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HCB.

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 No.:	IT-02-54-A-R77.4
		Date:	29 August 2005
		Original:	English

THE APPEALS CHAMBER

Before: **Judge Theodor Meron, President**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: **Mr Hans Holthuis**

Decision: **29 August 2005**

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

DECISION ON INTERLOCUTORY APPEAL ON KOSTA BULATOVIĆ CONTEMPT PROCEEDINGS

The Office of the Prosecutor:
Ms. Carla Del Ponte
Mr. Geoffrey Nice QC
Ms. Hildegard Uertz-Retzlaff
Mr. Dermot Groom

Counsel for the Appellant
Mr. Stéphane Bourgon

The Accused
Mr. Slobodan Milošević

Assigned Counsel
Mr. Steven Kay QC
Ms. Gillian Higgins

Amicus Curiae
Prof. Timothy McCormack

1. The Appeals Chamber is sezed of an appeal by Kosta Bulatović ("Appellant") against a decision of Trial Chamber III convicting him for contempt of the Tribunal and sentencing him to four months of imprisonment, suspended for two years.

I. Procedural Background

2. On 27 May 2005, Kosta Bulatović filed a notice of appeal[1] against the decision of Trial Chamber III holding him in contempt of the Tribunal.[2] In its Scheduling Order issued on 3 June,[3] the Appeals Chamber requested the Prosecution to assist in the appeal by filing a response to the Appellant's brief and ordered the Appellant to file his Appellant's Brief no later than 17 June. The Appellant filed his brief out of time on 20 June,[4] and failed to show good cause for the Appeals Chamber nevertheless to recognize the brief as validly filed pursuant to Rule 127 of the Rules of Procedure and Evidence ("Rules").

3. In response to the late filing, the Prosecution filed an application to strike the Appellant's Brief.[5] The Appellant filed a response to the Prosecution's Application requesting that the Appeals Chamber receive his Appellant's Brief as validly filed.[6] The Appeals Chamber dismissed the Prosecution's Application, deemed the Appellant's Brief validly filed, and granted the Prosecution an extension of time to 30 June in which to file its response to the Appellant's Brief.[7] On 29 June, the Appellant filed a further motion seeking an extension of time in which to file his reply to the Prosecution's Response.[8] The Appeals Chamber granted the Appellant's Motion and ordered the Appellant to file his reply no later than 4 July.[9] On 30 June the Prosecution filed its Response to the Appellant's Brief,[10] and on 1 July the Prosecution filed an amended version of that Response rectifying minor errors contained in the original Response filed.[11] The Appellant filed his reply to that Response on 4 July.[12]

II. Factual Background

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[1] Notice of Appeal of Decision on Contempt of the Tribunal, 27 May 2005 ("Notice of Appeal").
[2] *Prosecutor v. Milošević,* Case No. IT-02-54-R77.4, Decision on Contempt of the Tribunal, 13 May 2005 ("Impugned Decision").
[3] Scheduling Order, 3 June 2005.
[4] Appeal of Decision on Contempt of the Tribunal Kosta Bulatović Appellant's Brief, 20 June 2005 ("Appeal" and Appellant's Brief").
[5] Prosecution's Application to Strike Appellant's Brief, 21 June 2005 ("Prosecution's Application").
[6] Appellant's Motion Seeking Variation of Time Limits, 29 June 2005.
[7] Decision on Prosecution Application to Strike Appellant's Brief in the Appeal of the Decision on Contempt of the Tribunal Kosta Bulatović, 23 June 2005.
[8] Appellant's Motion Seeking Variation of Time Limits, 29 June 2005 ("Motion").
[9] Decision on Appellant Application for Extension of Time to File Reply in Kosta Bulatović Contempt Proceedings, 30 June 2005.
[10] Prosecution's Response to Appellant's Appeal Brief, 30 June 2005
[11] Corrigendum to Prosecution's Response to Appellant's Appeal Brief, 1 July 2005 ("Response").
[12] Appellant's Reply to Prosecution Response to Appellant's Appeal Brief, 4 July 2005 ("Reply").

4. The Appellant was called as a defence witness in the *Milošević* case and commenced giving testimony on 14 April 2005. On that day, the Appellant was directly examined by the Accused Milošević ("Accused") and the Prosecution commenced its cross-examination. The trial was adjourned for the weekend and recommenced on 19 April 2005. For reasons of illness the Accused was unable to attend the hearing on 19 April. After hearing from the Prosecution and from Milosević's appointed counsel, the Trial Chamber determined that the trial should continue in the absence of the Accused, and the Appellant was called into court for the Prosecution to continue with its cross-examination. When the Appellant resumed his place in the court he refused to answer the questions of the Prosecution. The Trial Chamber then advised the Appellant of its decision to continue the trial in the absence of the Accused and of the protections in place to ensure that no prejudice would accrue to the Accused. It advised the Appellant of his obligation to continue to give evidence and that if he failed to answer the questions of the Prosecution, he could be held in contempt. The Appellant continued to refuse to answer the questions of the Prosecution, stating that he would only answer in the presence of the Accused.[13]

5. Faced with the persistent refusal of the Appellant, the Trial Chamber adjourned the proceedings until the next day to allow the Appellant to seek legal advice. When the trial recommenced on 20 April 2005, the Accused was again absent from the hearing due to ill health. The Appellant was once more informed by the Trial Chamber of his obligation to answer questions and told that he could be held in contempt if he failed to do so. The Appellant again refused to answer the questions of the Prosecution.

