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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-00-39-AR73.2

Date: 15 September 2006

Original: English

BEFORE THE APPEALS CHAMBER

Before: **Judge Andrésia Vaz, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr Hans Holthuis**

Decision of: **15 September 2006**

THE PROSECUTOR

v.

Momčilo KRAJIŠNIK

DECISION ON KRAJIŠNIK'S APPEAL AGAINST THE TRIAL CHAMBER'S DECISION DISMISSING THE DEFENSE MOTION FOR A RULING THAT JUDGE CANIVELL IS UNABLE TO CONTINUE SITTING IN THIS CASE

Counsel for the Prosecutor:

Mr. Mark B. Harmon
Mr. Alan Tieger

Counsel for the Defence:

Mr. Nicholas Stewart
Mr. Davis Josse

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seized of an interlocutory appeal filed by the Defence for Momčilo Krajišnik ("Appellant") on 30 June 2006[1] against the decision of Trial Chamber I ("Trial Chamber")[2] dismissing the Appellant's request to declare that Judge Canivell is unable to continue sitting in this case and has not been validly sitting since 8 May 2006, and that the Presiding Judge should immediately report to the President under Rule 15*bis*(C) of the Rules of Procedure and Evidence ("Rules").[3] The Prosecution responded to the Appeal on 10 July 2006[4] and the Appellant filed his Reply on 14 July 2006.[5]

2. The Appeals Chamber was also seized by the "Defence Motion that His Honour Judge Meron Not Sit on This Appeal" filed by the Appellant on 13 July 2006.[6] Following the Order of the Tribunal's Vice-President dated 16 August 2006,[7] a panel of three Judges was constituted. The said motion was refused on 1 September 2006.[8]

I. BACKGROUND

3. The Appeals Chamber notes that, pursuant to Article 13*ter* of the Statute of the Tribunal ("Statute") introduced by the UN Security Council's Resolution 1329/2000 of 30 November

[1] Appeal against the Trial Chamber's Decision of 16 June 2006 Dismissing the Defense Motion for a Ruling that His Honour Judge Canivell is Unable to Continue Sitting in this Case, 30 June 2006 ("Appeal").
[2] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Defence Motion for a Ruling that His Honour Judge Canivell is Unable to Continue Sitting in this Case, 16 June 2006 ("Impugned Decision"). On 22 June 2006, the Appellant filed the Defence Application for Certification pursuant to Rule 73(B) of the Rules of Procedure and Evidence to Appeal against Decision on Defense Motion for a Ruling that His Honour Judge Canivell is Unable to Continue Sitting in this Case, and on 23 June 2006, the Trial Chamber granted certification (Decision on Defence Application for Certification to Appeal against Trial Chamber's Decision of 16 June 2006).
[3] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Defence Motion for a Ruling that His Honour Judge Canivell is Unable to Continue Sitting in this Case, 16 May 2006.
[4] Prosecution's Response to Defence Appeal against the Trial Chamber's Decision Dismissing the Defense Motion for a Ruling that His Honour Judge Canivell is Unable to Continue Sitting in this Case, 10 July 2006 ("Response").
[5] Defence Reply to the Prosecution's Response to Defence Appeal against the Trial Chamber's Decision Dismissing the Defence Motion for a Ruling that His Honour Judge Canivell is Unable to Continue Sitting in this Case, 14 July 2006 ("Reply").
[6] Defence Motion that His Honour Judge Meron Not Sit on this Appeal, 13 July 2006. *Cf.* Order Replacing a Judge in a Case before the Appeals Chamber, 11 July 2006.
[7] Order Pursuant to Rule 15, 16 August 2006.
[8] Order on Defence Motion that his Honour Judge Meron Not Sit on an Appeal, 1 September 2006; Report to Vice-President Pursuant to Rule 15(B)(ii) Concerning Decision on Defence Motion That Judge Meron Not Sit on an Appeal, 1 September 2006.

