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-01-42-Misc.1

Date: 7 June 2007

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IN THE APPEALS CHAMBER

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

Registrar: **Mr. Hans Holthuis**

Decision of: **7 June 2007**

PROSECUTOR

v.

PAVLE STRUGAR

PUBLIC

DECISION ON STRUGAR'S REQUEST TO REOPEN APPEAL PROCEEDINGS

The Office of the Prosecutor:

Ms. Carla Del Ponte
Ms. Helen Brady
Ms. Michelle Jarvis
Mr. Xavier Tracol

Counsel for Mr. Strugar

Mr. Goran Rodić
Mr. Vladimir Petrović

1. 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 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Defence Request Seeking the Re-Opening of Appeal Proceedings Before the Appeals Chamber" ("Defence Request"), filed confidentially on 26 March 2007. The Appeals Chamber also notes the "Prosecution Response to Defence Confidential 'Request Seeking the Re-Opening of Appeal Proceedings Before the Appeals Chamber' Dated 26 March 2007" ("Prosecution Response"), filed confidentially on 5 April 2007.[1]

I. Background

2. On 31 January 2005, Trial Chamber II found Pavle Strugar ("Strugar") guilty pursuant to Article 7(3) of the Statute of the Tribunal ("Statute") of certain crimes in connection with the attack by the Yugoslav Peoples' Army on the Old Town of Dubrovnik constituting violations of the Laws or Customs of war, under Article 3 of the Statute. He was acquitted of the other four counts in the Indictment. The Trial Chamber imposed a single sentence of eight years imprisonment.[2]

3. Both parties appealed. Strugar appealed the Trial Chamber's convictions, its chosen sentence, and its conclusion that Strugar was fit to stand trial.[3] The Prosecution appealed the Trial Chamber's treatment of command responsibility, its approach to cumulative convictions, and its chosen sentence.[4] Ultimately, however, both parties withdrew their appeals, and the Appeals Chamber accepted these withdrawals.[5]

4. At issue in the Defence Request is whether Strugar can reinstate his appeal. Before turning to the arguments of the parties, the Appeals Chamber will set forth in detail the events leading up to the withdrawals of the appeals.

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[1] Although these filings were made confidentially, the Appeals Chamber considers it appropriate to issue this decision publicly. In the course of the decision, the Appeals Chamber discusses and sometimes quotes from confidential materials (such as the minutes from Rule 65*ter* conferences). The Appeals Chamber deems this public use of confidential materials to be suitable, particularly since the references to these confidential materials generally pertain to an issue – the question of the withdrawals of the appeals – that was discussed subsequently in a public status conference and in public filings. *See generally* Transcript of Status Conference, 31 August 2006 (Open Session); Defence Notice of Withdrawing Appeal, 15 September 2006 ("Defence Withdrawal"); Withdrawal of Prosecution's Appeal Against the Judgement of Trial Chamber II Dated 31 January 2005, 15 September 2006 ("Prosecution Withdrawal"). The Appeals Chamber nonetheless declines to lift further the confidential status of the confidential sources referred to in this decision, since many of these sources make reference to specific medical details which, in the interest of the privacy of the accused, should be kept confidential.

[2] Trial Judgement, 31 January 2005 ("Judgement"), para. 481.

[3] *See generally* Defence Appeal Brief, 8 July 2005.

[4] *See generally* Prosecution Appeal Brief, 17 May 2005.

[5] Defence Withdrawal; Prosecution Withdrawal; Final Decision on "Defence Notice of Withdrawing Appeal" and "Withdrawal of Prosecution's Appeal Against the Judgement of Trial Chamber II Dated 31 January 2005", 20 September 2006 ("Decision Accepting Withdrawals").

5. In the Trial Judgement, the Trial Chamber noted Strugar's "personal and family circumstances", including the fact that he was 71 years old (at the time of the Trial Judgement); that he was "in poor health [and] suffers in particular from some degree of vascular dementia and depression and experiences memory losses"; and that his wife, with whom he has been married for nearly half a century, would face significant hardship in his absence, particularly in light of her failing vision and need for assistance.[6] These circumstances continued to haunt Strugar during the course of his appeal. In addition, according to the Defence, Mr. Strugar's wife was "unable to visit him here because of, among other things, her eyesight difficulties. Her eyesight is impaired by 90 per cent. She is almost blind, and, for this reason, cannot visit him at the UNDU."[7] Finally, he developed other health concerns, including severe hip problems that required surgery.

6. With these humanitarian considerations in mind, and after the briefing in the appeal was completed, the Pre-Appeal Judge discussed with the parties the possibility of Strugar spending time in Montenegro. This occurred in a confidential meeting undertaken pursuant to Rule 65*ter*(I) of the Tribunal's Rules of Procedure and Evidence ("Rules") on 11 October 2005. The Pre-Appeal Judge explained that Strugar could not serve his detention pending appeal in Montenegro, but suggested that there was a possibility that he could serve his final sentence in Montenegro. To this end, the Pre-Appeal Judge asked the parties to consider whether they were willing to mutually withdraw their appeals.[8]

7. At a Status Conference on 12 December 2005, the Pre-Appeal Judge returned to the issue of whether the parties might withdraw their appeals with an eye to letting Strugar serve his final sentence in Montenegro. The Pre-Appeal Judge explained that:

> One pre-requisite would be ... that a judgement becomes final, but then there is no obstacle at all that Mr. Strugar would, in this case – of course, we have not discussed it in the Chamber as such, but Mr. Strugar would undergo all these treatments in Montenegro. I can assure you once again that I would be prepared to convince the necessary persons in this Tribunal that a sentence could also be served in Montenegro.[9]

The Prosecution responded that it would give due consideration to this approach, if the Defence were interested.[10] Defence Counsel responded that Counsel and Strugar had engaged in "detailed discussions of all the options that were open to [Strugar]", but that Strugar was "still deeply convinced that the first-instance decision is unjust and is not justified by facts" and thus determined to maintain his appeal.[11] Around this time, the Appeals Chamber granted provisional release for

[6] Trial Judgement, para. 469 (finding these circumstances to be mitigating factors).
[7] Transcript of Status Conference, 31 August 2006, p. 58 (Open Session).
[8] Confidential Minutes of 65*ter*(I) Meeting, 11 October 2005, para. 4.
[9] Transcript of Status Conference, 12 December 2005, pp. 49-50 (Private Session).
[10] *Ibid.*, p. 50.
[11] *Ibid.*

Strugar to go to Montenegro for the replacement of a hip, requiring however, that certain measures were in place in order to guarantee his presence for the continuation of the appellate hearings.[12]

8. In March 2006, the Pre-Appeal Judge held another Rule 65*ter*(I) conference. The Pre-Appeal Judge "invited the parties to further discuss ... in general terms the possibilities of the mutual withdrawal of appeals".[13] The Prosecution was willing, but the Defence remained hesitant.[14] The Pre-Appeal Judge stated "that transferring Mr. Strugar to serve sentence in his own country [Montenegro] should not be a problem".[15] The Pre-Appeal Judge further observed that there might be some difficulties in light of the absence of a bilateral agreement between Montenegro and the ICTY, and also that the detention facility in Montenegro would need to satisfy certain standards "and that it would no[t] be a kind of sham-detention. Applying Rule 11*bis* (B) *mutatis mutandis*, the detention center selected must comply with the conditions foreseen by the UN and the Council of Europe. In that sense, the authorities of Montenegro, for instance, should have to guarantee that a visit to the detention center can be done without notice, as stipulated by the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT)."[16] At the end of the meeting, the Defence agreed to look into whether Montenegro had an appropriate detention centre, and the Pre-Appeal Judge agreed to "talk with the President, the Registrar and the entire bench in order to find out whether it is possible to get an agreement with the competent authorities so that the Accused can serve his sentence in Montenegro."[17]

9. On 8 May 2006, the Defence filed a "Resolution of the Government of the Republic of Montenegro", which expressed the Government of Montenegro's willingness to work with the ICTY to enable Strugar to serve his sentence in Montenegro and which provided specifics on several possible detention facilities.[18] On 11 May 2006, another Rule 65*ter*(I) conference occurred. There, the Pre-Appeal Judge informed the parties that "the Appeals Chamber's position is that the Registrar and the President of the Tribunal have the last word in deciding whether or not Mr. Strugar can serve the sentence in Montenegro" and that the President "thinks positively about a transfer to Montenegro."[19] The Pre-Appeal Judge then "explain[ed] the legal reasoning behind a possible transfer of Mr. Strugar to serve sentence in Montenegro", referring to Article 27 of the

[12] Decision on "Defence Motion: Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro", 16 December 2005.
[13] Confidential Minutes of 65*ter*(I) Meeting, 30 March 2006, para. 1.
[14] *Ibid.*, paras 2-3.
[15] *Ibid.*, para. 4.
[16] *Ibid.*, para. 4.
[17] *Ibid.*, para. 8.
[18] This document was filed confidentially.
[19] Confidential Minutes of 65*ter*(I) Meeting, 11 May 2006, para. 4.