6. Consequently, the Trial Chamber considered that there were sufficient grounds to proceed against the Appellant for contempt and issued an order *proprio motu,* in lieu of an indictment, declaring that it would prosecute the matter against the Appellant itself.[14] In so doing, the Trial Chamber relied on Rule 77 of the Rules of Procedure and Evidence which provides, in pertinent part as follows:

> A. The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who:
> i. Being a witness before a Chamber, contumaciously refuses or fails to answer a question;
> C. When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:
> iii. Initiate proceedings itself.

[13] *See* Impugned Decision, paras. 2-3.
[14] *Prosecutor v. Milošević,* Case No. IT-02-54-T, Order on Contempt Concerning Witness Kosta Bulatović, 20 April 2005 ("Order on Contempt"), p. 3.

D. If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:
   ii. In circumstances described in paragraph (C)(ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.

The Trial Chamber found that it had reason to believe that the Appellant may be in contempt of the International Tribunal because he knowingly and wilfully interfered with the administration of justice by contumaciously refusing to answer questions asked by the Prosecution.[15]

7. On 6 May 2005, the Trial Chamber held a contempt hearing with regard to the Appellant. Following the hearing, the Trial Chamber issued its written decision finding the Appellant to be in contempt of the International Tribunal and sentencing him to four months imprisonment to be suspended for two years on grounds of the Appellant's serious health problems.[16]

III. Grounds of Appeal

8. The Appellant appeals the contempt finding against him in the Impugned Decision pursuant to Rule 77(J) of the Rules on the basis of five grounds.[17]

A. Ground 1:

9. First, the Appellant argues that the charge of contempt was *ultra vires ab initio* in the particular circumstances of this case in that the Trial Chamber erred in law by ordering the proceedings against the Accused to continue in his absence on 19 April 2005,[18] and by holding that

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[15] *Id.*, pp. 2-3.
[16] Impugned Decision, paras 7, 18-19.

In *Prosecutor v. Aleksovski,* Case No. IT-95-14/1-AR-77, Judgment on Appeal by Anto Nobilo against Finding of Contempt, 30 May 2001, at para. 36 the Appeals Chamber stated:

> Both the purpose and the scope of the law of contempt to be applied by this Tribunal is to punish conduct which tends to obstruct, prejudice or abuse its administration of justice in order to ensure that its exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded.
>
> The law of contempt is not designed to buttress the dignity of the judges or to punish mere affronts or insults to a court or tribunal; rather, it is justice itself which is flouted by a contempt of court, not the individual court or judge who is attempting to administer justice.

[17] Rule 77(J) states, in pertinent part, that "[a]ny decision rendered by a Trial Chamber under this Rule shall be subject to appeal...."
[18] *The Prosecutor v. Milošević*, Case No. IT-02-54-T, Transcript, T. 38591 (19 April 2005) (Hereinafter *Prosecutor v. Milošević*).

the Appellant was required to answer the questions of the Prosecution on that day.[19] The Appellant submits that if the Trial Chamber erred in law then the Appellant could not have been under a legal obligation to answer the questions posited to him by the Prosecution. In his view, it follows from this reasoning that the order on contempt is null and void. The Appellant therefore requests that the Appeals Chamber quash the Impugned Decision on Contempt.[20] In presenting this argument as a ground of appeal, the Appellant states that he does not mean to address the broader issue of whether *in absentia* trials may ever be permitted but, rather, whether in the particular circumstances before the Trial Chamber on 19 April 2005, the Trial Chamber erred in ordering the trial to continue in the absence of the Accused.[21]

10. The Prosecution submits in response that: (a) the Appellant does not have standing to challenge the Trial Chamber's decision in relation to the absence of the Accused; and, (b) that such a decision on the correctness of continuing proceedings in spite of said absence does not invalidate the finding of contempt.

11. The Appeals Chamber considers that it is irrelevant to the contempt proceedings against the Appellant whether the Trial Chamber was in error in ordering a continuance of the trial proceedings in the absence of the Accused. As a witness before this Tribunal, the Appellant has an obligation to abide by any orders issued by the Trial Chamber, regardless of his personal view of the legality of those orders. The only basis on which the Appellant could legitimately refuse to answer the questions posed by the Prosecution is in exercise of particular rights held by witnesses in criminal proceedings, such as the right against self-incrimination.[22] The Appellant was not entitled to rely upon a right that pertains to the Accused as justification for his refusal to abide by the order of the Trial Chamber. Accordingly, this ground of appeal is dismissed.

B. Ground 2:

12. In the Appellant's second ground of appeal he asserts that in any event it was an error in law to dismiss the Defence motion to assign the case to another Chamber,[23] which invalidates the

[19] See *ibid,* T. 38592-38597,T.38606 (19 April 2005); *see also* T.38615-T.38616 (20 April 2005). *See generally* Notice of Appeal, para. 4.
[20] See Notice of Appeal at paras. 5-6.
[21] Appeal, para. 27.
[22] Even in such circumstances, the Trial Chamber can still compel testimony as long as the statements are not used against the witness in a subsequent prosecution, unless they are used as evidence of giving false testimony. *See* Rules at 90 (E)
[23] *Prosecutor v. Milošević*, T.38642 (20 April 2005).