2000,[9] as amended by Resolution 1597/2005,[10] *ad litem* judges "shall be elected for a term of four years" with the possibility of subsequent re-election, provided that "[d]uring any term" they will "serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years".

4. The Appeals Chamber recalls that Judge Joaquín Martín Canivell was elected *ad litem* judge of the Tribunal for a four-year term of office beginning on 12 June 2001.[11] On 1 May 2003, Judge Canivell was appointed to serve as *ad litem* Judge of the Tribunal,[12] and on 8 May 2003, he was assigned to Trial Chamber I to sit on the case of *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT ("*Krajišnik* case").[13]

5. On 6 January 2005, as per the letter of the Tribunal's President,[14] the UN Secretary General informed the Presidents of the UN General Assembly and of the Security Council that seven *ad litem* judges, including Judge Canivell, were appointed to cases which were likely to continue beyond 11 June 2005, the date of expiration of their mandates, and expressed his view that, in the absence of a relevant provision of the Statute, the approval of the Security Council and of the General Assembly was needed for these judges to continue sitting in their cases beyond that date in order to avoid having to re-hear the case by a new Chamber.[15] At that time, it was anticipated that the *Krajišnik* case would be completed by April 2006, and thus, the cumulative period of service of Judge Canivell would not exceed the three-year limitation.[16] Subsequently, the Security Council, by Resolution 1581/2005 of 18 January 2005,[17] and the General Assembly, by its decision of 20 January 2005,[18] decided that, with the view to "enhance the effectiveness of trial proceedings and contribute towards ensuring the implementation of the Completion Strategy", Judge Canivell, as well as the

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[9] S/RES/1329 (2000), Distr. 5 December 2000.
[10] S/RES/1597 (2005), 20 April 2005.
[11] A/55/PV.102, UN General Assembly, 55th session, 102nd Plenary Meeting, 12 June 2001, p. 8.
[12] Letter of Appointment of Judge Canivell from the UN Secretary General, dated 14 April 2003.
[13] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Order Assigning *Ad Litem* Judge to a Case before a Trial Chamber, 8 May 2003. *See also Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on Chamber's Composition, 15 May 2003.
[14] Letter from the President of the Tribunal to Mr. Hutchinson, UN Senior Legal Officer in Charge of the Office of Legal Counsel and to Mr. Michel, Under-Secretary General dated 4 January 2005; Letter from the President of the Tribunal to Mr. Zacklin dated 21 December 2004.
[15] Election of Judges 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 - Identical Letters dated 6 January 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, UN Doc. A/59/666 – S/2005/9, p. 2.
[16] *Ibid.*, p. 3.
[17] S/RES/1581 (2005), 18 January 2005.
[18] A/59/PV.80, UN General Assembly, 59th session, 80th Plenary Meeting, 20 January 2005, p. 3.

other six Judges, could finish the cases to which they had been assigned to before expiry of their terms of office.

6. On 22 March 2006, the President of the Tribunal informed the UN Secretary-General that due to unexpected circumstances the *Krajišnik* case could only be completed by August or September 2006, seeking "confirmation from the Council as well as from the General Assembly that [Judge Canivell] can continue to sit in this case beyond [April 2006] and see the case through to its completion, notwithstanding the fact that the cumulative period of his service would then attain and exceed three years".[19] The UN Secretary General addressed his request in this regard to the Presidents of the General Assembly and of the Security Council on 27 March 2006,[20] and on 10 April 2006, the Security Council unanimously adopted Resolution 1668/2006,[21] in which it decided "to confirm that Judge Joaquín Canivell can continue to sit in the Krajišnik case beyond April 2006 and see the case through to its completion, notwithstanding the fact that the cumulative period of his service in the International Criminal Tribunal for the Former Yugoslavia would then attain and exceed three years". The General Assembly confirmed this decision on 13 April 2006.[22]

