

UNITED
NATIONS



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No.: IT-02-54-
AR108bis.3
Date: 6 April 2006
Original: English

IN THE APPEALS CHAMBER

Before:

Judge Fausto Pocar, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar:

Mr. Hans Holthuis

Decision of:

6 April 2006

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

Confidential

**DECISION ON REQUEST OF SERBIA AND
MONTENEGRO FOR REVIEW OF THE TRIAL
CHAMBER'S DECISION OF 6 DECEMBER 2005**

The Office of the Prosecutor

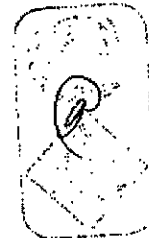
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The Government of Serbia and Montenegro

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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 "International Tribunal", respectively), is seized of the "Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005" filed confidentially by the Government of Serbia and Montenegro ("Serbia and Montenegro") on 20 December 2005 ("Request") pursuant to Rule 108bis of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

I. BACKGROUND

2. In June 2003, the Trial Chamber issued a series of decisions pursuant to Rule 54bis whereby it ordered Serbia and Montenegro to produce sets of the minutes and stenographic notes of meetings held by the Supreme Defence Council ("SDC") as requested by the Prosecution.¹ In response, Serbia and Montenegro filed confidential and *ex parte* requests before the Trial Chamber for the imposition of protective measures pursuant to Rule 54bis(I) to certain portions of the SDC minutes and stenographic notes.²

3. The Trial Chamber granted Serbia and Montenegro's requests for protective measures with regard to the SDC minutes in its confidential "Decision on Serbia and Montenegro's Request for Protective Measures Pursuant to Rule 54bis" rendered on 30 July 2003 ("Fourth Decision"). The Trial Chamber ordered that Serbia and Montenegro provide complete sets of the SDC minutes to the Prosecution, that certain portions of the minutes be used in closed session proceedings only, and that the transcripts of those closed sessions remain sealed. The Trial Chamber granted the requests on the basis that public disclosure of certain portions of the SDC minutes would prejudice Serbia and Montenegro's "national security interests" while disclosure of other portions would prejudice its "vital national interests" in the outcome of the proceedings before the International Court of Justice brought by Bosnia and Herzegovina against Serbia and Montenegro on accusations of genocide ("ICJ proceedings").³

¹ See Decision in Part on Prosecution Motion for Orders Pursuant to Rule 54bis Against Serbia and Montenegro, issued confidentially on 5 June 2003 ("First Decision"); Second Decision on Prosecution Motion for Orders Pursuant to Rule 54bis Against Serbia and Montenegro, issued confidentially on 12 June 2003 ("Second Decision"). The Third Decision on Prosecution Motion for Orders Pursuant to Rule 54bis Against Serbia and Montenegro was issued on 18 June 2003. In that decision, the Trial Chamber rejected the Prosecution's application for binding orders with respect to access to government archives under the control of Serbia and Montenegro.

² Confidential and *Ex Parte* Request for Protective Measures by Serbia and Montenegro, 17 June 2003; Further Confidential and *Ex Parte* Request for Protective Measures by Serbia and Montenegro, 3 July 2003; Additional Confidential and *Ex Parte* Written Observations by Serbia and Montenegro, 24 July 2003.

4. The Trial Chamber also granted Serbia and Montenegro's requests with regard to the SDC stenographic notes in its confidential "Ninth Decision on Applications Pursuant to Rule 54bis of Prosecution and Serbia and Montenegro" issued on 15 October 2003 ("Ninth Decision"). Similar to its Fourth Decision, the Trial Chamber ordered that Serbia and Montenegro provide complete sets of the SDC stenographic notes to the Prosecution, that certain portions of the notes be used in closed session proceedings only, and that the transcripts of those closed sessions remain sealed. Again, the Trial Chamber found that these protective measures were warranted because public disclosure of certain portions of the SDC stenographic notes would prejudice Serbia and Montenegro's national security interests while disclosure of other portions would prejudice its vital national interests in the ICJ proceedings.⁴