Impugned Decision.[24] The Appellant argues that the Trial Chamber's impartiality was compromised by, first, the fact that the Trial Chamber made the decision to continue the proceedings in the absence of the Accused. In declining to review this decision, the Trial Chamber made clear that it did not consider that its decision justified the Appellant's refusal to answer the Prosecution's questions. Had the contempt charge instead been referred to another Chamber, the Appellant believes that the new Chamber may have found the Appellant's actions justified.[25] The second exceptional circumstance identified by the Appellant was the appearance given by the Trial Chamber that it had already decided that the Appellant was in contempt of the Tribunal for refusing to answer the questions of the Prosecution prior to the contempt hearing, and thus had closed its mind to accepting possible justifications for that refusal.[26] The Appellant refers to the comments made by Judge Bonomy to the Appellant that there was no rational basis for his refusal to answer the questions of the Prosecution.[27] The Appellant claims that by hearing the matter for itself he was denied his right pursuant to Article 21(2) of the Statute of the Tribunal to a "fair and public hearing".[28]

13. In support of his arguments, the Appellant refers to the European Court of Human Rights case of *Kyprianous v. Cyprus*,[29] which he asserts is the "leading jurisprudence on this issue" and which states that contempt should always be dealt with by a different tribunal from that before which it is alleged to have occurred.[30] The Appellant argues that while the authority of *Mayberry v. Pennsylvania*[31] suggests that this might not be settled law, there can be no doubt that where the impartiality of the Trial Chamber may be called into question, the matter must be assigned to a different Trial Chamber.[32]

14. In Response, the Prosecution argues that there is a long line of national jurisprudence that supports the right of the court in which the contempt occurs to summarily deal with that contempt and that there was nothing improper about the Trial Chamber doing so in this instance.[33] It claims that the case of *Kyprianous v. Cyprus,* on which the Appellant relies to establish the contrary, can be distinguished on its facts from the Appellant's case in that the Judges in that case were "deeply insulted" by the contemnor and demonstrated a personal partiality.[34] It argues that the Appellant

[24] See Notice of Appeal, paras 7 & 8.
[25] Appeal, paras. 120-128.
[26] *Ibid*, para. 129.
[27] *Ibid*, para. 130.
[28] *Ibid*, para. 115.
[29] ECHR Application No. 7379/01, Judgment of 27 Jan 2004.
[30] Appeal, para. 117.
[31] 400 U.S. 455 (1971)
[32] Appeal, paras. 117-118.
[33] Response, paras. 70-82.
[34] *Ibid*, para. 81.

has failed to establish that the Trial Chamber erred in law by proceeding summarily against the Appellant.[35]

Analysis

15. It is well established in the jurisprudence and Rules of this Tribunal that an act of contempt be prosecuted by the Chamber hearing the proceedings in which the contempt arises unless there are exceptional circumstances for the Chamber to recuse itself. Rule 77(D) authorises a Trial Chamber, when satisfied that there are sufficient grounds to proceed against a person for contempt, to prosecute the matter itself. Further, the *Practice Direction on Procedure for the Investigation and Prosecution of Contempt before the International Tribunal* states that "(...) The Chamber in which the contempt allegedly occurred shall adjudicate the matter unless there are exceptional circumstances, such as cases in which the impartiality of a Chamber may be called into question, warranting the assignment of the case to another Chamber."[36] Underpinning this preference for hearing the contempt case in the Chamber in which the contempt arose is recognition of the principle that a Chamber has a right and a duty to ensure that its exercise of the jurisdiction given to it by the Statute is not frustrated, and that its basic judicial functions are safeguarded.[37]

16. In this case, the Appellant first argues that the impartiality of the Trial Chamber was called into question by its refusal to reconsider its order to continue in the absence of the Accused, and the statements it made to the Appellant when requesting that he conform to its decision to continue answering questions. While not explicitly stated as such, the argument of the Appellant is that the Trial Chamber should have disqualified itself from hearing the contempt proceeding against the Appellant because it was prejudiced. [38]

17. Judges with a conflict of interest or other bias can be disqualified from sitting on a trial or appeal in a specific case. This disqualification is governed by Rule 15(A) of the Rules, which provides that "a Judge may not sit on a trial or appeal in a case in which the Judge has a personal interest or concerning which the Judge has had any association which might affect his or her impartiality".[39] The Appeals Chamber has previously enunciated the following standards to be used in interpreting the "impartiality requirement" of the Statute and the Rules:

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[35] *Ibid.* para. 82.
[36] IT/227, 6 May 2004, para. 13.
[37] *See e.g., Prosecutor v. Tadić*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujia,, 31 Jan. 2000, paras. 12-18, 25-26; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR77, Judgement on appeal by Mr. Anto Nobilo against Finding of Contempt, 30 May 2001, para. 30.
[38] Appeal, para. 115.
[39] The Rules at 15 (A)

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

(ii) There is an unacceptable appearance of bias if:

> [...]
>
> the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[40]

18. As the Appeals Chamber in *Furundžija* explained, the "reasonable observer" contemplated by the appearance-of-bias test "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".[41] The pertinent factor is "whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgment) would be that the judge in question might not bring an impartial and unprejudiced mind to the issues arising in the case".[42]

19. The Tribunal's jurisprudence establishes a clear presumption of impartiality in relation to the functioning of any Judge of the Tribunal. In order to rebut this presumption of impartiality, the reasonable apprehension of bias must meet the high threshold of being "firmly established".[43] The reason for this threshold is that it is as much of a threat to the interests of the impartial and fair administration of justice for judges to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias as is the real appearance of bias itself.[44]

20. The Appeals Chamber has already held that the Appellant was bound to abide by the order of the Trial Chamber and the Trial Chamber's refusal to reconsider that order is of no relevance to the Appellant. However, the issue here is whether the Trial Chamber's refusal to reconsider its order impugned the impartiality of the Trial Chamber such that exceptional circumstances existed warranting a referral of the contempt proceedings to another Trial Chamber. The Appeals Chamber is not so persuaded.