7. In the Impugned Decision, the Trial Chamber ruled that: (i) the rights of the Accused were not infringed by the UN Security Council's Resolution 1668/2006;[23] (ii) Resolution 1668/2006 was a mere administrative act, allowing the Trial Chamber to complete the case in its present composition without undue delay;[24] (iii) the UN Security Council and General Assembly did not improperly usurp the Tribunal's functions in this case;[25] and (iv) Security Council resolutions should be implemented by the Tribunal if they do not interfere with the Tribunal's judicial function, and in the present case they did not.[26]

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[19] Letter dated 22 March 2006 from the President of the Tribunal to the Secretary-General, annexed to identical letters dated 27 March 2006 from the Secretary-General to the President of the General Assembly and the President of the Security Council, A/60/741-S/2006/199.
[20] Identical Letters dated 27 March 2006 from the Secretary-General to the President of the General Assembly and the President of the Security Council, A/60/741 – S/2006/199.
[21] S/RES/1668 (2006), 10 April 2006.
[22] A/60/PV.76, UN General Assembly, 60th session, 76th Plenary Meeting, 13 April 2006, p. 3.
[23] Impugned Decision, para. 17.
[24] *Ibid.*, para. 18.
[25] *Ibid.*, para. 19.
[26] *Ibid.*, para. 20.

II. DISCUSSION

8. As a general matter, the Appeals Chamber finds that the Appellant's argument lacks clarity. In sum, in his Appeal, the Appellant submits that Judge Canivell continues to sit in the *Krajišnik* case in direct contravention of the Statute,[27] arguing that the Trial Chamber adopted an erroneous view of the powers of the UN Security Council and General Assembly, as well as the duties of the Tribunal's President, and misapplied the Statute.[28] The Prosecution objects to all grounds submitted in the Appeal.[29] The essence of the Appeal is the allegation that "the Security Council is not empowered to override the clear terms of the [Tribunal's] Statute by means of an *ad hoc* resolution, such as Security Council resolution 1668".[30] In the Appellant's view, only an amendment to the Statute could create an exception to Article 13*ter*(2) of the Statute and secure its right to be prosecuted in accordance with the Statute under Article 1 of the Statute. The Appeals Chamber will first address the parties' submissions related to the procedure authorizing Judge Canivell to continue sitting in the case and then turn to the issue of whether Resolution 1668/2006 encroached upon the Tribunal's judicial function.

9. The Appeals Chamber notes that the Appellant expressly relies on the arguments contained in his relevant submissions before the Trial Chamber.[31] In this regard, the Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.[32] Consequently, a party may not merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber.[33] Moreover, the Appeals Chamber will

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[27] Appeal, para. 9.
[28] *Ibid.*, para. 8; ground (e), paras 17-18 and ground (j), paras 27-29.
[29] Response, paras 3, 38, 41, 42, 46, 47, 49.
[30] Reply, para. 31.
[31] *See, e.g.*, Appeal, para. 9 and Reply, para. 4.
[32] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006, para. 5; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić Interlocutory Appeal against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 6.
[33] *Prosecutor v. Savo Todović*, Case No. IT-97-25-/I-AR11*bis*.1 & IT-97-25/I-AR11*bis*.2, Decision on Savo Todović's Appeals Decisions on Referral under Rule 11*bis*, 4 September 2006, paras 73 and 112; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 13; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 13; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 7 with reference to *Prosecutor v. Dragoljub Kunarac*, Case No. IT-96-23 & IT-96-23/1/-A, Judgement, 12 June 2002, paras 35 *et seq.* *See also, Prosecutor v. Enver Handžihasanović and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 9 and, generally, paras 31, 35-36.

only reverse a Trial Chamber's decision if the latter committed a specific error of law or fact invalidating the decision or weighed relevant or irrelevant considerations in an unreasonable manner.[34]

A. Alleged Error of the Trial Chamber in Concluding that Resolution 1668/2006 Constitutes a Legal Basis for Judge Canivell to Continue Sitting in *Krajišnik* Case