Statute of the Tribunal, Rules 102(a) and 103 of the Rules, and the Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment.[20] The Pre-Appeal Judge "stress[ed] yet again that he cannot guarantee that the sentence will be served in Montenegro," as the "preparations are for the Registry to be done, and the final word is for the President of the Tribunal."[21] The Pre-Appeal Judge recognized the hesitancy of the Defence to withdraw the appeal in the absence of a guarantee, but explained that "[f]ormal conversations between the Registry and the government of Montenegro will not start before a judgement has become final."[22] He urged the Defence to come to a speedy decision about whether it wished to withdraw its appeal.[23]

10. By a letter dated 22 May 2006, the Registry informed the Defence of its view that "[t]he enforcement of a sentence in Montenegro would currently be subject to a number of important legal and other obstacles, which would need to be removed."[24]

11. Several more months passed without clear resolution of the withdrawal issue. In the meantime, the oral hearings for the appeals were scheduled and then postponed.[25] Then, at a Status Conference on 31 August 2006, the parties further discussed Strugar's health and revisited the issue of withdrawal. With regard to his health, Strugar noted that, among other things, he would need a second hip operation.[26] Counsel for Strugar sought clarification from the Pre-Appeal Judge as to "whether, legally speaking, there is the possibility for such an option [of Strugar serving his sentence in Montenegro], which, in our opinion, would be the best solution for the situation in which Mr. Strugar currently finds himself."[27] The Pre-Appeal Judge responded that:

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[20] *Ibid.*, para. 5.
[21] *Ibid.*, para. 11.
[22] *Ibid.*, para. 12.
[23] *Ibid.*, paras 12-13.
[24] Letter from Hans Holthuis, Registrar, to Goran Rodić, Counsel for Strugar, 22 May 2006 ("Letter of 22 May 2006") (provided as Annex 5 to the Defence Request).
[25] Scheduling Order for Appeals Hearing, 18 May 2006; Scheduling Order Temporarily Cancelling Appeals Hearing, 24 May 2006.
[26] Transcript of Status Conference, 31 August 2006, p. 56 (Open Session).
[27] *Ibid.*, p. 59. In full, the pertinent remarks read as follows:

> "In our view, [proper] medical care could be provided to General Strugar only if he were to serve his sentence in one of the institutions in Montenegro, the country he hails from. In this regard, the Defence respectfully appeals to this Chamber to be of assistance in this matter and, if possible, to inform Mr. Strugar's Defence of their view as to whether there is a possibility, in the context of this Tribunal's Statute, Rules of Procedure and Evidence and other legal acts, in view of the very specific circumstances of this case that are quite different from other cases that were before this Tribunal, for Mr. Strugar to serve his sentence in one of the relevant facilities in the territory of Montenegro. Furthermore, the Defence would like to hear the views of the pre-appeals Judge with regard to such a possibility. Finally, I would like to say that the Defence is aware of the fact that when it comes to the discussion about the facilities to be determined for such a purpose, the Defence would be prepared to withdraw their notice of appeal, or appeals brief, in order to make this sentence final; that this would be, of course, the precondition for such a discussion. Therefore, we would like to know first whether, legally speaking, there is the possibility for such an option, which, in our opinion, would be the best solution for the situation in which Mr. Strugar currently finds himself."

> the Registrar, in consultation with the President, would first have to conclude agreement with the Republic of Montenegro ..., and the prison conditions in Montenegro would have to fulfil the standards required by the Statute, the Rules and the relevant United Nations provisions and principles. Thus, as a Pre-Appeal Judge, I'm not authorised to decide the matter.[28]

The Pre-Appeal Judge went on to observe, however, that:

> I have carefully reviewed the legal situation and, personally, I do not see any general obstacle to give a strong recommendation to both the Registrar and the President to grant, if there should be a mutual withdrawal of both appeals and therefore the sentence has become final, the conviction has become final, to grant such a motion for humanitarian reasons based on the health situation of Mr. Strugar.[29]

The Pre-Appeal Judge continued:

> I have to submit this to the entire Bench, which has to decide whether or not to accept such withdrawals as being informed, voluntary and unequivocal ones and to order, if need may be, final dispositions pursuant to Rules 101(C) and 103(C) of the Rules.[30]

The Pre-Appeal Judge further stressed "that [a withdrawal], under no circumstances, can be revoked. Therefore, I have to re-emphasise that I'm not able give any guarantees."[31]

12. Later on in the Status Conference, Strugar expressed his intent to withdraw the appeal. The Pre-Appeal Judge reminded Strugar that "your decision has to be an informed one. You have heard that neither I nor the Chamber as such can give any guarantees at this point in time because the power is clearly vested in the Registrar and finally the President. Once again, you have fully understood ... that once you have taken a decision, the decision cannot be revoked?"[32] Strugar responded "Yes. I have."[33]

13. On 15 September 2006, both parties filed withdrawals of their appeals. The Defence Withdrawal stated that "General Strugar has reached the aforesaid decision [to withdraw] after being informed that there exist no legal impediments which could prevent him from serving the remainder of his prison sentence in Montenegro."[34] A footnote to this statement cited remarks of the Pre-Appeal Judge quoted above from the 31 August 2006 Status Conference.[35] The Defence Withdrawal also attached a signed statement of Strugar as an Annex. This stated in part: "I hereby confirm that I am informed and aware of all of the legal consequences of my above decision, including the fact that, once the Appeal is withdrawn, there is no possibility of subsequent

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[28] *Ibid.*, p. 61.
[29] *Ibid.*
[30] *Ibid.*, p. 62.
[31] *Ibid.*
[32] *Ibid.*, p. 65.
[33] *Ibid.*
[34] Defence Withdrawal, para. 10.
[35] *Ibid.*, fn. 3 (citing the text accompanying footnote 29, *supra*).

reconsideration of the Judgement, pursuant to which I was convicted, in the Appellate proceedings, and having the same abolished or altered in my favor."[36] The Prosecution Withdrawal stated that "[o]n the basis that Pavle Strugar has withdrawn his appeal against the Judgement, the Prosecution hereby withdraws its own appeal in this case."[37] Both withdrawals also noted the "humanitarian circumstances" in relation to Strugar's age and health.[38]

14. On 20 September 2006, the Appeals Chamber issued the Decision Accepting Withdrawals. In this decision, the Appeals Chamber accepted the withdrawals and declared the appellate proceedings to be finished. It took into consideration the above-mentioned statement and the references to humanitarian circumstances.[39]

15. On 15 March 2007, Counsel for Strugar received a letter from the Registry stating that Mr. Strugar would not serve his sentence in Montenegro. The letter explained:

> The Republic of Montenegro was informed that agreements with respect to the enforcement of sentences of persons convicted before the Tribunal are negotiated by the Registrar. The facilities in which convicted persons of the International Tribunal serve their sentences must conform to international standards outline [*sic*] by various international treaties and non-governmental organizations. Further, the State in question must have legislation in relation to the implementation of the Tribunal's Statute.
>
> Pursuant to Article 4 of the Practice Direction on the Procedure for the International Tribunal's Designation of the State in Which a Convicted Person is to Serve His/Her Sentence of Imprisonment, the President decides in which of the States with which the Tribunal has an enforcement agreement a sentence is enforced. Moreover, we have verified with the Office of Legal Affairs at UN Headquarters that resolution 827 of the Security Council, accepting the Secretary General's report, S/25704, in which it is stated that 'the enforcement of sentences should take place outside the territory of the former Yugoslavia', places a geographic restriction.
>
> As a result, the Tribunal is presently not in a position to conclude an agreement for enforcement of sentences within the Republic of Montenegro.[40]

This letter refers to paragraph 1 of the Security Council's Resolution 827 (adopted 25 May 1993), which "[a]pprove[d] the report of the Secretary General"; and to paragraph 121 of the report itself, which expressed the Secretary-General's view that "given the nature of the crimes in question and the international character of the tribunal, the enforcement of sentences should take place outside the territory of the former Yugoslavia."

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[36] Annex to Defence Withdrawal.
[37] Prosecution Withdrawal, para. 2.
[38] Defence Withdrawal, paras 9, 12; Prosecution Withdrawal, para. 2.
[39] Decision Accepting Withdrawals, p. 1 (quoting Annex to Defence Withdrawal, Defence Withdrawal, and Prosecution Withdrawal).
[40] Letter from Hans Holthius, Registrar, to Goran Rodić, Counsel for Strugar, 15 March 2007 ("Letter of 15 March 2007") (provided as Annex 8 to the Defence Request).

II. Arguments of the Parties

16. In the Defence Request, Strugar seeks to reopen his appeal.[41] He explains that one reason he sought to withdraw his appeal "was the fact that [he] was informed that there do not exist legal impediments that would prevent him from serving the remainder of his prison sentence in Montenegro".[42] In his view, the letter from the Registry of 15 March 2007 shows that there is in fact a clear legal impediment to his serving his sentence in Montenegro – namely, Security Council Resolution 827 (as interpreted by the Office of Legal Affairs at UN Headquarters).[43] Because he did not know of this legal impediment, he considers that his withdrawal was not an informed one.[44] Drawing a parallel to Rule 62*bis* of the Rules (which provides that guilty pleas must be found to be informed), he argues that an uninformed withdrawal cannot be deemed valid.[45] Strugar thus seeks revocation of the Decision Accepting Withdrawals. He also requests an oral hearing on this issue.