21. Contempt proceedings are part of the inherent authority of any Chamber at this Tribunal to protect the integrity of its own proceedings. There is no general rule that a Chamber must disqualify itself from a contempt proceeding simply because the contempt arises in response to a

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[40] *Prosecutor v Furundžija,* Case No IT-95-17/1-A, Judgement, 21 July 2000, para. 189. ("*Furundžija* Appeal").
[41] *Ibid*, para. 190.
[42] *Prosecutor v Delalić et al.*, Case No IT-96-21-A, Judgement, 20 Feb 2001, para. 697 ("*Delalić* Appeal").
[43] *See Delalić* Appeal, para. 707.
[44] *Ibid*, para. 707.

failure to abide by an order of a Chamber concerning the conduct of its proceedings. A Chamber must have the authority to issue such orders and must have the authority to enforce those orders.

22. The contempt of the Appellant in this case was a blatant refusal to comply with an order of the Trial Chamber and challenged the authority of the Chamber to protect the integrity of its own proceedings. In the face of this blatant refusal, the Trial Chamber adjourned the proceedings to enable the Appellant to seek legal advice. When the proceedings commenced the following day, and the Appellant indicated his intention to maintain his position, the Trial Chamber then initiated contempt proceedings against him under Rule 77. There was nothing unfair or partial about the action taken by the Trial Chamber. Indeed, the actions of the Trial Chamber showed the utmost respect for the rights of the Appellant. Accordingly, the Appeals Chamber is not persuaded that the Appellant has established that the Trial Chamber's refusal to reconsider its order in light of the Appellant's refusal can be a basis for impugning the impartiality of the Chamber such that it could not fairly and independently hear the contempt proceedings against the Appellant.

23. The second complaint of the Appellant is that the Trial Chamber had already determined that he was in contempt prior to its hearing of the contempt matter in May. In particular, the Appellant claims that the questions posed by Judge Bonomy as to the rational basis for the Appellant's refusal showed that the Trial Chamber had closed its mind to possible justifications for the Appellant's refusal to answer questions.

24. The Appeals Chamber does not accept that the questioning by the Trial Chamber as to the basis of the Appellant's refusal prior to initiating the contempt proceedings impugned the Trial Chamber's impartiality. Again, a Trial Chamber must have the authority to control the integrity of its own proceedings and to inform witnesses of their responsibilities and obligations. In questioning the Appellant, the Trial Chamber correctly informed the Appellant that the justification upon which he relied did not relieve him of his obligation as a witness before this Tribunal to answer the questions of the Prosecution. Therefore, the Trial Chamber's indications to the Appellant concerning his obligations before this Tribunal did not impugn the impartiality of the Chamber. The Trial Chamber gave the Appellant ample opportunity to seek legal advice and prepare a defence to the contempt hearing. There was nothing partial about the conduct of the Trial Chamber.

C. Ground 3:

25. Third, the Appellant submits that the Trial Chamber erred in law by ruling: (1) that the Defence preliminary motion challenging the jurisdiction of the Trial Chamber to hear the trial did

not fall within the definition of a preliminary motion challenging jurisdiction; (2) the motion was thus incompetent; and (3) that it was not open to the Defence to make it.[45]

26. The Appellant notes that in the Impugned Decision the Trial Chamber stated that Counsel had failed to take into account the terms of Rule 72(D) which defines a motion challenging jurisdiction as referring exclusively to a motion which challenges an indictment on the ground that it does not relate to: (i) any of the persons indicated in Articles 1, 6, 7 and 8 of the Statute; (ii) the territories indicated in Articles 1,8 and 9 of the Statute; (iii) the period indicated in Articles 1,8 and 9 of the Statute; (iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute and that on this basis it concluded that:

> The challenge to jurisdiction mounted on the basis of the nullity of the original Decision to proceed to hear the evidence did not fall within the definition of a preliminary motion challenging jurisdiction. The Motion advanced was thus incompetent....[46]

The Appellant claims that the Trial Chamber erred in its interpretation of Rule 72(D) and the conclusion it drew from that interpretation.[47]

27. The Appellant says that the challenge to jurisdiction which he sought leave to argue before the Trial Chamber was aimed at the Order on Contempt issued by the Trial Chamber on 20 April 2005, on the basis that it was *ultra vires* and that as such the Trial Chamber did not have jurisdiction to adjudicate.[48] The Appellant argues that the Order on Contempt is an indictment and that he sought leave to challenge the Order on Contempt on the basis that it did not relate to any of the categories in Rule 72(D) because it is *ultra vires*.[49] The Appellant argues therefore that the Trial Chamber's interpretation of Rule 72(D) was unnecessarily narrow.[50] He claims that Rule 72(D) must be interpreted in the context of the object and purpose of the Statute and the Rules. This Rule does not deal with the inherent power of contempt but a challenge to the jurisdiction of a Trial Chamber to adjudicate on contempt proceedings must be accommodated within Rule 72(D).[51] The Appellant argues that contempt is a serious offence and that there must be an avenue for an accused facing such a charge to bring a preliminary motion challenging the jurisdiction of a Trial Chamber

[45] Notice of Appeal, para. 10.
[46] Appeal, para. 135 quoting Impugned Decision, para. 8.
[47] *Ibid*, para. 136.
[48] *Ibid*, para. 137.
[49] *Ibid*, para. 139.
[50] *Ibid*, para. 140.
[51] *Ibid*, paras. 141-143.