10. The Appellant submits that the Trial Chamber erred in (i) failing to apply the mandatory prohibition in Article 13*ter*(2) of the Statute;[35] (ii) inferring that a request for assistance from the Tribunal's President gave any power to the Security Council and/or the General Assembly to override the Statute's terms;[36] (iii) finding that Resolution 1668/2006 was a mere administrative act;[37] (iv) concluding that the intervention of the Security Council and the General Assembly by way of an *ad hoc* resolution, rather than amending the Statute "'prevented' the 'significant hamper[ing]' of the 'Tribunal's duty to exercise its judicial functions in the interests of justice'";[38] and (v) deciding that the Tribunal should implement Security Council resolutions even if they constitute *ad hoc* directives with the effect of overriding the Statute.[39]

11. The Prosecution responds that Resolution 1668/2006 constitutes a valid legal basis for Judge Canivell to continue to sit in the *Krajišnik* case because the Security Council acted within its constitutional limitations in adopting unanimously the Resolution, whose wording is not ambiguous and which is binding on the Tribunal, a subsidiary organ of the Security Council.[40] It adds that, even if the Appeals Chamber were to decide to apply, *mutatis mutandis,*[41] the provisions of the Vienna Convention on the Law of Treaties[42] and maxims of

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[34] *Prosecutor v. Jadranko Prlić et al.,* Case No. IT-04-74-AR72.1, Decision on Petković's Interlocutory Appeal against the Trial Chamber's Decision on Jurisdiction, 16 November 2005, para. 11; *Prosecutor v. Slobodan Milošević,* Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 10; *Prosecutor v. Milan Milutinović*, Case No. IT-99-37-AR65.3, Decision Refusing Milutinović Leave to Appeal, 3 July 2003, para. 22.
[35] Appeal, ground (c), paras 14-15.
[36] *Ibid.*, ground (e), paras 17-18 and ground (j), paras 27-29.
[37] *Ibid.*, ground (g), paras 21-22.
[38] *Ibid.*, ground (h), para. 23 with reference to the Impugned Decision, para. 17.
[39] *Ibid.*, ground (i), paras 24-26 with reference to the Impugned Decision, para. 20.
[40] Response, paras 5, 15, in response to grounds (a) to (d), (h) and (i).
[41] *Ibid.*, para. 17.
[42] Vienna Convention on the Law of Treaties, adopted on 22 May 1969 and opened for signatures on 23 May 1969, entered into force on 27 January 1980 ("Vienna Convention").

statutory interpretation in order to interpret the Statute and Resolution 1668/2006, the Appeal would still fail.[43]

12. The Prosecution further argues that the Trial Chamber did not infer that the President of the Tribunal gave to the Security Council and/or the General Assembly any power to override the Statute[44] and that the Appellant has failed to properly establish (i) that the Security Council exceeded its constitutional limitations in adopting the Resolution[45]; and (ii) that the Resolution constituted an interference with the Tribunal's judicial functions,[46] underlining that the Security Council is empowered to issue resolutions relating to the conditions of service of Judges of this Tribunal.[47]

13. In his Reply, the Appellant reiterates that the Security Council is not empowered to override the terms of the Statute[48] and that while Resolution 1668/2006 is clear in its meaning[49] and procedurally valid,[50] it is not binding on the Tribunal.[51] Responding to the Prosecution's arguments with respect to the applicable provisions of the Vienna Convention, the Appellant submits that since the terms of the Statute are clear, there is no need for the use of any extraneous aids to interpretation,[52] such as recourse to any preparatory works.[53] According to the Appellant, the application of the Vienna Convention itself would in any case result in the primacy of the plain and ordinary meaning of Article 13*ter*(2) of the Statute

