appeal and that he was therefore the substantive appellant. But the argument would not correspond to what the Trial Chamber said.

10. What the Trial Chamber said in the third paragraph on page 3 of its certification decision of 25 September 2003 was "that the Request may properly be construed as a request for certification of an interlocutory appeal from the application of the Accused" for a continuance of two years. The second paragraph on page 2 of that decision defined "Request" as the "*Amici Curiae* Request ...". Thus, the request for certification remained that of the *amici.* So far as the accused was concerned, his request, made before the Trial Chamber, was for continuance; he did not request certification of an interlocutory appeal to the Appeals Chamber. That the object of the *amici's* request for certification related to the accused's request for continuance did not make the accused the author of the request for certification.

11. The accused restated his position in the oral proceedings before the Trial Chamber on 2 September 2003. He then said to the Trial Chamber: "I have already told you that I do not recognise this Court, so this is not a trial. It is you who have said that I have the right - ."[2] In my opinion, whatever might be the position of the accused on recognition of the Tribunal, that remark is consistent with the view that he himself has not brought the appeal, which, though later, related to those proceedings.

(c) Whether the appeal was brought by the accused acting through the amici curiae *as his counsel*

12. Has the appeal been brought by the *amici curiae* acting as counsel for the accused? This question may be examined under these two heads:

(i) Were the *amici* capable in law of acting as counsel for the accused?
(ii) If they were capable in law of acting as counsel for the accused, did he authorise them to act as his counsel?

13. As to (i), it does not appear that the *amici curiae* were capable in law of acting as counsel for the accused. This is shown by Rule 74 of the Rules of Procedure and Evidence of the Tribunal, under which the *amici curiae* were appointed. This Rule provides that a "Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber." Clearly, where counsel appears, he is not acting as counsel for the accused.

14. To the extent that *amici curiae* could historically be appointed to "represent the unrepresented,"[3] that aspect of the character of an *amicus* has now been overtaken by separate provisions and a separate procedure under which the Tribunal can assign counsel to give legal assistance to an indigent accused, if he desires it. The difference was acknowledged in the first *amicus curiae* order, made by the Trial Chamber on 30 August 2001, which stated that the Chamber considered it desirable to appoint *amici curiae* "not to represent the accused but to assist in the proper determination of the case, and pursuant to Rule 74." In my view, the principle of that

[2] Transcript of the Trial Chamber, 2 September 2003, p. 22.
[3] See para. 35 of the leading judgment of Seaton J.A. in *Attorney General of Canada v. Aluminum Company of Canada Limited*, (1987) 35 D.L.R. (4th) 495.

prohibition has been retained in subsequent orders – including an order of 11 January 2002 - made by the Trial Chamber on the subject.

15. In sum, although the institution of *amicus curiae* has broadened out in some jurisdictions,[4] shifting from its traditional role as friend of the court to advocate for an interested body other than an existing party, in my opinion, in the Tribunal, an *amicus curiae* is limited to his essential function as a friend of the court, as distinguished from being a friend of the accused. More pertinently, under the system of the Tribunal, he is not legally competent to act as counsel for the accused, and he certainly is not an intervener.[5]

16. As to (ii), assuming, contrary to the above, that the *amici curiae* were capable in law of acting as counsel for the accused, did he authorise them to act as his counsel? There does not appear to be any evidence that he did.

17. The Trial Chamber's order of 6 October 2003, entitled "Order of Further Instruction to the *Amici Curiae*", considered "the desirability of the *amici curiae* giving greater assistance to the Accused" and therefore authorised them "to receive such communications as the Accused may make to them and to act in any way to protect and further the interests of his Defence." It may be argued that, in making any communications to the *amici curiae*, the accused is authorising them to act. But it is not necessary to pursue inquiry into such an argument because it has not been suggested that the accused has made any communications to the *amici* for the purposes of this appeal.

18. This is aside from the fact that the Trial Chamber's "Order of Further Instruction to the *Amici Curiae*," made on 6 October 2003, was made after the filing of the interlocutory appeal on 1 October 2003. Thus, it cannot in any event be relied on.

19. Paragraph 5 of today's decision notes that "there is an identity of interests between the *amici* and the Accused" and that "the Appeals Chamber's consideration of this appeal would not infringe his interests", he having also expressed his discontent with the ruling of the Trial Chamber. However, the question is not one of identity of interests but one of authority to act. There is no need to argue that identity of interests is not the same thing as authority to act.

[4] See ibid., para. 39, citing David Scriven and Paul Muldoon, "Intervention as a Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure," in (1985) 6 *Advocates' Quarterly* 448, at pp. 453-455.

20. Finally, it is necessary to refer to the statements by the accused before the Trial Chamber, made immediately after its ruling, that he "categorically protest[s] against this ruling" and that "[e]very decision or ruling can be re-examined and abolished, and that is my request and demand, that it be rethought". These statements, which are referred to in paragraph 5 of the Appeals Chamber's decision, were not an indication of his intent to seek the decision of another judicial body, namely, that of the Appeals Chamber. They were a demand for reconsideration by the original judicial body, namely, the Trial Chamber. They do not support a view that the accused was himself appealing to the Appeals Chamber or that he was authorising the *amici curiae* to do so on his behalf. Accordingly, the statements of the accused, as quoted in that paragraph of the Appeals Chamber's decision, do not provide a basis for entertaining the appeal.

Conclusion

21. For these reasons, while I support the dismissal, I consider that it should have rested on the more fundamental fact that the interlocutory appeal has not been brought by a "party" within the meaning of Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal.

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

Mohamed Shahabuddeen

Dated 20 January 2004
At The Hague
The Netherlands.

[Seal of the Tribunal]

[5] For useful remarks on the subject of intervention as *amicus curiae*, see *Borowski v. Minister of Justice of Canada et al*, (1983) 144 D.L.R. (3d) 657, and *Clark v. Attorney General of Canada* , (1977) 81 D.L.R. (3d) 33.