"to adjudicate on specific contempt proceedings or to challenging the form of the Order on Contempt or to raising other preliminary motions pursuant to Rule 72".[52]

28. In Response, the Prosecution argues that in summary contempt proceedings the procedural rights of an accused are limited "as the need for immediacy in restoring order and authority to the courtroom outweighs the need for procedural safeguards. They are also limited because contemptuous acts are typically undisputed, occur in open court and are on the record".[53] The Prosecution argues that national jurisprudence supports this position,[54] and that the Trial Chamber could have declined to hear any preliminary jurisdictional motion but heard the Appellant on the issue, thus affording him more procedural protection than he was entitled.[55]

29. The Prosecution argues further that Rule 72(D) does not support the expansive interpretation sought by the Appellant. It argues that the Rule is clear and unambiguous in its terms and the Appeals Chamber should not redefine it in the terms sought by the Appellant.[56]

30. The Prosecution argues further that even if the Trial Chamber should have considered a preliminary challenge to jurisdiction any error committed by the Trial Chamber is harmless as the Trial Chamber had clear jurisdiction to conduct the contempt proceeding under Rule 77.[57]

31. In Reply, the Appellant argues that the only issue in dispute is whether it is open to a person charged with contempt to challenge the jurisdiction of the Tribunal by preliminary motion and that the Prosecution failed to address this issue.[58]

32. The Appellant argues that the "need for immediacy in restoring order and authority to the courtroom" is irrelevant to the unique circumstances of this case. The issue was whether the Appellant was required to answer the questions of the Prosecution in the absence of the Accused and the background to that question is whether the Tribunal has jurisdiction to hold part of a trial *in absentia*.[59] The Appellant argues that this issue should have been the subject of a proper debate before the Appellant was placed in a situation of potential contempt.[60]

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[52] *Ibid*, para. 144.
[53] Response, para. 85.
[54] *Ibid*, paras. 86-88.
[55] *Ibid*, para. 89
[56] *Ibid*, paras. 91-92.
[57] Response, paras 93-94.
[58] Reply, para. 50.
[59] *Ibid*, para. 52.

33. The Appellant argues further that it is "inconceivable that the International Tribunal's jurisdiction over contempt – based on its inherent powers – could be shielded from a challenge as to whether a Trial Chamber has jurisdiction to hear contempt proceedings in certain circumstances"[61], and that there "must be procedural safeguards for persons charged with such offences, including the possibility to challenge the jurisdiction of the Trial Chamber".[62]

34. Finally, the Appellant argues that the Prosecution's argument that the Trial Chamber had jurisdiction under Rule 77 is irrelevant. The proposed challenge to jurisdiction was not based on Rule 77 but was "based on the lack of jurisdiction of the Trial Chamber to proceed pursuant to a charge of contempt which was *ultra vires* of its own powers, due to its unwarranted infringement on the fundamental right of the Accused to be tried in his presence".[63]

Analysis

35. The Appeals Chamber is not satisfied that the Appellant has established an error on the part of the Trial Chamber in holding that it was not open to the Appellant to bring a preliminary motion challenging the jurisdiction of the Tribunal under Rule 72(D). Rule 72(D) is clear and unambiguous in its terms and is inapplicable to proceedings for contempt. As already made plain, the jurisdiction of the Trial Chamber to conduct contempt proceedings arises from its inherent authority to ensure the integrity of its own proceedings and the conduct of those proceedings is governed by Rule 77.

36. The Appeals Chamber is also not persuaded that the Trial Chamber erred in failing to consider the preliminary motion on the merits. The Trial Chamber had already correctly determined that the witness had an obligation to comply with its order and it is irrelevant *vis-à-vis* the Appellant as to whether that order was *ultra vires* since the Appellant's refusal to comply with that order did place him in the position of being prosecuted by the Chamber for contempt. The situation was well explained to the Appellant by the Trial Chamber. Having determined to continue in the absence of the Accused, any complaint about that determination was for the Accused and not the Appellant to make. Regardless of the legality of that determination the obligation of the Appellant to comply remained. In this respect, even if the Trial Chamber had considered the preliminary motion challenging its jurisdiction, that motion should have failed.

[60] *Ibid*, para. 54.
[61] *Ibid*, para. 57
[62] *Ibid*, para. 58.
[63] *Ibid*, para. 59.