17. The Prosecution Response opposes the Defence Request. The Prosecution accepts the parallel to Rule 62*bis* of the Rules, but considers that Strugar's withdrawal was an informed one.[46] In the Prosecution's view, the question is not whether Strugar was informed of the existence of legal impediments; rather, it is whether Strugar was informed "that his withdrawal was not conditional upon him serving his sentence in Montenegro and that it was irrevocable".[47] The Prosecution submits that Strugar was indeed informed that his withdrawal was irrevocable and that he might not ultimately serve his sentence in Montenegro. The Prosecution also considers that in any event Strugar knew there were possible legal obstacles in light of the Registry's Letter of 22 May 2006 and the Pre-Appeal Judge's statements that he could make no guarantees.[48] The Prosecution considers that no oral hearing on this issue is necessary in light of the written submissions.[49] Finally, the Prosecution states that should the Appeals Chamber grant the Defence

[41] The Appeals Chamber notes that Strugar has also sought other forms of relief. He asked the Appeals Chamber to allow him to return to Montenegro to receive medical treatment under detention conditions (a request this Chamber dismissed for lack of jurisdiction) and that the Appeals Chamber defer addressing the Defence Request until Strugar had received medical treatment (a request this Chamber denied). *See* Defence Request for Providing Medical Aid, 10 May 2007 (filed confidentially); Confidential Addendum, filed 14 May 2007; Defence Request Seeking the Postponement of the Decision to the 'Confidential Defence Request Seeking the Re-Opening of Appeal Proceedings before the Appeals Chamber', 10 May 2007 (filed confidentially); Prosecution Consolidated Response to the Defence Requests Dated 10 May 2007, 17 May 2007 (filed confidentially); Decision on Strugar's Requests Filed 10 May 2007, 23 May 2007 (filed confidentially). The Appeals Chamber also observes that Strugar filed a confidential "Defence Request Seeking Early Release" with the President of the Tribunal on 26 March 2007; and a confidential "Defence Submission" with the President of the Tribunal on 10 May 2007.
[42] Defence Request, para. 13.
[43] *Ibid.*, paras 35-39.
[44] *Ibid.*, paras 39, 41-42.
[45] *See ibid.*, para. 38.
[46] Prosecution Response, para. 4.
[47] *Ibid.*, para. 7.
[48] *Ibid.*, para. 8.
[49] *Ibid.*, para. 10.

Request, then it should also reinstate the Prosecution's appeal, as the Prosecution Withdrawal was conditional on the Defence Withdrawal.[50]

18. Strugar has not filed a reply to the Prosecution Response.

III. Discussion

19. To begin with, the Appeals Chamber rejects Strugar's request for an oral hearing. No provision of the Rules so requires, and the Appeals Chamber considers that it can adequately dispose of the Defence Request on the basis of the written filings.[51]

20. The Appeals Chamber next turns to preliminary matters of some importance: namely, how to characterize the Defence Request procedurally and whether the Appeals Chamber has jurisdiction regarding it. The Decision Accepting Withdrawals terminated the appeal proceedings in Strugar's case.[52] It transformed him from an appellant into an individual with a final sentence. To reopen his case, Strugar must thus convince the Appeals Chamber to revisit the Decision Accepting Withdrawals. For the Appeals Chamber to revisit this Decision, however, it must have a jurisdictional basis for doing so.

21. One mechanism for reopening a case is to bring a successful motion for review under Article 26 of the Statute and Rules 119-120 of the Rules. The Decision Accepting Withdrawals can be considered a "final judgement" for purposes of Article 26 because it "terminates the proceedings".[53] Strugar nowhere suggests, however, that he is bringing a motion for review, and he fails to address how he satisfies the basic requirements for review. He nowhere explains, for example, how an apparent legal impediment constitutes a "fact"[54] or how it can be deemed "new" where the matter of legal impediments was plainly at issue in the earlier proceedings.[55] Accordingly, the Appeals Chamber does not consider the Defence Request to constitute a motion for review.

22. The Defence Request is more plausibly construed as a motion for reconsideration of the Decision Accepting Withdrawals. For one thing, Strugar specifically asks the Appeals Chamber to

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[50] *Ibid.*, para. 11.
[51] *See, e.g., Prosecutor v. Milan Lukić & Sredoje Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber's Decision on Sredoje Lukić's Motion for Provisional Release, 16 April 2007, para. 15.
[52] Decision Accepting Withdrawals, p. 2.
[53] *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 ("*Barayagwiza* Decision"), para. 49.
[54] *See Prosecutor v. Goran Jelisić*, Case No. IT-95-10-R, Decision on Motion for Review, 2 May 2002, p. 3 (rejecting the convicted person's argument that a change in the governing legal standard constituted a "new fact" of "an evidentiary nature").
[55] *See ibid.* (stating that the term "new fact" refers to "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings").

"revoke[]" the Decision Accepting Withdrawals.[56] For another, his arguments closely resemble the kinds of arguments raised in motions for reconsiderations. In general, the Appeals Chamber has the power to reconsider past decisions, particularly "where it was realized that the previous decision was erroneous or where it has caused an injustice."[57] Here Strugar suggests an error and implies an injustice. He claims that the Decision Accepting Withdrawals erroneously accepted an uninformed withdrawal – a claim that, if true, would demonstrate a miscarriage of justice.[58] Given how closely his arguments track the sort of arguments relevant in motions for reconsideration, the Appeals Chamber considers that the Defence Request is properly viewed as such a motion.

23. This in turn raises the question of whether the Appeals Chamber has the power to consider such a motion. It is clear that the Appeals Chamber normally has the power to reconsider its prior decisions.[59] But matters are complicated by the fact that Strugar's case is now closed. While the Appeals Chamber once held that it has the inherent power to reconsider final judgements,[60] it has since taken a different position and held that there is no inherent power to reconsider final judgements.[61] Accordingly, the Appeals Chamber will consider whether, for purposes of a motion for reconsideration, the Decision Accepting Withdrawals constitutes a "final judgement".

24. In both the *Čelebići* Decision and the *Žigić* Decision, the Appeals Chamber appeared to presume that the "final judgements" on appeal were indeed appeal judgements in the classic sense of the word – namely, reviews on the merits of the trial judgements. The *Žigić* Decision, for example, emphasized that reconsideration was unwarranted with regard to "a person whose conviction has been confirmed on appeal".[62] It did not consider whether reconsideration was similarly unwarranted with regard to a person whose appeal terminated by another means and who thus did not receive full benefit of an appeal process that he had initiated. Similarly, in discussing

[56] Defence Request, para. 43.
[57] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001 ("*Galić* Decision"), para. 13.
[58] *See* Defence Request, para. 42.
[59] *Prosecutor v. Zdravko Mucić et al,* Case No. IT-96-21-Abis, Judgement on Sentence Appeal, 8 April 2003 ("*Čelebići* Decision"), para. 49; *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's 'Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005', 26 June 2006 ("*Žigić* Decision"), para. 9.
[60] *Čelebići* Decision, paras 49-53.
[61] *Žigić* Decision, para. 9; *see also Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R, Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006, pp. 1-2; *Prosecutor v. Timohir Blaškić*, Case No. IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006, para. 79 (Public Redacted Version); *Georges Anderson Nderubumwe Rutaganda v. Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006, para. 6.
[62] *Žigić* Decision, para. 9.

the special context of reconsideration of final judgements, the *Čelebići* Decision assumed that it spoke of a "final judgement" on the merits.[63]

25. The Appeals Chamber concludes that the Decision Accepting Withdrawals is fundamentally different from the kind of "final judgement" referred to in both the *Čelebići* Decision and the *Žigić* Decision. While the Decision Accepting Withdrawals may be a "final judgement" in the sense that it concluded the case,[64] it neither constitutes the kind of judgement envisioned in Article 25(2) of the Statute nor provides all the due process protections that naturally accompany a full judgement on the merits. It is essentially of a *sui generis* nature and is limited to procedure and process. It was adopted without any consideration of the merits of the Trial Chamber judgement. Were reconsideration prohibited in such circumstances, then substantive injustice might result. Accordingly, the Appeals Chamber concludes that it has the power to reconsider the Decision Accepting Withdrawals in the same way that it has the power to reconsider other decisions that do not constitute judgements on the merits.[65]

26. Having satisfied itself of its jurisdiction, the Appeals Chamber now turns to the merits. The Appeals Chamber will reconsider the Decision Accepting Withdrawals if it finds that the decision was erroneous or has led to a miscarriage of justice.[66]

27. As noted earlier, both parties suggest that a defendant's withdrawal of his appeal, like a guilty plea, must be informed.[67] The Appeals Chamber agrees. Where a defendant has invoked the legal right to appeal and now seeks to abandon this right, the Appeals Chamber should satisfy itself that this abandonment is informed. In the Decision Accepting Withdrawals, the Appeals Chamber did not explicitly discuss whether Strugar's withdrawal was an informed one. The Appeals Chamber will now consider this issue.

28. As the Prosecution points out, Strugar knew of the possibility that he might not serve his sentence in Montenegro and of the fact that withdrawal made his appeal final.[68] As the Defence observes, however, Strugar did not know that there was no legal possibility that he could serve his

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[63] *See Čelebići* Decision, para. 51 (considering a "judgement" of the Appeals Chamber to be one "which invalidates the Trial Chamber's decision or an error of fact which has occasioned a miscarriage of justice").
[64] *See supra* note 53 and accompanying text.
[65] This conclusion is supported by the *Barayagwiza* Decision. There, in considering a case that had been finalized through means other than a judgement on the merits, the Appeals Chamber neither indicated that reconsideration lay outside its power nor suggested that there was an unusually heightened standard for reconsideration. *Barayagwiza* Decision para. 73 (simply rejecting the motion for reconsideration on the merits).
[66] *See Galić* Decision, para. 13; *see also Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, *Décision relative à la Requête de l'Appelant Jean-Bosco Barayagwiza demandant l'examen de la Requête de la Défense datée du 28 juillet 2000 et réparation pour abus de procédure*, 23 June 2006, para. 22.
[67] Defence Request, para 38; Prosecution Response, para. 4.
[68] Prosecution Response, para. 7. The Decision Accepting Withdrawals also noted Strugar's awareness that withdrawal would finalize his appeal. Decision Accepting Withdrawals, p. 1.

sentence in Montenegro. Indeed, Strugar explicitly based his withdrawal on the assumption that it was legally possible for him to serve his sentence in Montenegro[69] – an assumption that is rejected in the Registry's Letter of 15 March 2007.[70] The Appeals Chamber is thus on notice of a "specific instance" where Strugar was confused.[71] It may be, of course, that Strugar's assumption in this respect was devoid of good sense in light of the Registry's Letter of 22 May 2006, which referenced "legal obstacles" although without specifically mentioning the Report of the Secretary General which accompanied the Statute, and in light of various caveats given by the Pre-Appeal Judge. But an informed decision depends not just on the communication of information, but also on the decision-maker's comprehension of this information. Moreover, Strugar had some reason to be confused. The possibility of him serving his sentence in Montenegro had first been raised by the Pre-Appeal Judge; he had received assurances from the Pre-Appeal Judge over a period of many months that this could be done (albeit assurances of varying degrees of certainty); and at his final status conference he heard the personal opinion of the Pre-Appeal Judge (an opinion given with the caveat that it held no guarantees) that legally there was no general obstacle to the service of his sentence in Montenegro.