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[43] Response, para. 16. In particular, the Prosecution claims that application of Articles 30.3 (which incorporates the principle *lex posterior derogat legi priori*), 31 (which deals with the general rules of interpretation of the terms of a treaty in their context and in the light of its object and purpose), 32 (which suggests supplementary means of interpretation, including the recourse of the preparatory work of a treaty and the circumstances of its conclusion) would lead to the conclusion that Resolution 1668/2000 provides for a valid exemption (Response, paras 17-28). It contends that the three-year service limit for *ad litem* judges must be interpreted in the light of the Resolution, constitutive of the context of the term of the Statute, by virtue of Article 31 of the Vienna Convention (Response, paras 24-26.) Furthermore, the Prosecution adds that the maxim *in dubio pro reo* is inapplicable since the interpretation of the Resolution does not raise doubts (Response, para. 34). Lastly, it maintains that the service limit set out in the Statute must be interpreted in the light of the exemption granted by the Security Council to Judge Canivell in the Resolution (Response, paras 35-38, citing the golden rule, the mischief rule, the purposive rule, the logical rule, the teleological rule and the maxim of *lex specialis*.)

[44] Response, paras 39 and 41, in response to grounds (e) and (j).

[45] *Ibid.*, para. 40.

[46] *Ibid.*, para. 43.

[47] *Ibid.*, para. 45.

[48] Reply, para. 31.

[49] *Ibid.*, para. 5 with reference to the Reply of 24 May 2006, paras 6-8.

[50] *Ibid.*, para. 5 with reference to the Motion, para. 7, and the Reply of 24 May 2006, paras 8 and 12.

[51] *Ibid.*, para. 5 with reference to the Motion, paras 7-22, and the Reply of 24 May 2006, paras 6-7 and 9.

[52] *Ibid.*, para. 13. *See also* paras 28-30.

[53] *Ibid.*, paras 23-26 with reference to the Vienna Convention, Article 32(b). In any event, the Appellant notes that "one of the compelling reasons for introducing *ad litem* judges was to 'face the problem of managing [the increased] quantity [of indictments and arrest] while not allowing itself to sacrifice the exemplarity and quality of its proceedings." (reference to UN Doc A/55/382 – S/2000/865 at page 5).

being upheld.[54] He further submits that a UN Security Council resolution cannot be interpreted pursuant to the Vienna Convention since it is not equivalent to a treaty.[55] The Appellant concludes that, in any event and according to principle of *in dubio pro reo,* the Appeals Chamber must adopt the interpretation favourable to the accused.[56]

14. In sum, the Appellant appears not to be disputing the procedural validity of the UN Security Council Resolution 1668/2006, but argues that it is not binding upon the Tribunal since the Statute has not been amended.

15. The Appeals Chamber recalls that the UN Security Council, acting under Chapter VII of the UN Charter as a legislator, has adopted the Statute and established the Tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, *i.e.*, as a measure contributing to the restoration and maintaining of peace in the former Yugoslavia.[57] While the UN Security Council is not a judicial organ and is not provided with judicial powers,[58] it exercises, in discharge of its functions, both decision-making and executive powers,[59] including those related to the mandates of the Tribunal's Judges.[60]

16. Without assuming competence to adjudicate on the validity of a resolution passed by the Security Council, the Appeals Chamber considers that the UN Security Resolution 1668/2006 was directed to administrative matters and did not interfere with the Tribunal's judicial function.

17. The Appeals Chamber notes that the Security Council is not required to amend the Tribunal's Statute in order to reflect all its resolutions. Contrary to what the Appellant appears to submit, the Security Council can address an administrative matter either by amending the Tribunal's Statute or by simply adopting a resolution – as it did. Thus, the ability to decide on a case by case basis whether to extend an *ad litem* judge's mandate and/or the three year cumulative service limitation falls within the Security Council's discretionary

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[54] Reply, para. 14.
[55] *Ibid.*, paras 15, 21-22.
[56] *Ibid.*, para. 27.
[57] *The Prosecutor v. Duško Tadić a.k.a. "Dule"*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Decision"), para. 38.
[58] *Ibid.*, para. 37.
[59] *Id.*
[60] For example, pursuant to Article 13*ter* of the Statute, the *ad litem* judges of the Tribunal are elected by the General Assembly from a list submitted by the Security Council.

powers.[61] The Appeals Chamber accordingly sees no merit in the Appellant's arguments in this respect.