D. Ground 4:

37. Fourth, the Appellant submits that the Trial Chamber erred both in fact and in law by finding that he "*plainly acted with the necessary mens rea to establish that he is guilty of contempt of the Tribunal.*"[64] The Appellant argues that the identified issue, to be adjudicated when the Trial of the Appellant commenced, was: "Did the Respondent knowingly and wilfully interfere with the administration of justice before the Tribunal by contumaciously refusing to answer questions?"[65] He proposes that this question considered in light of Rule 77(A)(i) identifies the elements of *mens rea* for contempt as threefold: (1) contumaciously refusing to answer; (2) knowing that this interfered with the administration of justice; and (3) wilfully interfering with the administration of justice in doing so.[66] He asserts that the Trial Chamber's interpretation of "knowingly and wilfully" was erroneous and that, as such, the Trial Chamber erred in its consideration of the particular circumstances of the Appellant in light of the erroneous *mens rea* requirement.[67] As a result, the Appellant requests that the Appeals Chamber substitute a finding of "Not Guilty" for the Trial Chamber's finding of "Guilty".[68]

38. In the Impugned Decision, the Trial Chamber held that:

> "where the issue is one of compliance with an order of the court, the "knowledge" required is knowledge of the making of the order requiring that the Respondent should answer. There is no question of special knowledge of the consequences of such refusal being required. It is an obvious consequence of refusing to comply with an order of the Chamber that the administration of justice is interfered with. No higher standard was set by the Appeals Chamber in *Aleksovski*."[69]

While the Appellant agrees with this statement based on *Aleksovski,* he submits that it deals only with the question of knowledge and that it does not address the issue of "wilfully" interfering with the administration of the Trial Chamber. He submits that in the *Aleksovski* case the issue was the disobeying of an order prohibiting the disclosure of information as opposed to the situation in this case of refusal to obey an order to testify. The Appellant asserts that in this case the "wilful" requirement must have been evaluated with respect to his state of mind at the relevant time; that is, at the time of the refusal to obey the orders of the Tribunal. The Appellant submits that while his refusal to answer the questions posed to him could establish knowledge of interference with the administration of justice, it does not establish that he "wilfully" did so without specific examination

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[64] Appeal, para. 147 citing *The Prosecutor v. Duško Tadić,* Case No. IT-94-I-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 16..
[65] Appeal, para. 147.
[66] *Ibid*, para. 150.
[67] *Ibid*, para. 146.
[68] *Ibid*, para. 161.
[69] Impugned Decision, para. 17 (footnote omitted).

of the Appellant's state of mind at that time. To buttress this plea, the Appellant calls on the language of the Trial Chamber in the *Brđanin* Decision on Motion for Acquittal Pursuant to Rule 98 *bis,* which states that contempt is a specific intent offence and a protean one and, as such, the *mens rea* relevant thereto shifts depending on the case at hand.[70]

39. In response, the Prosecution argues that the Trial Chamber did not err when it said that the Appellant's refusal to testify could only lead to the conclusion that he wilfully interfered with the administration of justice.[71] The Prosecution buttresses his position by recalling the reasoning used in the *Aleksovski* case. Based on this reasoning, he argues that "[w]ilfulness to interfere with the administration of justice *does* 'almost necessarily follow' from circumstances where there is mere knowledge of the Trial Chamber order", and "[t]his is especially so where the order is an order to testify."[72]

Analysis

40. In the case at hand, there is no evidence that the Trial Chamber made an error in its ruling.[73] Even if the Appellant is correct when he says that there exists a shifting *mens rea* requirement depending on the particular circumstances of the contempt case, it does not follow that in this case the Appellant did not "wilfully intend" the specific result, that being interference with the administration of justice. In the circumstances, no conclusion could logically follow other than that he wilfully intended to avoid testifying, thereby necessarily interfering with the administration of justice.

41. The Appellant was asked on several occasions to answer the questions posed to him. The possibility of a contempt order, and the reasons therefore, were explained to him. And yet he contumaciously refused to cooperate with the will of the Tribunal in favour of his own perception of justice in the circumstances. In this regard, the Prosecution is quite right in stating that "[n]o function is more basic to a court's administration of justice than its ability to compel witness testimony. Witness testimony and the administration of justice are in a real sense synonymous."[74]

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[70] Appeal, paras 152-156 citing *Prosecutor v. Brđanin*, Case No. IT-99-36-R77, Trial Chamber, Decision on Motion for Acquittal Pursuant to Rule 98 *Bis*, 19 March 2004, para. 16: "There are differences in the states of mind required for each of the various types of conduct envisaged in Rule 77(A). The *mens rea* has to be established on a case by case basis in relation to each of the conducts referred to in Rule 77(A)(i) to (v). For each form of criminal contempt, the Prosecution must establish that the accused acted with specific intent to interfere with the Tribunal's due administration of justice."

[71] Response, para. 102.

[72] Response, para. 101 (emphasis in original text).

[73] Error of law or fact is the standard required for the Appeals Chamber to overturn a Trial Chamber's ruling. See *Prosecutor v. Kvočka et al.,* Case No: IT-98-30/1-A, Judgement, 28 February 2005, paras. 13-20.

[74] Response, para. 101.

42. The Appellant was at all times aware of his choice and of the consequences – both to himself and to the administration of justice. He insisted on giving evidence solely under his own conditions. In short, he acted wilfully and with full knowledge of what he was doing. In light of this fact, the Appellant does not demonstrate that the alternative conclusion should follow, that is, that the Appeals Chamber should depart from its own wording in *Aleksovski* and, in the present case, rule that a refusal to answer a question when the outcome and effects were known to the Appellant is not in itself sufficient to establish wilful interference with the Trial Chamber's administration of justice.

43. Thus, far from making an error of law or fact, the Trial Chamber came to the logical conclusion that such behaviour amounted to contempt of court in the particular circumstances of the case. The *Aleksovski* judgement of the Appeals Chamber clearly supports this conclusion.

