



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-99-37-AR72.2

Date: 8 June 2004

Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney**

Registrar:

Mr. Hans Holthuis

Decision of:

8 June 2004

PROSECUTOR

v.

**Milan MILUTINOVIĆ
Nikola ŠAINOVIĆ
Dragoljub OJDANIĆ**

**REASONS FOR DECISION DISMISSING INTERLOCUTORY APPEAL CONCERNING
JURISDICTION OVER THE TERRITORY OF KOSOVO**

Counsel for the Prosecutor:

**Mr. Norman Farrell
Mr. Geoffrey Nice
Ms. Cristina Romano**

Counsel for the Defence:

**Mr. Eugene O' Sullivan and Mr. Slobodan Zečević for Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Nikola Šainović
Mr. Peter Robinson and Mr. Vojislav Seležan for Dragoljub Ojdanić**

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 (“International Tribunal”),

NOTING “General Ojdanić’s Appeal from Decision on Motion Challenging Jurisdiction and Motion for Extension of Time to File Opening Brief” (“Appeal”) filed by counsel for Dragoljub Ojdanić (“Appellant”) on 13 May 2003 against the “Decision on Motion Challenging Jurisdiction” rendered by Trial Chamber III on 6 May 2003 (“Impugned Decision”), in which the Trial Chamber rejected “General Dragoljub Odjanić’s Preliminary Motion to Dismiss for Lack of Jurisdiction: Kosovo” filed on 29 November 2002;

NOTING the “Order Assigning Judges to a Case before the Appeals Chamber” issued by the President on 14 May 2003, appointing a Bench of three Judges of the Appeals Chamber (“Bench”) pursuant to Rule 72(E) of the Rules of Procedure and Evidence of the International Tribunal;

NOTING the orders issued by the Bench on 15 July 2003 and 17 November 2003 suspending the briefing schedule pending determination of the Defence’s request for additional resources to pursue the defense of the Appellant;¹

NOTING the “Motion for Stay of Proceedings or for Appointment of *Amicus Curiae*” filed by the Appellant on 28 November 2003 seeking, *inter alia*, a stay of the proceedings pending the decision of the Registry on his request for additional funds;

NOTING the letter of the Registry dated 16 December 2003 responding to the Appellant that the “Registry is not in a position to allocate additional funds to your defence team”;

NOTING the order of the Bench of 16 January 2004 resuming the briefing schedule;

NOTING “General Odjanić’s Opening Brief” filed by the Appellant on 30 January 2004;

NOTING “Prosecution’s Response to Admissibility of ‘General Odjanić’s Opening Brief’ filed on 30 January 2004” filed by the Prosecution on 9 February 2004;

¹See *Prosecutor v. Milan Milutinović, Nikola Šainović & Dragoljub Ojdanić*, “Decision on Motion for Additional Funds”, Trial Chamber III, 8 July 2003 and *Prosecutor v. Milan Milutinović, Nikola Šainović & Dragoljub Ojdanić*, IT-99-37-AR73.2, “Decision on Interlocutory Appeal on Motion for Additional Funds”, Appeals Chamber, 13 November 2003;

NOTING the “Decision” issued by the Bench of three Judges of the Appeals Chamber on 27 February 2004 declaring that the Appeal, except the part in which it challenged the exceedingly long time (166 days) used by the Trial Chamber to render its decision, concerned issues of jurisdiction and referred the Appeal to a bench of five judges, these three issues being:

- 1) The Trial Chamber erred in its conclusion that the FRY was a member of the United Nations for the purposes of the jurisdiction of the Tribunal over crimes committed on its territory;
- 2) The Trial Chamber erred in its conclusion that the Security Council’s Chapter VII powers could be exercised to confer on the Tribunal jurisdiction over crimes committed on the territory of the FRY even if it was not a member of the United Nations at the relevant time, and
- 3) The Trial Chamber erred in failing to determine that the Tribunal’s jurisdiction over crimes committed on the territory of the FRY could not be based upon the principle of universal jurisdiction.