29. The Prosecution suggests that even assuming that Strugar was confused on the legal possibility of service of his sentence in Montenegro, this cannot justify reopening of his appeal. The Prosecution considers that Strugar needed to be informed only about the "general" consequences of his withdrawal and this is a rather specific issue. The Appeals Chamber agrees that a defendant need not be aware of all specific consequences of withdrawal for his withdrawal to be considered informed. But where it is clear that the defendant withdraws an appeal due to a misunderstanding of the options legally available in his situation, the Appeals Chamber cannot consider the withdrawal to be informed.[72] Here, Strugar's withdrawal was premised on such a misunderstanding, and he promptly sought reconsideration when informed in the Letter of 15 March 2007 that in fact he was legally barred from serving his sentence in Montenegro. In these

[69] Defence Withdrawal, para. 12 ("General Strugar has reached the aforesaid decision [to withdraw] after being informed that there exist no legal impediments which could prevent him from serving the remainder of his prison sentence in Montenegro").
[70] The Letter of 15 March 2007 clearly concludes that the Report of the Secretary General that accompanied the Statute precludes individuals convicted by the ICTY from serving their sentences within the former Yugoslavia.
[71] *See Prosecutor v. Kambanda*, Case No. ICTR-97-23-A, Appeal Judgement, 19 September 2000, para. 77 (suggesting that for a Chamber to find that a defendant makes an uninformed decision, there should be clear indicia in the record of the defendant's lack of understanding).
[72] *See ibid.*, para 75 (noting the need, in the context of guilty pleas, for an accused to understand the "consequences of pleading guilty in general"); *see also Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 14 (finding that an accused must understand the general consequences of a guilty plea to be considered informed).

circumstances, the interests of justice plainly call for reconsideration of the Decision Accepting Withdrawals in order to avoid a miscarriage of justice.[73]

30. The Appeals Chamber accordingly reconsiders the Decision Accepting Withdrawals, reverses this decision, and reopens the appeals. It reopens not only the Defence Appeal, but also the Prosecution Appeal, since the Prosecution's withdrawal of its appeal was explicitly conditioned upon Strugar's withdrawing his own appeal.[74]

IV. Disposition

31. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Defence Request to the extent that it requests an oral hearing on its contents; and otherwise **GRANTS,** Judge Schomburg dissenting, the Defence Request. The Appeals Chamber accordingly **RECONSIDERS,** Judge Schomburg dissenting, the Decision Withdrawing Appeals; **REVERSES**, Judge Schomburg dissenting, this Decision; and thus **REOPENS**, Judge Schomburg dissenting, both the Defence Appeal and the Prosecution Appeal in this case.

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

Dated this 7th day of June 2007,
At The Hague, The Netherlands.

Judge Theodor Meron
Presiding Judge

Judge Mohamed Shahabuddeen appends a separate opinion.

Judge Wolfgang Schomburg appends a dissenting opinion.

[Seal of the International Tribunal]

[73] The Appeals Chamber need not address whether the legal impossibility of Strugar's serving his sentence in Montenegro existed at the time of his withdrawal or arose later in light of the legal position expressed in the Registry's Letter of 15 March 2007 (a position that Strugar does not ask the Appeals Chamber to review). Either way, the Appeals Chamber deems reconsideration to be in the interests of justice.
[74] Prosecution Withdrawal, para. 2; Decision Accepting Withdrawals, p. 1; Prosecution Response, para. 11.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I agree with today's decision. I have considered possible objections but, for the following reasons, conclude that they do not prevail.

A. The appellant was not informed

2. Enforcement of sentences is regulated by article 27 of the Statute of the Tribunal, Rule 103(A) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), and the Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment. Article 27 of the Statute provides:

> Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Rule 103(A) of the Rules provides:

> Imprisonment shall be served in a State designated by the President of the Tribunal from a list of States which have indicated their willingness to accept convicted persons.

The Practice Direction sets out the procedure to be followed by the Registrar in assisting the President in making a designation.

3. Thus, as provided by Rule 103(A) of the Rules, the designation "by the International Tribunal", as visualised by article 27 of the Statute, is to be done by "the President of the Tribunal". The President of the Tribunal has not made a designation in favour of Montenegro as a state in which a sentence of imprisonment may be served. Absent such a designation, the appellant cannot serve his sentence of imprisonment in Montenegro. It is convenient to note that a designation is presupposed by Rule 103 (B) which provides: "Transfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed". The words "as soon as possible" do not dispense with the prior need for the designation of "that State" by the President; they are directed to the transferring of the convicted person to a state on the assumption that the state has been designated under the immediately preceding Rule.

4. The appellant told a bench of the Appeals Chamber, before which his appeal was pending, that, "after being informed that there exist no legal impediments which could prevent him from serving the remainder of his prison sentence in Montenegro",[1] he was withdrawing the appeal. That was not correct, because he had been warned by the Pre-Appeal Judge that the final say [illegible]

[1] Defence Notice Withdrawing Appeal, 15 September 2006, para. 10.

the President and that there was no guarantee that the President would direct that he be sent to Montenegro. However, his attention was not drawn to the point later made in a letter from the Registrar of 15 March 2007 to his counsel to the effect that he could not be sent to a state which formed part of the territory of the former Yugoslavia. Nor was that point identified in an earlier letter from the Registrar to defence counsel of 22 May 2006, in which the Registrar broadly stated that the "enforcement of a sentence in Montenegro would currently be subject to a number of important legal and other obstacles, which would need to be removed". The appellant felt that the only problems were those arising from the President's discretion. In this respect, as recalled in paragraphs 7 and 11 of today's decision, the Pre-Appeal Judge indicated that he would make a recommendation that the appellant be sent to Montenegro. Thus, the appellant thought that the problems arising from the President's discretion could be resolved and that there was still a *possibility* of his being sent to Montenegro. His belief in that possibility was the basis on which he withdrew his appeal.

5. That basis was not correct: in the absence of a designation by the President in favour of Montenegro, there was no *possibility* of the sentence being served in that state. I believe that the problem in this appeal is the need to appreciate the importance attached by the appellant to the opposite view that the possibility existed. The possibility being non-existent, it appears that the appellant was misinformed. Justice requires that he be allowed to withdraw the withdrawal of his appeal, with the like liberty being given to the prosecution to withdraw its withdrawal of its own appeal.

B. The Appeals Chamber is not subordinating its views to those of an executive body

6. A concern is whether the Appeals Chamber is subordinating its views to those of an executive body. If the Appeals Chamber is doing that, it is doing what is plainly wrong. However, I do not believe that it is doing so.

7. The contrary view is based on the fact that the Secretary-General (through his Legal Counsel) has expressed the opinion that imprisonment in a state (such as Montenegro) which was part of the territory of the former Yugoslavia is barred. It is not clear what has led to Montenegro not being designated by the President, but, if the Secretary-General's views had anything to do with it, there is nothing to show that the President subordinated his own views to those of the Secretary-General; rather, absent evidence to the contrary, in accordance with the presumption of regularity it has to be presumed that the non-designation of Montenegro was due to the Secretary-General's opinion being considered by the President to be right and adopted by him on that account – and not because it possessed any overriding authority.

C. The reasons given by the Secretary-General were correct

8. There could be a question as to whether the considerations on which the President acts in deciding whether a state is to be designated are open to review by the Appeals Chamber. The Appeals Chamber is a criminal court. What would seem to be important to it is whether there is in fact a designation, not the correctness of any reasons which led to there being a designation or none. In any event, however, if, in making no designation of Montenegro, the President acted on the views of the Secretary-General, those reasons are correct.

9. Paragraph 121 of the Secretary-General's report (on the basis of which the Security Council adopted the Statute of the Tribunal) reads:

> The Secretary-General is of the view that, given the nature of the crimes in question and the international character of the tribunal, the enforcement of sentences should take place outside the territory of the former Yugoslavia.

The Secretary-General's report does not have "the same binding authority" as if it formed part of the Statute itself.[2] But the Statute was adopted by the Security Council in the unaltered text in which it was submitted in draft to the Council in the report. And the Security Council did say it "[a]pprove[d]"[3] of the report when adopting the Statute. As was observed by the Appeals Chamber in *Tadić*:

> By "approving" the Report, the Security Council clearly intended to endorse its purpose as an explanatory document to the proposed Statute. Of course, if there appears to be a manifest contradiction between the Statute and the Report, it is beyond doubt that the Statute must prevail. In other cases, the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute.[4]

There is no "manifest" contradiction in this matter. It is incorrect to proceed on the basis that the Secretary-General's report lacks the authority of the Security Council. In the practice of the Tribunal, considerable weight has been given to the report.