5. On 18 July 2005, the Trial Chamber rendered an oral decision in which it rejected an application by Serbia and Montenegro requesting that evidence relating to the personnel files of the Republika Srpska Army ("VRS"), which Serbia and Montenegro had provided voluntarily to the Prosecution, be heard in closed session due to its interest in the ICJ proceedings. The Trial Chamber found that this interest was not a vital national interest nor a national security interest under Rule 54bis and, as such, could not justify the imposition of the protective measures sought.⁵

6. On 20 September 2005, the Appeals Chamber rendered its confidential "Decision on Serbia and Montenegro's Request for Review" of the Trial Chamber's Oral Decision of 18 July ("Decision of 20 September 2005"). The Appeals Chamber found that the Trial Chamber had erred in considering whether Serbia and Montenegro's interest in the ICJ proceedings warranted protection under Rule 54bis as a "vital national interest." The Appeals Chamber held that Rule 54bis empowers a Trial Chamber to grant protective measures on the basis of a State's national security interest only and not some other State interest. Nevertheless, the Appeals Chamber ordered that fairness required that the VRS personnel files should be heard in closed session on the basis that Serbia and Montenegro had a "legitimate expectation" that its vital national interests in the ICJ proceedings would be protected due to the Trial Chamber's earlier Fourth and Ninth Decisions. The Appeals Chamber found that although in those decisions, the Trial Chamber erroneously granted protective measures to certain portions of the SDC minutes and stenographic notes under Rule 54bis on the basis of Serbia and Montenegro's vital national interests in the ICJ proceedings, Serbia

³ Fourth Decision, pp. 3-4.

⁴ Ninth Decision, p. 3.

⁵ Oral Decision of 18 July 2005, Closed Session, T. 42396-42391.

and Montenegro should not be prejudiced for having relied upon that error when voluntarily providing the VRS personnel files to the Prosecution.⁶

7. Following the Appeals Chamber's Decision of 20 September 2005, the Prosecution filed a confidential motion before the Trial Chamber requesting, *inter alia*, that it reconsider its Fourth and Ninth Decisions on grounds that the Trial Chamber erred when it granted protective measures under Rule 54bis(I) to Serbia and Montenegro on the basis of vital national interests.⁷ The Trial Chamber disposed of the motion in its confidential "Decision on Prosecution Motion for Reconsideration of Decisions Concerning Supreme Defence Council Documents and Implementation of Appeals Chamber Review Decision" of 6 December 2005 ("Impugned Decision"). With regard to its Fourth and Ninth Decisions, the Trial Chamber ordered, at paragraph 54(a) of the Impugned Decision, that:

[t]he Trial Chamber by majority **GRANTS** the Prosecution motion for reconsideration of the Trial Chamber's Fourth and Ninth Decisions regarding the SDC minutes and stenographic notes and rescinds the protective measures granted to portions of the minutes and stenographic notes on a basis other than "national security interests." The Chamber also **ORDERS** that sections of the trial transcript in which these portions of the notes and minutes are discussed be unsealed.

8. Thereafter, Serbia and Montenegro filed the Request at issue in this Decision. Serbia and Montenegro submits that the Appeals Chamber should, in a confidential decision, reverse the Trial Chamber's order in paragraph 54(a) of the Impugned Decision on the basis of one of three alternative grounds, which are addressed in turn below. Serbia and Montenegro also requests that the Appeals Chamber suspend the Impugned Decision pending a decision by the Appeals Chamber on its Request. Finally, Serbia and Montenegro seeks an oral hearing before the Appeals Chamber on its Request.⁸

9. On 22 December 2005, the Appeals Chamber suspended the execution of paragraph 54(a) of the Impugned Decision pursuant to Rule 108bis(C), pending its decision on Serbia and Montenegro's Request.⁹

⁶Decision of 20 September 2005, paras 19-23.

⁷Prosecution Motion for Reconsideration of Decisions Concerning SDC Documents and Submissions on the Implementation of the Appeals Chamber Review Decision in Relation to VJ Files and Other Documents Voluntarily Provided, filed confidentially on 23 September 2005.

⁸Request, para. 2 and p. 18.

10. Following Serbia and Montenegro's Request, the "Prosecution Submission in Response to Serbia and Montenegro's Request for Review of the Trial Chamber's Decision of 6 December 2005" was filed confidentially on 9 February 2006 ("Response"). The "Reply of Serbia and Montenegro to 'Prosecution Submission in Response to Serbia and Montenegro's Request for Review of the Trial Chamber's Decision of 6 December 2005'" was filed confidentially on 28 February 2006 ("Reply").