E. Ground 5:

44. Fifth, the Appellant submits that, should the Appeals Chamber concur with the Trial Chamber and find the Appellant guilty of contempt, the Trial Chamber nevertheless erred by imposing a sentence of four months because it did not give due weight to the individual circumstances of the Appellant.[75] The Appellant says that the Trial Chamber suspended that sentence for two years because of the medical condition of the Appellant but that this has no bearing on the severity of the sentence imposed.[76] The Appellant requests the Appeals Chamber to review the sentence imposed by the Trial Chamber and to substitute its own sentence on the basis of a discernible error in the Trial Chamber's exercise of its discretion.[77]

45. The Appellant argues that the Trial Chamber erred in the exercise of its discretion by failing to take into account as a mitigating factor the change in circumstances which the Appellant faced when he appeared before the Trial Chamber on 19 April 2005 to continue his testimony;[78] erred by not giving due consideration to the personal circumstances of the Appellant;[79] and erred by failing to give due consideration to fact that the Appellant completed his testimony before the Trial Chamber on Monday 25 April 2005.[80] The Appellant argues further that the sentence imposed by

[75] Notice of Appeal, para. 14.
[76] Appeal, para. 165.
[77] *Ibid*, para. 178.
[78] *Ibid*, para. 166(a).
[79] *Ibid*, para. 166(b).
[80] *Ibid*, para. 166(c).

the Trial Chamber constitutes a marked departure from the sentencing practice of the Tribunal in contempt proceedings.[81]

46. The Appellant says that, for him, two crucial persons were missing on 19 April 2005: the Accused; and, the person who conducted the examination-in-chief, whom he holds in high esteem and whom he wished to help.[82] He claims that he suffered stress and anxiety due to the absence of the Accused and in this context the proceedings that then took place constituted a significant factor in mitigation which the Trial Chamber failed to take into account.[83] The Appellant claims that while the Trial Chamber stated in the Impugned Decision that "[i]f the reasons behind the stance taken by the [Appellant] have any relevance at all, it is in relation to the question of penalty", it did not take this into consideration or, if it did, it failed to mention it in considering the sentence to be imposed in the Impugned Decision.[84]

47. The Appellant claims that other than stating that "the conduct of the Appellant would normally merit the immediate imposition of a custodial sentence in order to mark the gravity of the offence and to deter others from defying the authority of the Trial Chamber", the Trial Chamber did not mention which factors it considered as aggravating or mitigating circumstances in imposing a sentence of four months imprisonment.[85]

48. The Appellant claims further that the Trial Chamber erred by not giving due weight to his personal circumstances. These included his cooperation with all parties in the courtroom during his testimony; his positive attitude and genuine interest in contributing to the establishment of the truth; his calm and reasonable approach to the questioning of the Trial Chamber and his attempts to explain why he could not continue with his testimony; his willingness to accommodate the Trial Chamber by offering to continue his testimony at anytime provided the Accused was present; and his return to the Tribunal to face the contempt proceeding on 6 May 2005.[86]

49. The Appellant finally claims that the Trial Chamber erred by failing to give due weight to the important fact that he remained in The Hague and completed his testimony on Monday 25 April 2005.

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[81] *Ibid*, para. 167.
[82] *Ibid*, para. 168.
[83] *Ibid*, para. 169.
[84] *Ibid*, para. 170.
[85] *Ibid*, para. 171.
[86] *Ibid*, para. 172.

50. Taking account of all these circumstances the Appellant claims that the sentence of four months imprisonment was "plainly unreasonable as well as an abuse of the Trial Chamber's discretion".[87] He claims that one example of the sentencing practice of the Tribunal in relation to contempt illustrates the unreasonableness of his sentence.[88] The Appeals Chamber notes that Trial Chamber I found Beqa Beqaj guilty of contempt for wilfully and knowingly interfering with a potential witness when considering the evidence as a whole with regard to six alleged incidents of interference with the aim of influencing the testimony of the witness. He was sentenced under one count to four months in prison.[89]

51. The Appellant argues that an appropriate sentence in his case is "a symbolic punishment of one (1) day imprisonment, suspended for a period of not more than six (6) months".[90]

52. In Response, the Prosecution argues that the practical effect of the sentence imposed by the Trial Chamber is no penalty unless the Appellant commits another offence in two years. It claims that it is therefore unreasonable for the Appellant to argue that the suspension of the sentence has no bearing on its severity. It claims that "very little impacts its severity as much as suspending it".[91]

53. With respect to the argument of the Appellant that the Trial Chamber failed to take into account relevant mitigating factors the Prosecution says that the Trial Chamber did consider mitigating factors and suspended the Appellant's sentence because of the mitigating circumstance of his ill health. It argues that the fact that the Trial Chamber did not mention any additional mitigating circumstances does not mean that it did not consider them, but that it did not find them to be relevant or persuasive. It says, taking into account the aggravating circumstances of the case, the suspension of the sentence demonstrates the discretion exercised by the Trial Chamber.[92]

54. The Prosecution argues that the suspended sentence is within the discretion of the Trial Chamber and that there is clear authority in national jurisdictions for the imposition of punitive sentences of imprisonment in contempt cases.[93]

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[87] *Ibid*, para. 174.
[88] *Ibid*, para. 175.
[89] *See Prosecutor v. Beq Beqaj*, Case No. IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005, paras. 49-57.
[90] Appeal, para. 179.
[91] Response, para. 108.
[92] *Ibid*, para. 109.
[93] *Ibid*, paras. 110-111.