NOTING the “Order Assigning Judges to a Case Before the Appeals Chamber” issued by the President on 12 March 2004 assigning the case to a bench of five Judges of the Appeals Chamber;

NOTING “Prosecution’s Response to Defence Interlocutory Appeal on Jurisdiction (Kosovo)” filed on 12 March 2004;

NOTING “General Odjanić’s Reply” filed on 16 March 2004, in which he requests the Appeals Chamber to direct the Registrar to provide adequate resources to his defence team so that he may receive a fair hearing on the Appeal or, in the alternative, that the Appeals Chamber appoint an *Amicus Curiae* to brief the issues raised in the appeal and refute the response of the Prosecution (“Reply”);

CONSIDERING that the Appellant does not proffer any reason why the Appeals Chamber should depart from its “Decision on Interlocutory Appeal on Motion for Additional Funds” rendered on 13 November 2003, which confirmed the decision of the Registrar not to grant additional funds to the defence team in this case;

CONSIDERING that, since the filing of the Appeal, the Defence has had sufficient time and resources to prepare its case and that the appointment of an *Amicus Curiae* was not warranted in the present case;

NOTING the “Decision on Interlocutory Appeal” filed by the Appeals Chamber on 12 May 2004 indicating that the Appeal was dismissed and that reasons were to be given in due course (“12 May Decision”);

NOTING that the Appellant submits, *inter alia*, that the Trial Chamber erred in finding in the Impugned Decision that the International Tribunal has jurisdiction to try him for crimes allegedly committed in the territory of Kosovo because the Security Council did not have the power to vest the International Tribunal with jurisdiction over the territory of a State, the Federal Republic of Yugoslavia, which, at that time, was not a member of the United Nations;

CONSIDERING that the Appeals Chamber in the *Tadić* Jurisdiction Decision found that “[t]he establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41[of the Charter]” and that “the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter”;²

CONSIDERING, in respect of all three issues on which the Appeal has been referred by the three member bench to the five member bench, that the only question which the Tribunal has to consider in this case is whether the terms in which it has been given jurisdiction embrace the particular territory in question;

CONSIDERING, in this respect, that Article 1 of the Statute of the International Tribunal provides that

[t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991;

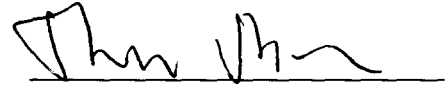
NOTING that Kosovo is, and was, at the relevant time, a part of the territory of the former Yugoslavia;

FINDING that, pursuant to Article 1 of its Statute, the International Tribunal has jurisdiction over General Odjanić for crimes allegedly committed in the territory of Kosovo;

STATES that the Decision of 12 May has dismissed the Appeal for the foregoing reasons.

²*Prosecutor v. Duško Tadić*, IT-94-1-T, “Decision on Defence Motion for Interlocutory Appeal on Jurisdiction”, 2 October 1995, paras 36 and 40.

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



Theodor Meron
Presiding Judge

Dated this 8th day of June 2004,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

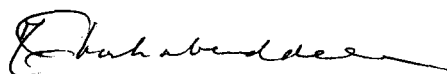
DECLARATION OF JUDGE SHAHABUDDEEN

1. I support the reasons given for the decision but would have wished that there was included some elaboration to explain why in this important matter the Appeals Chamber considers that

“the only issue which the Tribunal has to consider in this case is whether the terms in which it has been given jurisdiction embrace the particular territory in question;”

2. In my respectful view, the reasons given for the decision should have added, for example, that the *Tadić* Jurisdiction Decision did not go on to decide the issue whether the Appeals Chamber has jurisdiction to consider whether the Security Council, in the case of a State which is not a member of the United Nations, has competence to vest the Tribunal with jurisdiction over that State (as distinguished from establishing the Tribunal as an institution) and that the Appeals Chamber has no jurisdiction to consider that issue.

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



Mohamed Shahabuddeen

Dated this 8th day of June 2004,

At The Hague,

The Netherlands.

[Seal of the Tribunal]