11. On 14 March 2006, the Trial Chamber terminated proceedings in this case due to the death of the Accused on 11 March 2006.¹⁰ Nevertheless, the Appeals Chamber will rule on Serbia and Montenegro's pending Request as it concerns the sensitive issue of whether certain parts of the trial record provided by a State will remain subject to protective measures and hence be inaccessible to the public. The Appeals Chamber considers that it is in the interests of justice to do so even though the Accused was not heard with regard to Serbia and Montenegro's Request prior to his death. The Appeals Chamber recalls that when a State files a Rule 108bis request, only the State and the party upon whose motion the Trial Chamber issued the impugned decision, in this case the Prosecution, have a right to be heard by the Appeals Chamber.¹¹ However, the other party, in this case the Accused, does not have such a right but "may be heard if the Appeals Chamber considers that the interests of justice so require."¹² Here, the Appeals Chamber has not ruled on this issue because the Accused never filed a motion indicating any desire to be heard even though he had ample opportunity to do so given that Serbia and Montenegro filed its Request 81 days prior to the Accused's death and the briefing by Serbia and Montenegro and the Prosecution was completed over a week before his death.

II. THE RESPONSE AND THE REPLY

12. As a preliminary matter, the Appeals Chamber addresses whether it may consider the Prosecution's Response and Serbia and Montenegro's Reply. On 16 February 2006, the Appeals Chamber was further seized of Serbia and Montenegro's confidential motion requesting the Appeals Chamber to dismiss the Prosecution's Response as untimely filed or alternatively, to grant Serbia and Montenegro leave to file a reply within three weeks of the day that the Response was

⁹ See Order Suspending Execution of the Order Contained in Paragraph 54(a) of the Trial Chamber's Decision Dated 6 December 2005, issued confidentially on 22 December 2005.

¹⁰ See Order Terminating the Proceedings, 14 March 2006.

¹¹ See Rule 108bis(B).

¹² *Ibid.* (emphasis added).

filed ("Motion").¹³ Serbia and Montenegro argues that the time limit found in Rule 126bis for filing responses to motions in general applies to Rule 108bis proceedings and that, therefore, the Prosecution's Response should have been filed within fourteen days of the filing of Serbia and Montenegro's Request. Serbia and Montenegro points out that the Prosecution neither explained why it filed its Request 37 days beyond that time limit nor requested an extension of the time limit on a good cause basis pursuant to Rule 127 of the Rules.¹⁴

13. On 22 February 2006, the Prosecution filed a confidential response to Serbia and Montenegro's Motion.¹⁵ The Prosecution contends that its Response to Serbia and Montenegro's Request should be considered by the Appeals Chamber because it is "admissible, relevant, [and] not in breach of any timetable set by the Rules or the Appeals Chamber."¹⁶ In the alternative, the Prosecution requests that if the Appeals Chamber finds that its Response was not timely filed, that it vary any time limit it finds applicable. The Prosecution argues that good cause exists pursuant to Rule 127 because its "action in submitting a comprehensive pleading was reasonable, it was aimed at expediting the overall substantive consideration of the Review Request in the context of a complex procedural history and substantive issues addressed."¹⁷ With regard to Serbia and Montenegro's request to file a reply within three weeks, the Prosecution objects, stating that it fails to request permission to file a reply and to provide valid reasons as to why it cannot file a reply in a shorter time period.¹⁸

14. The Appeals Chamber considers that under the International Tribunal's Rules and Practice Directions, no time limits therein are explicitly applicable to review proceedings brought pursuant to Rule 108bis. While Rule 108bis stipulates that "[t]he party upon whose motion the Trial Chamber issued the impugned decision shall be heard by the Appeals Chamber" upon the filing of a request for review by a State, no deadline is given for that party's response. Rule 126bis's general time limit for filing a response does not apply because that Rule sets the deadline for filing a response to a motion filed by a party. Rule 108bis pertains to a State filing a motion for review in a case. However, a State may not be considered a party before the International Tribunal under its

¹³ Serbia and Montenegro's Motion Concerning Prosecution Submission in Response to Serbia and Montenegro's Request for Review of the Trial Chamber's Decision of 6 December 2005, Dated 9 February 2006, para. 8. As noted above, Serbia and Montenegro then filed the requested Reply on 28 February 2006.