10. Pausing there, it may be noticed that article 26 of the ICTR Statute expressly states that "[i]mprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons ...". The provision was necessary because, in its absence, it might be thought that Rwanda, being the state of conflict, was excluded as a possible place of imprisonment. Naturally, the ICTR still has a discretion whether to order imprisonment to be served in Rwanda, and how it is exercised is not a matter for present consideration. The important thing, however, is that, by comparison, there is the silence in

[2] *Tadić*, IT-94-1-A, 15 July 1999, para. 295.
[3] Paragraph numbered 1 of S/RES/827 (1993) of 25 May 1993.

the Statute of the ICTY plus the express exclusionary language of paragraph 121 of the accompanying report of the Secretary-General.

11. It is obvious that paragraph 121 of the Secretary-General's report has to be regarded as conveying the intention of the Security Council that imprisonment in the case of the ICTY could only be done outside the territory of the former Yugoslavia. The Appeals Chamber cannot go behind that view. Accordingly, if the Appeals Chamber is competent to pass on the reasons why Montenegro has not been designated, it can only find in favour of the correctness of the reasons given in paragraph 121 of the Secretary-General's report.

D. Four possible objections

12. It is necessary to consider some objections. First, it is said that imprisonment in Montenegro would be possible if the appellant were sentenced by a court in that state under the referral procedure of Rule 11*bis* of the Rules as authorised by the Security Council. That is true. But I am not able to accept that the introduction of the referral procedure amounts to an implied modification by the Security Council of the procedure applicable where a sentence is imposed by the Tribunal itself. The appellant was not sentenced under the referral procedure. Whether the referral procedure could have been employed depended on a number of contingencies which are not pertinent to the procedure under which the appellant was in fact sentenced by the Tribunal.

13. Second, it is also said that there are international conventions which enjoin imprisonment in a convicted person's home state. But those conventions regulate relations as between states. The Tribunal is not a party to them. It can be bound by the principles of the conventions if these had the force of customary international law. But, though the conventions may represent the practice of many states, the status of customary international law is, correctly, not claimed for the conventions.

14. Third, it is argued that the Tribunal has to take account of the fact that the wartime conditions which gave birth to it have now ceased. It is not said that the exercise of the Tribunal's jurisdiction comes to an end with the restoration of peace. Peace may well require the continued exercise of jurisdiction to punish serious violations of international humanitarian law which previously occurred; and the conditions regulating the exercise of that jurisdiction need not be affected. Nothing in chapter 7 of the Charter (under which the Tribunal was established) or in Security Council resolution 827 (1993) (which established the Tribunal) supports the contention under reference.

[4] IT-94-1-A, 15 July 1999, para. 295.

15. In *Erdemović* (decided in 1996), a Trial Chamber did seem to link imprisonment in a state outside the territory of the former Yugoslavia to "the situation prevailing in that region";[5] but the Trial Chamber did not suggest that imprisonment in a state forming part of the territory of the former Yugoslavia could be proper if, by itself, it was of the view that there was a change in "the situation prevailing in that region". The Trial Chamber said that it "share[d] the view of the Secretary-General that the sentences should be served outside of the former Yugoslavia".[6] I do not consider that it is the law that the Appeals Chamber can, on its own, say whether the security considerations underlying the Secretary-General's view (as, in my opinion, endorsed by the Security Council) have ceased to operate.

16. Fourth, it is also argued that the Tribunal may act on the basis of humanitarian considerations. Accepting the general influence of such considerations, yet it seems to me that they do not constitute an admissible ground for the particular action proposed in this case; they do not operate *in vacuo*. There must first be a designation by the President of the Tribunal of the state in question as a state in which a sentence of imprisonment may be served. In the absence of a designation of Montenegro, there cannot be imprisonment in that state – on any ground, humanitarian ones included.

E. Conclusion

17. In the result, I am of opinion that today's decision is correct.

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

7 June 2007
The Hague
The Netherlands

Mohamed Shahabuddeen

[Seal of the International Tribunal]

[5] IT-96-22-T, 29 November 1996, para. 70.
[6] *Ibid.*

DISSENTING OPINION OF JUDGE SCHOMBURG

A. Introduction

1. With all due respect, I do not agree with the decision. The Trial Judgement has become final. Neither the Statute of the International Tribunal ("Statute") nor the Rules of Procedure and Evidence of the International Tribunal ("Rules") allow for a "reopening" of appellate proceedings. Moreover, an informed withdrawal of an appeal cannot be revoked. With respect to the enforcement of Mr. Strugar's sentence, there are no legal obstacles preventing him from serving the sentence in his home country Montenegro, especially when his request is based on exceptional humanitarian reasons.

2. When deciding to withdraw his appeal, Mr. Strugar was fully informed about the factual and legal situation which has not changed since then. He was well-aware that there could be obstacles to his transfer to Montenegro. It is regrettable that the President of the International Tribunal, who is pursuant to Rule 103 of the Rules the only competent authority to decide whether Mr. Strugar can be transferred to his home country, has not exercised his discretionary power to explicitly decide this matter. Thus, the case should have been first referred to the President for the sole purpose of letting him exercise his discretion "as soon as possible" (Rule 103(B)). Accordingly, there are no reasons allowing for a "reopening" of the appeal.

B. Finality of the Trial Judgement

3. Objectively and subjectively there are no new facts that might allow for a review of the Appeals Chamber's decision of 20 September 2006, which explicitly and unanimously accepted the mutual withdrawal of the appeals for extraordinary humanitarian reasons. Indeed, the decision provided that with the withdrawal of the parties' appeals "the sentence of eight years imposed on Pavle Strugar in the Trial Judgement has become final."[1] I recall the jurisprudence of the International Tribunal, which holds the following:

> The Appeals Chamber is satisfied that the existing appeal and review proceedings established under the Statute provide sufficient guarantees to persons convicted before this Tribunal that they have been tried fairly and in accordance with norms of due process. [...] This Appeals Chamber holds that there is no power to reconsider a final judgement.[2]

[1] Final Decision on "Defence Notice of Withdrawing Appeal" and "Withdrawal of Prosecution's Appeal Against Judgement of Trial Chamber II Dated 31 January 2005," 20 September 2006 ("Decision Accepting Withdrawals").
[2] *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's 'Motion for Reconsideration of the Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005', 26 June 2006, para. 9.

There the Appeals Chamber considered, *inter alia*, that the interests of both the victims and the perpetrator entitle them to certainty and finality of legal judgements.[3] The only possibility to challenge a judgement that has become final is the review procedure as provided by the Statute and the Rules. However, in this case, the preconditions for the institution of review proceedings have not been met. There is no other legal basis on which the Appeals Chamber could base its decision resulting in a renewed challenge to the factual and legal findings of the Trial Judgement. By allowing the "reopening" of the appeals the Appeals Chamber circumvents the high threshold guaranteeing the finality of proceedings before the International Tribunal.

C. The legal situation with regard to Mr. Strugar serving his sentence in Montenegro for humanitarian reasons

4. The Appeals Chamber presumes that there is "no legal possibility that [Mr. Strugar] could serve his sentence in Montenegro."[4] The Appeals Chamber in this regard seems to defer to the view of the Registrar, laid out in his letter of 15 March 2007.[5] In this letter, "verified with the Office of Legal Affairs at UN Headquarters," the Registrar claims that the Report of the Secretary-General of 1993[6] bars the transfer of sentenced person to one of the States on the territory of the former Yugoslavia.[7]

5. However, the independent judiciary of the International Tribunal is not bound by the legal opinion of the Registrar, which in this concrete case is apparently itself based on an opinion given by the executive. In particular, the view expressed in the Registrar's letter is a) not binding upon the President and b) not correct in substance. There certainly is a possibility to enforce Mr. Strugar's sentence in Montenegro, in particular in this case where all the decisions have been and should be based on exceptional humanitarian reasons.

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[3] *Id.*
[4] Decision, para. 28.
[5] *See* Annex 8 of the Defence Request Seeking the Re-Opening of Appeal Proceedings Before the Appeals Chamber, 26 March 2007 ("Defence Request").
[6] The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 (3 May 1993).
[7] *See* Decision, para 27: "[...] an assumption that is rejected in the Registry's Letter of 15 March 2007."

1. The judiciary is not bound by a legal opinion of the Registrar

6. Article 27 of the Statute solely stipulates that

> Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. [...].[8]

Rule 103 of the Rules specifies that

> Imprisonment shall be served in a State designated by the *President of the Tribunal* from a list of States which have indicated their willingness to accept convicted persons.[9]

7. It is therefore plain that the authority to decide where a sentence handed down by the International Tribunal is enforced lies, pursuant to Rule 103(A) of the Rules, with the President of the Tribunal, *i.e.* a part of the judiciary. It is the President – not the Registrar – who has finally to determine the place of imprisonment. This is further supported by a more general consideration. The Registrar, pursuant to Article 17(1) of the Statute, is "responsible for the administration and servicing of the International Tribunal." He is thus expected to implement the decision of the Chambers or, in this case, of the President. The designation of where a convicted person shall serve his sentence touches on the fundamental rights of a convicted person at the end of the proceedings against him and must accordingly be made by the independent judiciary.

8. The legal advice provided by the Registrar is indispensable for the functioning of the Tribunal. However, this cannot mean that the Appeals Chamber or the President is bound by a legal opinion offered by the Registrar. In particular, if the Appeals Chamber or the President considers that the Registrar's legal views on a subject pertaining to the core functions of the judiciary, such as the designation of the State where the sentence is to be served, are at odds with the correct interpretation of the law, then the views of the Appeals Chamber or the President must prevail.