18. Furthermore, the statutory limitation on the cumulative period of service of *ad litem* judges under Article 13*bis*(2) should be interpreted in light of its object, purpose, context and practical policy considerations, or *raison d'être* of the provision in question.[62] In this regard, the Appeals Chamber agrees with the Prosecution that "the choice of a three-year cumulative service limit appears to have been primarily motivated by budgetary considerations, and not by any issues concerning the fair trial of an accused".[63] Further, even at the time of establishment of the mechanism providing for the institution of *ad litem* judges, it was considered logically conceivable that extensions of service might be necessary where a trial would last longer than three years.[64] It is obvious that, in these circumstances, preventing Judge Canivell from sitting in the *Krajišnik* case until the end of the trial would in fact be detrimental to the right of the Accused[65] to be tried without undue delay under Article 21 of the Statute, this being the expression of the fundamental right enshrined in Article 14(3)(c) of the International Covenant on Civil and Political Rights of 1966.[66]

19. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber did not err in considering that Resolution 1668/2006 was a sound basis for Judge Canivell to continue sitting in the Krajišnik case.

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[61] *See supra,* para. 15; also see similar UN Security Council Resolutions, the most recent being S/RES/1705 (2006) of 29 August 2006, adopted following respective requests from the President of the International Criminal Tribunal for Rwanda ("ICTR") and the UN Secretary-General, and authorizing Judge Solomy Balungi Bossa to continue sitting in the *Butare* case until its completion notwithstanding Article 12*ter*(2) of the ICTR Statute and the fact that by doing so she may exceed her elected term as an *ad litem* Judge; *furthermore,* UN Security Council Resolution S/RES/1482 (2003) of 19 May 2003 for the ICTR, extending the term of Judge Maqutu (permanent Judge) for purposes of finishing the *Kamuhanda* and the *Kajelijeli* trials, but not the *Butare* trial. By the same resolution, the UN Security-Council decided to extend mandates for Judges Dolenc and Ostrovsky (permanent Judges) to finish the *Cyangugu* case and for Judge Pillay to finish the *Media* case, which they began before expiry of their term of office.

[62] *Cf. Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-AR72.1, Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, para. 12; *Tadić* Decision, para. 88; *See also Archbold,* International criminal Courts (Practice, Procedure, Evidence), 2005, paras 5-22 through 5-41.

[63] Response, paras 29-31.

[64] Report of the Advisory Committee on Administrative and Budgetary Questions to the General Assembly, "Conditions of Service for the *ad litem* Judges of the International Tribunal for the Former Yugoslavia", A/55/806, 23 February 2001, para. 14.

[65] And importantly, of other accused awaiting trial in the UN Detention Unit in The Hague.

[66] Article 14(3) of the ICCPR: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (c) To be tried without undue delay [...]".

B. Alleged Interference with the Independence or Impartiality of the Trial Chamber and the Appellant's Right to a Fair Trial

20. The Appellant submits that the Trial Chamber erred in concluding that continuing to hear the *Krajišnik* case by the current Bench would not interfere with the independence and impartiality of the Trial Chamber.[67] In the Appellant's view, such finding amounts to the "acceptance of an instruction by the UN Security Council and/or the General Assembly that the judges should disregard the clear wording of the Statute which it is their unequivocal judicial duty to apply in the trial of [the Appellant]".[68] The Appellant further submits that, because of the Trial Chamber's failure "to comply with the mandatory declaration" that the Tribunal shall function in accordance with provisions of the Statute, his trial is "now being conducted beyond the competence and power of the Tribunal under Article 1".[69]