¹⁴ *Id.*, paras 4-5.

¹⁵ Prosecution Response to Serbia and Montenegro's Motion Concerning Prosecution Submission in Response to Serbia and Montenegro's Request for Review of the Trial Chamber's Decision of 6 December 2005, Dated 9 February 2006 ("Response to Motion").

¹⁶ *Id.*, para. 8.

¹⁷ *Id.*, paras 9-10.

¹⁸ *Id.*, para. 10.

Rules. Rule 2 defines a party for purposes of the Rules as the Prosecutor or the Defence, which comprises the accused and/or the accused's Counsel.

15. The Appeals Chamber notes that in previous Rule 108bis review proceedings before the International Tribunal, the admissibility and the merits of a request have often been considered separately and time limits for written pleadings on those issues have been set on a case by case basis.¹⁹ Although no explicit time limits were set here, the Appeals Chamber considers that the Prosecution's filing of its Response 51 days after the filing of Serbia and Montenegro's Request was clearly outside of any reasonable time limit that has been imposed in past cases,²⁰ and even exceeds the deadline for responding to an appeal from judgement.²¹ Nonetheless, as there was no fixed time limit in this case, the Appeals Chamber will consider the Prosecution's Response. The Appeals Chamber notes that in the future, when no deadline for responding to a Rule 108bis request has been specified, responses filed this long after the filing of the review request may not be considered. Having decided to consider the Prosecution's Response, the Appeals Chamber will also consider the reply filed by Serbia and Montenegro. Although there is no right of reply by a State in Rule 108bis proceedings,²² the Appeals Chamber finds that it is in the interests of justice to consider this additional submission from Serbia and Montenegro.²³

¹⁹ See e.g., *Prosecutor v. Simić et al.*, Case No. IT-95-9-AR108bis, Decision and Scheduling Order, 8 November 2000; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR108bis, Order on Admissibility of State Request for Review of Order to the Republic of Croatia for the Production of Documents Issued by Trial Chamber III on 4 February 1999 and Request for Suspension of Execution of Order, 26 March 1999; Scheduling Order, 26 March 1999; Scheduling Order, 17 March 1999; *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108bis, Decision on the Notice of State Request for Review of Order on the Motion of the Prosecutor for the Issuance of a Binding Order on the Republic of Croatia for the Production of Documents and Request for Stay of Trial Chamber's Order of 30 January 1998, 26 February 1998 ("Blaškić Decision on Notice of State Request"); Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997; *Blaškić Decision on Admissibility*.

²⁰ *Ibid.*

²¹ See Rule 112 of the Rules, which requires that a Respondent's brief be filed within 40 days of the filing of the Appellant's Brief.

²² *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 ("Milošević Rule 70 Decision"), para. 4.

²³ The Appeals Chamber therefore rejects the Prosecution's objection to the Reply on grounds that Serbia and Montenegro failed to request for permission to file a Reply and failed to give a valid reason for why it needed three weeks to file the Reply. See Response to Motion, para. 10. In the Motion, Serbia and Montenegro "respectfully asks to be given the right to reply." *Id.*, para. 7. Furthermore, the Appeals Chamber finds that Serbia and Montenegro offered a valid reason for the time requested to do so when stating that "[c]onsidering the circumstances and the great importance of the questions put before the Appeals Chamber, a reasonable time for Serbia and Montenegro to file its reply would be three weeks [...]." *Ibid.* Finally, in granting Serbia and Montenegro's request to file its Reply, the Appeals Chamber grants Serbia and Montenegro leave to exceed the word limit for filing replies prescribed in the Practice Direction on the Length of Briefs and Motions. See Reply, para. 2.