55. Finally, the Prosecution argues that in this case the Trial Chamber imposed "no actual penalty" and as such the sentence cannot be considered "plainly unreasonable" and an abuse of its discretion. It says that the suspended sentence was within the Trial Chamber's discretion, and no discernible error has been shown on the part of the Trial Chamber.[94] Accordingly, the sentence imposed by the Trial Chamber should be affirmed by the Appeals Chamber.[95]

56. In Reply, the Appellant argues that the Prosecution arguments regarding the impact of the suspension of the sentence are incorrect. He claims that the fact that a sentence of imprisonment is suspended does not change the fact that the Trial Chamber considered a sentence of four months imprisonment to be the appropriate sentence. A consideration as to whether a sentence should be suspended follows the determination of the actual sentence to be imposed.[96] The Appellant argues that this sentence will be reflected on his criminal record and if the suspended sentence is activated he will spend four months in prison.[97]

57. The Appellant also reiterates that contrary to the arguments of the Prosecution, the Trial Chamber did not consider the mitigating factors relevant to the Appellant and that this is plainly a discernible error. The Appellant argues that no reasonable trier of fact could have concluded that in the circumstances of this case that four months imprisonment is an appropriate sentence.[98] The Appellant argues further that the Prosecution's reference to national practice is misleading as there are other authorities showing a lenient approach to contemnors.[99]

Analysis

58. Trial Chambers are vested with a broad discretion in determining an appropriate sentence and the Appeals Chamber will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[100]

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[94] *Ibid,* para. 112.
[95] *Ibid,* para. 1, page 38.
[96] Reply, para. 73.
[97] *Ibid,* paras. 74-76.
[98] *Ibid,* paras. 78-81.
[99] *Ibid,* para. 83.
[100] *Prosecutor v. Tadić*, Judgement in Sentencing Appeals, Appeals Chamber, Case No. IT-94-1-A, 26 Jan. 2000, para. 23; *Prosecutor v. Aleksovski*, Judgement, Appeals Chamber, Case No. IT-95-14/1-A, 24 Mar. 2000, para. 187; *Furundžija* Appeal, para. 239; *Delalić* Appeal, para. 725; *Prosecutor v. Kupreškić et al.*, Judgement, Appeals Chamber, Case No. IT-95-16-A, 23 Oct. 2001, para. 408; *Prosecutor v Jelisić,* Judgement, Appeals Chamber, Case No. IT-95-10-A, 5 July 2001, para. 99; *Prosecutor v. Krstić,* Judgement, Appeals Chamber, Case No.IT-98-33-A, 19 Apr. 2004, para. 242; *Prosecutor v. Blaškić,* Judgement, Appeals Chamber, Case No. IT-95-14-A, 29 July 2004, para. 680; *Prosecutor v. Babić,* Judgement on Sentencing Appeal, Appeals Chamber, Case No. IT-03-72-A, 18 July 2005, para. 7.

59. The Appeals Chamber is not satisfied that the Appellant has established that the Trial Chamber erred in failing to consider the absence of the Accused as a factor in mitigation of the sentence imposed on the Appellant. The Appellant's refusal to answer questions because of that absence was the basis of the contempt proceedings and the Appeals Chamber is not satisfied that the Trial Chamber committed a discernible error by failing to treat it as a factor in mitigation. The reference to the remark of the Trial Chamber in the Impugned Decision, that if the reasons for the Appellant's refusal have any relevance it was in relation to penalty, does not mean that the Trial Chamber was therefore bound to find that it did have actual relevance in relation to the penalty imposed. It was well within the Trial Chamber's discretion to find that it had no such relevance.

60. The Appeals Chamber is also not satisfied that the Trial Chamber committed a discernible error in the exercise of its discretion by failing to afford weight to the fact that the Appellant had in the presence of the Accused cooperated with the parties and shown his willingness to accommodate the Chamber and continue with his testimony. The Appellant had an obligation as a witness to give evidence and to continue with that evidence in the absence of the Accused as ordered by the Trial Chamber. The fact that he was willing to give evidence on his own terms is not a factor that the Trial Chamber was bound to consider as mitigating. Nor is the Appellant's assertion of a positive attitude and commitment to establishing the truth, or the fact that he remained in The Hague in order to complete his testimony in the presence of the Accused.

61. The Appeals Chamber is also not satisfied that the Trial Chamber erred in imposing a four months sentence on the Appellant such that in the circumstances of this case that sentence is plainly unreasonable.

62. The Appeals Chamber is also not satisfied that the circumstances of this Appellant should be compared to the circumstances of other accused convicted of contempt by this Tribunal. Trial Chambers have the discretion to tailor sentences in contempt proceedings as they find appropriate, and so long as the sentences are merited by the individual circumstances of a case, a Trial Chamber is not obligated to consider whether the same sentence has been given for a more or less serious contempt charge in another case.[101]

[101] "[T]he precedential effect of previous sentences rendered by the International Tribunal...is not only 'very limited' but 'also not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence.' The reasons for this are clearly set out in the case law of the International Tribunal: (1) such comparison can only be undertaken where the offences are the same and committed in substantially similar circumstances; and (2) a Trial Chamber has an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the

63. Accordingly, this ground of appeal also fails.

For the reasons stated above the Appellant's appeal is **DISMISSED**.

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

Done this 29th day of August 2005
At The Hague
The Netherlands

Theodor Meron
Presiding

[Seal of the Tribunal]

gravity of the crime." *Babić* Sentencing Appeal, para. 32 (internal citations omitted). *See also Ćelebići* Appeal Judgement, paras. 717, 720 and 821.