9. It is indeed the Registrar who concludes general enforcement agreements with States that are willing to accept convicted persons. The usual procedure is for States to enter into a general agreement with the Tribunal. It is true that there is no such general agreement with Montenegro. However, there have been cases in the past where convicted persons were transferred to a State without the existence of such a general enforcement agreement,[10] based on bilateral arrangements

[8] It has to be noted that Article 27 does not exclude any country. The aforementioned Report of the Secretary-General has not found its way into the Statute.

[9] Italics added for emphasis. Again, there is no limitation of States enforcing the sentence, and as will be explained later, practice shows that the International Tribunal has already in the past concluded enforcement agreements with States that are not on the Registrar's list.

[10] The enforcement of the sentences of Duško Tadić and Dragoljub Kunarac is based on an *ad-hoc* enforcement agreement, concluded in the form of an exchange of letters by the Registrar and the German Ambassador to the

concluded on a case-to-case basis according to the practice in cooperation in criminal matters in general. Moreover, in this case Montenegro has explicitly expressed its willingness to conclude a bilateral arrangement with the Tribunal.[11] Consequently, the Registrar cannot be allowed to tie the hands of the judiciary by not trying to negotiate an agreement with Montenegro, even though it is the apparent wish of the Appeals Chamber, accepted by the Prosecution, that Mr. Strugar's sentence be enforced there for exceptional humanitarian reasons. Only the absence of detention facilities which meet the United Nations' standards[12] or a substantial likelihood that the sentence would be served in a sham prison could be an obstacle to such an arrangement.[13]

10. In sum, the Registrar's view, as expressed in its letter of 15 March 2007, may be considered by the President but does not have a binding effect on him. Furthermore, it is for the President to exercise the discretion vested in him and rule on the request of Mr. Strugar to be transferred to Montenegro.

2. The Registrar's assessment of the legal situation

11. In his letter of 15 March 2007, the Registrar referred to Security Council Resolution 827 "accepting the Secretary-General's report in which it is stated that 'the enforcement of sentences should take place outside the territory of the former Yugoslavia'".[14] The Registrar further explained that he had "verified with the Office of Legal Affairs at U.N. Headquarters that [this] places a geographical restriction" on the enforcement of sentences handed down by the International Tribunal and that therefore "the Tribunal is presently not in a position to conclude an agreement for enforcement of sentences with the Republic of Montenegro."[15]

12. I disagree with this assessment of the legal situation. The Report of the Secretary-General is not an impediment to the transfer of a person convicted by the International Tribunal to his home country for exceptional humanitarian reasons. Indeed, customary international law and a historical, systematic and teleological interpretation of the Secretary-General's Report do allow for the enforcement on the territory of the former Yugoslavia of sentences handed down by the

Netherlands. *See* for Tadić, Exchange of Notes between the International Tribunal and Germany of 17 October 2000 and for Kunarac, Exchange of Notes between the International Tribunal and Germany of 14 November 2002.

[11] *See* Decision, para. 9.

[12] *See* United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, U.N. Doc. A/CONF/611, Annex 1

[13] I note that Mr. Strugar was previously allowed to be medically treated in Montenegro, that though on provisional release he spent this time under detention conditions, and that he voluntarily returned to the seat of the Tribunal ahead of schedule.

[14] Report of the Secretary-General, *supra* note 6, para. 121.

[15] Letter of the Registrar of 15 March 2007 (Annex 8 of the Defence Request).

International Tribunal. Moreover, the Report of the Secretary-General does not bind the International Tribunal, or, in particular, its independent judiciary.

(a) Applicable international law

13. The recommendation that the enforcement of sentences should not take place on the territory of the former Yugoslavia does not reflect international law.[16] The treaty-based common State practice and international humanitarian law allow for a sentenced person, if he so wishes, to serve the sentence in his home country.

14. Several international conventions have provisions stipulating that sentences have to be enforced in the home country of the convicted persons. Those conventions and international treaties are ratified by a large number of States around the globe. It is the common practice of States to cooperate internationally when it comes to transferring convicted persons to their home countries.

15. I note that the International Tribunal is not party to any of those conventions. However, it cannot operate completely detached from the State practice of the international community which they reflect. Indeed, for humanitarian reasons, an accused who was charged and convicted elsewhere would obviously benefit from the provisions of these conventions. He cannot be deprived of the rights granted therein solely because he was convicted by the International Tribunal.

16. The most important treaty in this context is the **Council of Europe's Convention on the Transfer of Sentenced Persons** of 21 March 1983.[17] Its relevant provisions read:

> **Preamble**
>
> [...] Considering that these objectives require that foreigners who are deprived of their liberty as a result of their commission of a criminal offence should be given the opportunity to serve their sentences within their own society; and [...]
>
> **Article 2:** General principles
>
> (1) The Parties undertake to afford each other the widest measure of cooperation in respect of the transfer of sentenced persons in accordance with the provisions of this Convention.
>
> (2) A person sentenced in the territory of a Party may be transferred to the territory of another Party, in accordance with the provisions of this Convention, in order to serve the sentence imposed on him. To that end, he may express his interest to the sentencing State or to the administering State in being transferred under this Convention.
>
> (3) Transfer may be requested by either the sentencing State or the administering State.

[16] It is instructive to recall the rationale behind this recommendation. It reflects – as will be shown later – only the fact that at the time of the drafting of the Secretary-General's Report there was still war on the territory of the former Yugoslavia: no reasonable person would have sent convicted persons to the region at that time. However, time has passed, the war is over, and this exception to general State practice is no longer relevant.

[17] CETS No. 112.

This convention is an instrument whose application is not restricted to just Europe,[18] and it has been ratified by more than sixty countries around the world, *inter alia*, Australia, Bahamas, Bolivia, Canada, Chile, Costa Rica, Ecuador, Israel, Japan, Korea, Mauritius, Mexico, Panama, Tonga, Trinidad and Tobago, the United States of America, and Venezuela.[19] According to the convention's Explanatory Report, primary objectives of this convention are the following humanitarian reasons:

> As penal policy has come to lay greater emphasis upon the social rehabilitation of offenders, it may be of paramount importance that the sanction imposed on the offender is enforced in his home country rather than in the State where the offence was committed and the judgment rendered. This policy is also rooted in humanitarian considerations: difficulties in communication by reason of language barriers, alienation from local culture and customs, and the absence of contacts with relatives may have detrimental effects on the foreign prisoner. The repatriation of sentenced persons may therefore be in the best interests of the prisoners as well as of the governments concerned.[20]

17. On the basis of these objectives, the Committee of Ministers, the Council of Europe's decision-making body, adopted a recommendation to member States, which reads as follows:

> [...] Restating the importance of social rehabilitation of sentenced persons and to that end the transfer of such persons, where they do not have the nationality of the sentencing state, to the country where their own society is; [...]
>
> (1) Recommends the governments of member states:
>
> [...] (b) to proceed diligently and urgently in processing requests for transfer in such a way that the provisions of Article 5, paragraph 4, of the convention are entirely complied with; [...][21]

18. As regards the United Nations, only the most recent and important convention will be referred to, namely, the **United Nations Convention against Transnational Organized Crime** of 15 November 2000 (Palermo I). This convention was primarily drafted to promote international cooperation in order to prevent and combat serious transnational organized crime. The Convention, ratified by more than 130 States, including Montenegro,[22] includes the following provisions:

> **Article 17:** Transfer of Sentenced Persons
>
> States Partied may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention, in order that they may complete their sentences there.

19. Both the United Nations and the Council of Europe demand or at least encourage the repatriation of a convicted person to his home country. This standard of international humanitarian

[18] It should be noted that Montenegro has already acceded to this convention.
[19] http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=8&DF=5/25/2007&CL=ENG.
[20] http://conventions.coe.int/Treaty/en/Reports/Html/112.htm, para. 9.
[21] Recommendation No. R (92) 18 of the Committee of Minister of Member States Concerning the Practical Application of the Convention on the Transfer of Sentenced Persons (adopted on 19 October 1992).

law is also reflected in the Statutes and Rules of Procedure and Evidence of other international criminal courts and tribunals.

20. The Statute of the **International Criminal Tribunal for Rwanda** (ICTR), which was adopted by the Security Council about one year after the establishment of this Tribunal, reads:

> **Article 26:** Enforcement of Sentence
>
> Imprisonment shall be served *in Rwanda* or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.[23]

The ICTR Rules of Procedure and Evidence read:

> **Rule 103:** Place of Imprisonment
>
> (A) Imprisonment shall be served *in Rwanda* or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons for the serving of sentences. Prior to a decision on the place of imprisonment, the Chamber shall notify the Government of Rwanda.
>
> (B) Transfer of the convicted person to that State shall be effected as soon as possible after the time limit for appeal has elapsed.

The ICTR's Statute and Rules explicitly envisage transfer to Rwanda, the home country of most of the accused in its jurisdiction. It is significant that the legal framework of the second international tribunal established by the Security Council encompasses this option. Indeed, in contrast to the situation in the former Yugoslavia in 1993, there was no ongoing war on the territory of Rwanda at the time of the ICTR's establishment which would have prevented the enforcement of sentences for safety reasons.

21. Although there is not yet an agreement in place with the Rwandan government on the transfer of persons sentenced by the ICTR to Rwanda,[24] this is primarily because of the risk that the death penalty could be executed for other crimes not contained in the ICTR Statute or not charged by the ICTR. It is not a reflection of the original intention of the drafters of the Statute and Rules.[25]

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[22] http://www.unodc.org/unodc/en/crime_cicp_signatures_convention.html.
[23] Italics added for emphasis.
[24] For the same reason, no case has yet been transferred to Rwanda pursuant to Rule 11*bis* of the ICTR's Rules of Procedure and Evidence as the abolition of the death penalty is still pending in Rwanda, the non-execution of the death penalty being one prerequisite under Rule 11*bis*(C) of the ICTR Rules as amended on 7 June 2005.
[25] *See* The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, U.N. Doc. S/1995/134, 13 February 1995, at para. 19: "Unlike the former Yugoslavia, Rwanda is not excluded from the list of States where prison sentences pronounced by the International Tribunal for Rwanda may be served." As indicated already, a similar solution was not possible neither in 1993 nor in 1995 for the former Yugoslavia as there was, in contrast to Rwanda, still an ongoing war.