III. STANDARD OF REVIEW

16. The Appeals Chamber recalls that the decision to reconsider a previous interlocutory decision is a discretionary one.²⁴ Therefore, the Appeals Chamber will not conduct a *de novo* review of a reconsideration decision by a Trial Chamber and the question before it is not whether it "agrees with that decision" but "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."²⁵ It must be demonstrated that the Trial Chamber has committed a "discernible error"²⁶ resulting in prejudice to a party.²⁷ The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion only where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."²⁸ The Appeals Chamber will also consider whether the Trial Chamber "has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations [...]" in reaching its discretionary decision.²⁹

IV. THE APPLICABLE LAW

17. Rule 54 and Rule 54bis allow a party to request a State to produce documents or information for the purposes of an investigation or the preparation or conduct of a trial. Where a Trial Chamber orders a State to produce the requested materials under Rule 54bis(E), it may grant appropriate measures prior to disclosure to protect State interests under sub-paragraph (I). The use of the term "interest" in sub-paragraph (I) has been interpreted by the Appeals Chamber to refer to "national security interests" only, in light of the reference therein to other subparagraphs of Rule 54bis, which refer to imposing protective measures for reasons of a State's national security interests.³⁰

18. Under Rule 54bis(C)(i)(a), a decision issued by a Trial Chamber pursuant to Rule 54bis(E) is subject to review at the request of a State pursuant to Rule 108bis. The Appeals Chamber will consider the merits of a State's request under Rule 108bis(A) if it finds that the State has demonstrated that the request is admissible. To meet the threshold test of admissibility, the State must demonstrate: (1) that it is directly affected by the Trial Chamber's Rule 54bis(E) decision, and

²⁴ *Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgment, 23 May 2005 ("Kajelijeli Appeals Judgment"), para. 203.

²⁵ *Cf. Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("Milošević Decision on Joinder"), para. 4.

²⁶ *Cf. Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Milošević's Provisional Release, 17 October 2005 ("Stanišić Provisional Release Decision"), para. 6.

²⁷ *Milošević Decision on Joinder*, para. 6.

²⁸ *Stanišić Provisional Release Decision*, para. 6 & n. 10.

²⁹ *Ibid.*

³⁰ Decision of 20 September 2005, para. 19.

(2) that the decision concerns issues of general importance relating to the powers of the International Tribunal.³¹

V. DISCUSSION

A. Admissibility

19. Serbia and Montenegro contends that its Request is admissible because it is directly affected by the Impugned Decision.³² The Appeals Chamber finds that this is established. The Impugned Decision varied protective measures, which were originally granted by the Trial Chamber at the request of Serbia and Montenegro, for certain confidential documents that Serbia and Montenegro produced pursuant to an order of that Trial Chamber. The SDC minutes and stenographic notes are State documents originating from a military body, which is the head of the armed forces in Serbia and Montenegro.³³

20. Serbia and Montenegro further submits that the Request is admissible because the Impugned Decision concerns issues of general importance relating to the powers of the International Tribunal. Serbia and Montenegro asserts that the Impugned Decision should be reviewed by the Appeals Chamber because it raises questions on the appropriate legal standard that should be applied by a Trial Chamber when reconsidering its interlocutory decisions to grant protective measures to information provided by States under Rule 54bis, the application of that standard, and the appropriate circumstances for when a Trial Chamber should exercise its discretionary power to reconsider its protective measures decisions under Rule 54bis.³⁴ Serbia and Montenegro argues that these issues concern the nature and extent of the powers that the International Tribunal may exercise vis-à-vis sovereign States.³⁵

21. The Appeals Chamber finds that Serbia and Montenegro has raised issues relating to the powers of the International Tribunal—specifically, the inherent power of a Trial Chamber to reconsider its interlocutory decisions. Serbia and Montenegro has also raised issues of general importance because they concern, in particular, the extent of a Trial Chamber's power to reconsider interlocutory decisions granting protective measures to information provided by States. Reconsideration of such decisions may impact upon the relationship of States with the International Tribunal; in particular, upon their obligation under Article 29 of the Statute to cooperate without

³¹ See Rule 108bis(A).

³² Request, para. 5.

³³ Cf. *Milošević* Rule 70 Decision, para. 7; *Blaškić* Decision on Notice of State Request, para. 8; *Blaškić* Decision on Notice of State Request; *Blaškić* Decision on Admissibility, para. 13.

³⁴ Request, paras 2, 6, 8.

³⁵ *Id.*, paras 7, 9.

undue delay in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law through the production of evidence. Therefore, the Appeals Chamber now turns to consider the merits of Serbia and Montenegro's submissions on these issues.