21. The Appellant argues that the Trial Chamber also erred in holding that the Appellant's right under Article 21(3) of the Statute to be presumed innocent until proven guilty was not infringed by the implementation of the UN Security Council Resolution 1668/2006 adopted in violation of the explicit provision of Article 13*ter*(2) of the Statute,[70] as well as by failing to apply Rule 15*bis* of the Rules to the present situation, requiring a report to the President of the Tribunal[71] and thus denying the Appellant his right to "give or withhold consent to the substitution of a further judge".[72] The Appellant concludes that in holding so the Trial Chamber failed to take into account his legitimate expectation that "either his trial would be concluded before April 2006" or that "the Statute would be lawfully amended to allow the trial to continue".[73]

22. The Prosecution claims that the Appellant's respective submissions are unfounded. It argues that the Appellant has not shown that the Trial Chamber erred in law when it noted that Resolution 1668/2006 did not interfere with the independence or impartiality of the Chamber.[74] Furthermore, it submits that the Appellant has failed to raise properly the argument of legitimate expectation before the Trial Chamber and therefore the Trial Chamber

[67] Appeal, ground (f), paras 19-20.
[68] *Id.*
[69] *Ibid.*, ground (a), paras 9-10.
[70] *Ibid.*, ground (b), paras 11-13.
[71] *Ibid.*, ground (d), para. 16.
[72] *Ibid.*, ground (k), para. 30.
[73] *Id.*
[74] Response, para. 42.

did not err in not addressing it.[75] The Prosecution adds that, in any event, this argument is without merit, since the numerous adjournments and delays in this case have been granted by the Trial Chamber at the request of the Appellant's lawyers and in his interests.[76]

23. In light of its findings above,[77] the Appeals Chamber concludes that the Appellant's arguments related to the alleged breach of impartiality and independence of the Trial Chamber fails. In any case, the Appeals Chamber agrees with the Prosecution that the Appellant has not established that the Trial Chamber erred in concluding that its independence and impartiality, as well as the Appellant's right to a fair trial, had not been affected by the implementation of the UN Security Council Resolution 1668/2006.[78]

24. Rule 15*bis* procedures are also inapplicable to the present circumstances, since they only apply when a Judge is unable to continue sitting in a part-heard case. In the present case and as explained above,[79] Judge Canivell has been explicitly and lawfully authorized to continue sitting in the case until the end of the trial. Consequently, the Appellant's argument that he had a "legitimate expectation that Rule 15*bis* would be followed" and that the "Trial Chamber erred in neglecting to consider this fundamental principle of legal certainty"[80] is without merit.

25. Similarly and in light of the findings above, the Appeals Chamber fails to see how implementing the UN Security Council 1668/2006 could possibly violate the Appellant's right under Article 21(3) of the Statute to be presumed innocent until proven guilty. Allowing Judge Canivell to sit until the end of the present case has been done out of a legitimate concern in this trial to ensure that the proceedings do not suffer undue delays and that the trial is completed within a reasonable time, which is recognized as a fundamental right of due process.[81]

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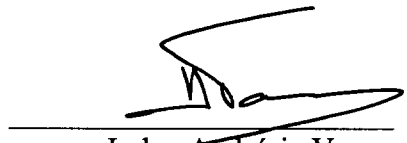
[75] *Ibid.*, para. 47.
[76] *Ibid.*, para. 48.
[77] *See supra,* paras 16-19.
[78] Impugned Decision, para. 17; Response, para. 42.
[79] *See supra,* paras 4-6 and 16-19.
[80] Reply, paras 7-12.
[81] *Prosecutor v. Jadranko Prlić et al.,* Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defense Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006, p. 4; *See supra*, para. 18

III. DISPOSITION

26. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal in its entirety.

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

Dated this 15th day of September 2006,
At The Hague,
The Netherlands.



Judge Andrésia Vaz
Presiding

[Seal of the Tribunal]