22. The Statute of the **Special Court for Sierra Leone**,[26] attached to a special agreement between the United Nations and Sierra Leone, reads:

> **Article 22:** Enforcement of Sentences
>
> (1) Imprisonment shall be served *in Sierra Leone*. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.
>
> (2) Conditions of imprisonment, whether *in Sierra Leone* or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to Article 23 of the present Statute.[27]

The Rules of Procedure and Evidence read:

> **Rule 103:** Place of Imprisonment
>
> (A) Imprisonment shall be served *in Sierra Leone*, unless circumstances require otherwise. The Special Court may conclude agreements with other countries willing to accept and imprison convicted persons.
>
> (B) The place of imprisonment for each convicted person shall be designated by the *President*.
>
> (C) Transfer of the convicted person to the place of imprisonment shall be effected as soon as possible after the time limit for appeal has lapsed. [28]

Indeed, the Report of the Secretary-General on the establishment of the Special Court explicitly mentioned that sentences should normally be served in Sierra Leone unless there are security issues.[29]

23. The **International Criminal Court**[30] can be seized of cases concerning individuals from an unpredictable number of States. Its Statute neither specifies nor excludes any specific country in which the sentences should be enforced. Rather, it sets out different factors that have to be taken into consideration when determining the State in which the sentence is to be enforced. Significantly, these include the views of the sentenced person and the nationality of the sentenced person. The respective provisions in the Statute read:

> **Article 103**: Role of the States in enforcement of sentences of imprisonment

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[26] 2178 U.N.T.S. 138.
[27] Italics added for emphasis.
[28] Italics added for emphasis.
[29] *See* The Secretary General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915, 4 October 2000, at para. 49: "While imprisonment shall normally be served in Sierra Leone, particular circumstances, such as the security risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory, may require their relocation to a third State."
[30] 2187 U.N.T.S. 90.

> (1) (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. [...]
>
> (3) In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:
>
> (a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principle of equitable distribution, as provided in the Rules of Procedure and Evidence;
>
> (b) *The application of widely accepted international treaty standards governing the treatment of prisoners*;
>
> (c) *The views of the sentenced person*;
>
> (d) *The nationality of the sentenced person*;
>
> (e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement. [...][31]

24. In this context, it also has to be recalled that already in 1946, under the system in place before the first international criminal courts, the International Military Tribunals at Nuremberg and Tokyo, prison sentences were enforced in Germany and in Japan, respectively, *i.e.* the home countries of the perpetrators.[32]

(b) Political Situation in the territory of the former Yugoslavia in 1993

25. As was pointed out above, according to international humanitarian law, sentences should be enforced in the home country of the convicted person, wherever possible. The Report of the Secretary-General related to the ICTY has to be seen in light of the political situation in the former Yugoslavia at the time it was drafted, *i.e.* 1993, when armed conflict on the territory of the former Yugoslavia was still ongoing. It was indeed reasonable not to enforce the sentences handed down by the International Tribunal at a time when there was war, as this would have risked the lives of the sentenced persons. Moreover, there were serious doubts about the functioning of a regular prison regime and a judiciary supervising detention conditions, heightening the risk of interference with the enforcement of sentences if imprisonment were served on the territory of the former Yugoslavia.[33] However, the opinion of the Secretary-General has never found its way into the Statute, thus leaving the State of enforcement to a reasonable decision of the International Tribunal

[31] Italics added for emphasis.
[32] The only difference between both Tribunals was that in the case of the Nuremberg Tribunal it was the four occupying powers that shared the joint responsibility for the enforcement of the sentences. At Tokyo, this task was given to Japan itself.
[33] *See* 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA p. 304 (1995).

when the circumstances so allowed, and indeed, the circumstances have changed fundamentally since 1993.[34]

26. Today's different political situation was also the prerequisite for the introduction of the current version of Rule 11*bis* of the Rules in 2002. According to this provision it is possible, *inter alia*, to refer a case to a State in whose territory the crime was committed "so that those authorities should forthwith refer the case to the appropriate court for trial within that State." Once a case is referred, it will be heard under the laws of the respective State. As a result, a sentence imposed by a court of that State is enforced on its territory. This mechanism is explicitly supported by the Security Council in its Resolution 1534 (2004) reads:

> *Commends* those States which have concluded agreements for the enforcement of sentences of persons convicted by the ICTY or the ICTR or have otherwise accepted such convicted persons to serve their sentences in their respective territories; *encourages other States in a position to so to act likewise*; and invites the ICTY and ICTR to continue and intensify their efforts to conclude further agreements for the enforcement of sentences or to obtain the cooperation of other States in this regard; [...]
>
> *Welcomes* in particular the efforts of the Office of the High Representative, ICTY, and the donor community to create a war crimes chamber *in Sarajevo*; encourages all parties to continue efforts to establish the chamber expeditiously; and encourages the donor community to provide sufficient financial support to ensure the success of domestic prosecutions in Bosnia and Herzegovina and in the region; [...].[35]

I note that the Security Council did not exclude any State from accepting convicted persons to serve their sentences in their territories according to international humanitarian law.

27. Rule 11*bis* of the Rules, which was implicitly endorsed by Security Council Resolution 1534 (2004), recognizes that the political situation on the territory of the former Yugoslavia has changed substantially. Moreover, if it is legally possible to refer an entire case to the territory of the former Yugoslavia, including the enforcement of the sentence in the event of a conviction, it can be concluded, *a maiore ad minus,* that the States on the territory of the former Yugoslavia can now be

[34] I also note that even when the creation of the ICTY was discussed, the Russian proposal to establish an international tribunal provided that "a judgement shall be executed in the State in whose territory the crime was committed, or in the State of which the perpetrator is a national." *Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General*, U.N. Doc. S/25537, p. 11. In a similar vein, Article 46(1) of the Conference on Security and Cooperation in Europe (CSCE) Draft Convention on an International War Crimes Tribunal for the former Yugoslavia, stipulated that "[p]enalties are to be enforced on behalf of the Court in a State party to this Convention which is a successor State to the former Yugoslavia." *See* Rapporteurs (Corell-Türk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia, *Proposal for an International War Crimes Tribunal for the Former Yugoslavia*, 9 February 1993, printed in 2 MORRIS & SCHARF, *supra* note 33, p. 293. Indeed, in the explanatory section to the proposed convention, it was stated as follows: "A major issue is to decide where imprisonment is to be served. The Rapporteurs [to the CSCE] hold the view that the rule should be – subject to a narrow field of exception – that the sentences shall be served in the territory of the former Yugoslavia (cf. Article 46). This undoubtedly puts a heavy burden on the States in that territory. But unless they are prepared to take upon themselves to accept enforcement, the Rapporteurs see little possibility that justice can be done in the present case [...]." *Id.*, p. 264-265. It is thus clear that the Report of the Secretary-General was not based on normal State practice but followed strictly pragmatic considerations.

entrusted with the enforcement of sentences. In particular, Resolution 1534 (2004) must be viewed in light of the *lex posterior derogat priori* principle, *i.e.* although the Security Council concurred with the Report of the Secretary-General in 1993, it later explicitly departed from the Report's suggestion not to send convicted persons to the territory of the former Yugoslavia.

(c) Separation of Powers

28. Furthermore, the 1993 Report of the Secretary-General, while providing guidance, does not have a binding force. I am aware that the principle of the separation of powers cannot yet be applied to international law in exactly the same way as it is applied in domestic systems. However, we are required to maintain and, where it is not yet recognized, to establish the independence of the judiciary in so far as possible.[36] This was already recognized by the Trial Chamber in the *Tadić* case:

> The International Tribunal has, as its Statutes and Rules attest, been constituted so as to ensure a fair trial to an accused and it is to be hoped that the way its Judges administer their jurisdiction will leave no room for complaints about lack of impartiality or want of independence.[37]

As judges we are bound only by the Statute and the Rules. The Report of the Secretary-General is of a *quasi* executive nature and it became with its approval by the Security Council a legislative source of guidance. It has to be reemphasized that the passage that considers that sentences may only be enforced outside the territory of the former Yugoslavia is not reflected in the wording of the Statute or the Rules. It may therefore only be taken into consideration as a non-binding opinion which facilitates interpretation of the applicable provisions under the prevailing circumstances at that time. However, it can never be obligatory for the independent judiciary to follow the Report's recommendations.

29. As already pointed out, the authority and hence the duty to decide where a sentence is enforced lies solely with the President of the Tribunal, acting as a body of the judiciary. This discretionary power has to be exercised as fundamental rights of the convicted person are at stake. If the convicted person wishes to have his sentenced enforced in his home country, humanitarian aspects have to be taken into consideration as well. In this context, the German Constitutional Court (*Bundesverfassungsgericht* – BVerfG) dealt with the question of legal protection and remedies of convicted persons who sought to have their sentences enforced in their home country. Significantly,

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[35] S.C. Res. 1534, U.N. Doc. S/RES/1534 (26 March 2004), paras 8 and 10 (italics added for emphasis).