B. Reconsideration of Protective Measures Decisions under Rule 54bis (I)

22. Serbia and Montenegro first argues that the Trial Chamber erred in the Impugned Decision when it reconsidered its Fourth and Ninth Decisions under the usual standard found in the jurisprudence of the International Tribunal for reconsideration of interlocutory decisions. Serbia and Montenegro asserts that this "lenient" standard applies to "ordinary" interlocutory decisions such as those on time-limits for submissions, admission of evidence or length of briefs regulating the proceedings in a case, but does not apply to interlocutory decisions granting measures to protect State interests under Rule 54bis, which confer positive rights on States and impact upon the cooperation of sovereign States with the International Tribunal. As such, these interlocutory decisions should be subject to a higher standard of reconsideration and reconsideration should only be appropriate in "highly exceptional circumstances" such as when a State makes a request for protective measures in bad faith.³⁶

23. Furthermore, Serbia and Montenegro submits that if the same standard for reconsideration were to apply to these interlocutory decisions, which create a "legitimate expectation" of protection for States, this would be a "serious violation of the principles of legal certainty and fairness." Serbia and Montenegro notes that interlocutory decisions granting protective measures to information provided by States under Rule 54bis "provide reliance to States" in their subsequent decisions and policy actions. If States were "never certain that their interests would in fact be protected" due to the possibility of reconsideration of these decisions, it would cause severe prejudice to States and would impact negatively on States' future willingness to cooperate with the International Tribunal. In this particular case, Serbia and Montenegro asserts that the Fourth and Ninth Decisions issued over two years ago gave rise to a legitimate expectation that the protective measures granted therein would remain in place. Consequently, Serbia and Montenegro conducted its foreign policy and formulation of its defence in the ICJ proceedings in reliance on the Fourth and Ninth Decisions remaining undisturbed.³⁷

24. In the alternative, Serbia and Montenegro argues that if the legal standard for reconsideration of interlocutory decisions is proper for reconsidering decisions granting protective

³⁶ *Id.*, paras 10, 11, 20-21.

³⁷ *Id.*, paras 12-19.

measures to States under Rule 54bis, then the Trial Chamber erred in its application of that test. In its view, the Trial Chamber should have determined whether Serbia and Montenegro's interests in the ICJ proceedings could also be qualified as a national security interest since the Appeals Chamber did not rule on this issue. Furthermore, Serbia and Montenegro contests the Trial Chamber's assumption that its legal error in the Fourth and Ninth Decisions amounted to prejudice without determining whether it actually caused prejudice and to what extent.³⁸ Finally, Serbia and Montenegro submits that the Trial Chamber erred in the exercise of its discretion by failing to "give weight or sufficient weight" to the impact its ruling would have on the cooperation of States with the Tribunal, the detriment its ruling would have on Serbia and Montenegro, which relied on the protective measures granted for over two years, and the requirements of legal certainty and fairness inherent in any judicial procedure.³⁹

25. The Appeals Chamber recalls that in the Impugned Decision, the Trial Chamber looked to the test for reconsideration of interlocutory decisions found in the jurisprudence of the International Tribunal and did not find that some other test should apply to its Fourth and Ninth Decisions.⁴⁰ The Trial Chamber held that reconsideration of these decisions granting protective measures to certain portions of the SDC minutes and stenographic notes was required in light of the Appeals Chamber's Decision of 20 September 2005,⁴¹ noting that the granting of protective measures under Rule 54bis for reasons of "vital national interests" was erroneous. Furthermore, the Trial Chamber also found that its erroneous Fourth and Ninth decisions had caused prejudice to the rights of the Accused to have a public trial and to the public's interest in that trial.

26. The Appeals Chamber finds that the Trial Chamber did not err in the Impugned Decision on the basis of Serbia and Montenegro's assertion that a "higher" or different test for reconsideration of interlocutory decisions should apply to a Trial Chamber's decisions on protective measures under Rule 54bis. Serbia and Montenegro fails to provide support for such an assertion in the jurisprudence of the International Tribunal. It is clear that the test for reconsideration of

³⁸ *Id.*, paras 22-28.

³⁹ *Id.*, paras 29-35.

⁴⁰ Impugned Decision, para. 27 & fn. 33. The Appeals Chamber notes that the Trial Chamber cited to a number of interlocutory appeals decisions, all of which provide varying language articulating the test for reconsideration of interlocutory decisions. The Trial Chamber also cited to one Appeals Judgment for that test; however, the question at issue in that case was not that of the appropriate test for reconsideration of interlocutory decisions. See *Prosecutor v. Mucić, Delić, and Landžo*, Case No. IT-96-21-Abis, Judgment, 8 April 2003, para. 48. Subsequent to that Appeals Judgment and the interlocutory appeals decisions cited by the Trial Chamber in this case, the Appeals Chamber has since definitively articulated the appropriate language for reconsideration of interlocutory decisions in a subsequent ICTR Appeals Judgment as follows: a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases "if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice." *Kajelijeli Appeals Judgment*, paras. 203-204 (citing to *Nahimana et al.*, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005, p. 2).

⁴¹ See *supra* para. 6.

interlocutory decisions may be applied by a Chamber to any of its previous interlocutory decisions. There is no merit to the argument of Serbia and Montenegro that reconsideration under that test should be or has been limited to decisions relating to procedural issues surrounding the management of a trial. Indeed, Chambers in both the International Tribunal and the International Criminal Tribunal for Rwanda ("ICTR") have, *inter alia*, applied their inherent power of reconsideration to previous decisions on provisional release of an accused and protective measures granted to evidence on behalf of the interests of victims and witnesses in safety and privacy.⁴²

27. Furthermore, nothing in the jurisprudence of the International Tribunal suggests that the legal standard for a Chamber to reconsider its interlocutory decisions is a low one, such that a Chamber may easily exercise its inherent power of reconsideration. Rather, a Chamber considers requests for reconsideration of interlocutory decisions in exceptional cases.⁴³ Even in such circumstances, a Trial Chamber has discretion whether or not to reconsider its interlocutory decision.⁴⁴ The Appeals Chamber finds that these requirements allow for due consideration to be given by a Chamber to the interests of States when determining whether to reconsider an interlocutory decision granting protective measures to material provided by a State under Rule 54bis(D).

28. However, the Appeals Chamber finds that the Trial Chamber erred when applying the reconsideration test and subsequently deciding to reconsider its Fourth and Ninth Decisions in the exercise of its discretion. First, although the Trial Chamber properly noted that there was a clear error of law in its Fourth and Ninth Decisions, it erred in also finding that this caused prejudice to the Accused's right to a public trial and the public's interest in that trial. The Appeals Chamber recalls that "[t]he principle advantage" to having public proceedings "is that it helps to ensure that a trial is fair."⁴⁵ In considering the issue of potential prejudice caused by the protective measures erroneously imposed in its Fourth and Ninth Decisions, the Trial Chamber failed to give sufficient weight to the fact that, in a previous decision, the Trial Chamber had held that the "closed session

⁴² See, e.g., *The Prosecutor v. Zepić, Delalić, Zdravko Mucić, aka "Pavo", Hazim Delić, Esad Landžo, aka "Zenga"*, Case No. IT-96-21-A, Order of the Appeals Chamber on Hazim Delić's Emergency Motion to Reconsider Denial of Request for Provisional Release, 1 June 1999; *Prosecutor v. Radoslav Brđanin, Momir Talić*, Case No. IT-99-36-PT, Order on the Prosecution's Motion for Reconsideration of the Order Issued by the President on 11 September 2000, 11 January 2001; *The Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić, Momir Nikolić*, Case No. IT-02-60-AR65 & IT-02-60-AR65.2, Decision on Provisional Release of Vidoje Blagojević and Dragan Obrenović, 3 October 2002; *The Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić, Momir Nikolić*, Case No. IT-02-60-PT, Decision on Dragan Obrenović's Application for Provisional Release, 19 November 2002; Decision on Vidoje Blagojević's Application for Provisional Release, 19 November 2002; *Prosecutor v. Augustin Ndingihyimana, Augustin Bizimungu, François-Xavier Nsubanyemeye and Innocent Sagahutu*, Case No. ICTR-2000-56-T, Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials, 3 November 2004.

⁴³ *Kajelijeli Appeals Judgement*, para. 204.