[36] I refer to Montesquieu who stated as follows: "Il n'y a point encore de liberté, si la puissance de juger n'est pas séparée de la puissance législative & de l'exécutrice. Si elle étoit jointe à la puissance législative, le pouvoir sur la vie & la liberté des citoyens seroit arbitraire ; car le juge seroit législateur. Si elle étoit jointe à la puissance exécutrice, le juge pourroit avoir la force d'un oppresseur. CHARLES-LOUIS DE SECONDAT, BARON DE LA BREDE ET DE MONTESQUIEU, L'ESPRIT DES LOIX, LIVRE XI, CHAPITRE VI (Nouvelle Edition, printed 1767).

the Court emphasized the importance of safeguarding the dignity of the sentenced person when reaching the discretionary decision. The Constitutional Court held:

> The legal status of a person sentenced to a term of imprisonment is basically determined by his or her entitlement to rehabilitation [...]. The objective of rehabilitation is in keeping with the image which a community subscribing to principles of human dignity and the social state has of itself. This ensures, when discretionary decisions are taken in the field of enforcement, that **the sentenced person is entitled to the proper exercise of such discretion by the authorities**. This entitlement also encompasses the question from the point of view of enforcement legislation of whether the sentenced person is to be transferred to his or her homeland in order to serve sentence, which must be considered separately from the question of enforcement.
>
> If the sentenced person expresses the wish under the Convention on the Transfer of Sentenced Persons to be transferred to his or her homeland in order to serve the sentenced passed, the public prosecutor[38] must weigh the sentenced person's interest in social rehabilitation against the requirements of the administration of justice (including from the point of view of enforcement practice in the host state). This decision process allows the enforcement authorities to take account of the sentenced person's entitlement to probation when exercising its discretion. In this respect, the sentenced person is entitled to the proper exercise of their discretion by the enforcement authorities.[39]

30. Consequently, it is for the President to explicitly decide the matter of Mr. Strugar's possible transfer to Montenegro. Thus, the approach taken by the Appeals Chamber to declare Mr. Strugar's transfer to Montenegro legally impossible is premature because Mr. Strugar is first entitled to obtain an explicit decision by the only competent authority of the International Tribunal, *i.e.* the President.[40]

3. Preliminary conclusion: there is the legal possibility to transfer Mr. Strugar to Montenegro

31. It would have been legally possible to enforce Mr. Strugar's sentence in Montenegro. The Tribunal could have entered into a bilateral arrangement with Montenegro, as offered by Montenegro, and as it has been done on previous occasions with another State.[41]

32. Considering the exceptional humanitarian situation in the case at hand, a bilateral agreement would indeed have been warranted. While recognizing that the Registrar prefers to negotiate more general enforcement agreements, it is still possible to agree upon agreements relating to only one specific case. This has been the practice, for example, in the cases where Germany agreed to enforce sentences imposed by this Tribunal. As noted above, Montenegro has offered to enter into

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[37] *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 32.
[38] The competent authority in the framework of the International Tribunal is the President.
[39] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 18 June 1997, 96 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 100, para. 87 (references omitted) bold for emphasis.
[40] I note that according to general legal practice a non-decision cannot be regarded as a decision if the law demands that an explicit decision is taken. Indeed, Rule 103 of the Rules presupposes such a decision. It is hardly conceivable that the State in which the convicted person will serve his sentence is designated in the absence of any decision on that matter.
[41] *See supra* note 10.

such an agreement. Naturally, Montenegro would be required to offer detention conditions that comply with the demands of the United Nations;[42] and there could be no sham detention.

33. I therefore regret that the President of this Tribunal as the only competent authority has not taken a decision. In my view, a humanitarian solution tailor-made for this case only would have been an appropriate solution in Mr. Strugar's case, this being in line with the expressed opinions of the parties and the understanding of the Appeals Chamber at that time when it accepted the mutual withdrawal of the appeals.

34. It has to be noted that there is always a system of supervision in place. In particular, if the detention conditions do not meet the aforementioned standards of the United Nations or are revealed as a mere sham detention, the President is entitled to revoke a transfer decision and order the re-transfer of a convicted person to the seat of the Tribunal or to another State.

D. Mr. Strugar made an informed decision

35. The decision considers that Mr. Strugar's withdrawal of his appeal was not informed "due to a misunderstanding of the options *legally available* in his situation."[43] As stated before, in particular where exceptional humanitarian reasons exist, there were and are no legal obstacles to the transfer of Mr. Strugar to Montenegro. Consequently, there could not have been a misunderstanding of the legal options available to him. Mr. Strugar clearly and rightly so believed that *legally* it would be possible for him to serve his sentence in Montenegro.

36. Moreover, Mr. Strugar was informed of the *factual* obstacle that the Registrar adheres to a different legal opinion and accordingly would be unlikely to make efforts by his own volition to secure Mr. Strugar's transfer to Montenegro. It is clear from the Rule 65*ter* Meetings, the Status Conferences and the extensive communications between the parties, the Chamber, and the Registrar, that Mr. Strugar was well-aware of the fact that no guarantees on his transfer could be offered. I recall in particular the letter of the Registrar of 22 May 2006, in which he stated that "[t]he enforcement of a sentence in Montenegro would currently be subject to a number of important legal and other obstacles, which would need to be removed."[44] What Mr. Strugar believed was that the President (who at that time was the Presiding Judge in the appellate proceedings) as the competent authority would make every effort to facilitate his transfer to Montenegro. This hope unfortunately did not materialize. However, it cannot be said that Mr. Strugar was not put on notice

[42] *See* in particular, United Nations Standard Minimum Rules for the Treatment of Prisoners, *supra* note 12.
[43] Decision, para. 29 (italics added for emphasis).
[44] Letter of the Registrar of 22 May 2006, Annex 4 of the Defence Request. I note that Strugar's knowledge was also confirmed by his Counsel's e-mail to the Chamber of 26 May 2006 (Annex 7 of the Defence Request).

by the Appeals Chamber and the Registrar. Thus he was aware of the uncertainties in relation to a possible transfer to Montenegro.[45] Nevertheless, he made a voluntary and fully informed decision to withdraw his appeal, no doubt also with a view to the fact that the Prosecution withdrew its appeal as well.

37. Finally, I wonder with concern how a bench composed of four of the five judges that unanimously accepted the withdrawal of the appeal as an informed one[46] can come more than nine months later to the conclusion that neither Mr. Strugar[47] nor the former bench[48] was informed. Indeed, in light of the Registrar's letter of 22 May 2006, the entire bench was aware that the Registrar had expressed the opinion that the enforcement of Mr. Strugar's sentence in his home country faced "a number of important legal and other obstacles"[49] when it made its decision that unanimously accepted the mutual withdrawal of the parties' appeals. The legal and factual basis for Mr. Strugar's decision to withdraw his appeal and for the Appeals Chamber's acceptance of this decision has not changed since the decision accepting the withdrawal was rendered.

E. Conclusion

38. In sum, I respectfully disagree with the majority of the Appeals Chamber and would not have granted Mr. Strugar's request to "reopen" his appeal case and the corresponding request by the Prosecution. Mr. Strugar was sentenced by the Trial Chamber to eight years of imprisonment. For exceptional humanitarian reasons both Mr. Strugar and the Prosecution withdrew their appeals. With the acceptance of the parties' withdrawals of their appeals, the Trial Judgement has become final. Mr. Strugar was fully informed of any obstacles that could possibly prevent his transfer to Montenegro. The Chamber, also for humanitarian reasons in this exceptional case, accepted the mutual withdrawal of the parties' appeals. Consequently, Mr. Strugar was entitled to an explicit decision by the President. A convicted person like Mr. Strugar should not be left in limbo.[50] That is why Rule 103 provides that the decision by the President should be taken "as soon as possible." However, there is no legal basis for the Appeals Chamber to try to resolve the uncertainty by "reopening" the appeals.

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[45] *See* also the warnings given to Mr. Strugar in the Status Conference, Transcript pp. 61, 65 (31 August 2006).
[46] The at that time Presiding Judge has decided in his capacity as President not assign himself to the bench again.
[47] As quoted directly in footnote 39 of the Decision, it reads in the Decision Accepting Withdrawals, supra note 1, p. 1, that emphasizing that "Pavle Strugar [...] confirmed the following: 'I am aware of all the legal consequences of [the notice of withdrawal] including the fact that once the appeal is withdrawn there is no possibility of subsequent reconsideration of the judgment, pursuant to which I am convicted, and having the same abolished or altered in my favor.'"
[48] The transcripts of all Status Conferences and the minutes of all Rule 65*ter*(I) Meetings were served on all members of the bench by separate memoranda in compliance with Rules 65*ter*(J) and 107 of the Rules.
[49] Letter of the Registrar of 22 May 2006, Annex 4 of the Defence Request.
[50] Rule 103(B) of the Rules provides that "[t]ransfer of a convicted person [...] shall be effected as soon as possible [...]."

39. As a matter of principle, the withdrawal of the appeals cannot be revoked. This was emphasized during the Status Conference and explicitly accepted by Mr. Strugar.[51] The Appeals Chamber is not in a position to decide whether it is legally possible for Mr. Strugar to be transferred to Montenegro as this authority solely lies with the President. In my mind, the only correct course of action would have been to refer the matter to the President to exercise the power vested in him. The decision to "reopen" the case bars the President from any intervention[52] in this case until the judgement has again become "final."

40. It is for these reasons that with all due respect I dissent from the course of action taken by the Appeals Chamber.

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

Dated this 7th day of June 2007,
At The Hague, The Netherlands.

W. Schomburg

Judge Wolfgang Schomburg

[Seal of the International Tribunal]

[51] Transcript, p. 62 (31 August 2006).
[52] This is also true for any possible request seeking early release.