⁴⁴ *Id.*, paras. 203-204.

protective measures granted" with regard to the SDC stenographic notes "did not affect the fairness of the trial."⁴⁶ The Appeals Chamber does not agree with the Trial Chamber's summary dismissal in the Impugned Decision of that previous finding as "inapposite" because its previous decision was considering the issue of "fair [...] conduct of proceedings" rather than looking to the right of the Accused to a public trial and the interests of justice.⁴⁷ The Trial Chamber explicitly considered in that previous decision the issue of whether the protective measures for the SDC notes would "impede[] the Prosecution's ability to present important evidence in public and the Accused's right to a fair trial."⁴⁸ By concluding that the confidentiality provided for the SDC notes would not affect the fairness of the trial, the Trial Chamber was, in essence, finding that these protective measures would not impinge upon the Accused's right to a public trial or the public's access to that trial.⁴⁹

29. Second, the Appeals Chamber finds that the Trial Chamber erred when exercising its discretion to reconsider its Fourth and Ninth Decisions before considering or giving weight to Serbia and Montenegro's reliance on the protective measures imposed in these decisions and the resulting prejudice that removal of those protective measures might cause to Serbia and Montenegro. The Trial Chamber was correct to note that Serbia and Montenegro did not have a "legitimate expectation" at the time those decisions were rendered in protective measures being granted on the basis of its vital national interests in the ICJ proceedings. However, after the measures were granted and, with the passage of time of over two years, Serbia and Montenegro did legitimately come to rely upon those protective measures remaining in place in the conduct of its foreign policy and in the preparation of its case before the ICJ. The Trial Chamber did not consider this issue at all in the Impugned Decision or the impact that reconsideration of its Fourth and Ninth Decisions could have on the cooperation of States with the International Tribunal in future proceedings.

30. Thus, the Appeals Chamber finds that the Trial Chamber should not have reconsidered its Fourth and Ninth Decisions absent exceptional circumstances with respect to the protective measures granted to the SDC minutes and stenographic notes.

⁴⁶ *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 32.

⁴⁷ Decision on Prosecution Request for Certification of the Trial Chamber's Eighth and Ninth Decision on Applications Pursuant to Rule 54bis of Prosecution and Serbia and Montenegro—Twelfth Decision, issued confidentially on 20 November 2003 ("Twelfth Decision"), p. 3.

⁴⁸ Impugned Decision, fn. 36.

⁴⁹ Twelfth Decision, p. 3.

⁴⁹ In any event, the Appeals Chamber notes that the issue of possible prejudice to the Accused's right to a public trial or to the public's interest in the proceedings by keeping the protective measures in place has since become moot in light of the Accused's recent death and the Trial Chamber's termination of the trial proceedings. See *supra* para. 11.

VI. DISPOSITION

31. On the basis of the foregoing, the Appeals Chamber GRANTS Serbia and Montenegro's Request in part,⁵⁰ GRANTS Serbia and Montenegro's Motion, REVERSES the Trial Chamber's rescission in paragraph 54(a) of the Impugned Decision of protective measures granted to portions of the SDC minutes and stenographic notes in the Fourth and Ninth Decisions on the basis of interests other than "national security interests," and REVERSES the Trial Chamber's order in paragraph 54(a) of the Impugned Decision that certain sections of trial transcript in which these portions of the SDC minutes and stenographic notes are discussed be unsealed.

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

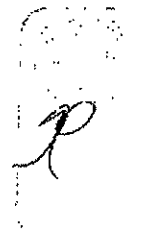
Dated this 6th day of April 2006,

At The Hague,
The Netherlands.



Judge Fausto Pocar, Presiding Judge

[Seal of the International Tribunal]



⁵⁰ The Appeals Chamber grants all of the relief sought by Serbia and Montenegro in its Request except for its submission that there should be an oral hearing before the Appeals Chamber on its Request. See Request, p. 18. The Appeals Chamber considers that under Rule 108bis(D), Rule 116bis applies *mutatis mutandis*. Rule 116bis stipulates that "[a]n appeal from a decision rendered under Rule 54bis shall be heard expeditiously on the basis of the original record of the Trial Chamber [and] may be determined entirely on the basis of written briefs." The Appeals Chamber considers that the written briefs filed in this case provide a sufficient basis for disposing of Serbia and Montenegro's Request and that it is in the interests of justice to render this Decision entirely on the briefs.