Case No. IT-94-1-R

IN THE APPEALS CHAMBER

Before:
Judge Claude Jorda, President

Judge Mehmet Güney

Judge Asoka de Z. Gunawardana

Judge Fausto Pocar

Judge Liu Daqun

Registrar:
Mr. Hans Holthuis

Decision of:
30 July 2002

PROSECUTOR
v.

DUSKO TADIC

DECISION ON MOTION FOR REVIEW

Counsel for the Prosecutor:

Mr. Norman Farrell

Counsel for the Defence:

Mr. William Clegg
Mr. Anthony Abell

I. Background

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the "Appeals Chamber " and the "International Tribunal" respectively) is seised of the "Request for Review of My Complete Case and Review of the Trial Chamber and Appeals Chamber Proceedings Conducted Before the Hague Tribunal" filed by Dusko Tadic ("Tadic" or the "Applicant ") on 18 June 2001[1] (the "Tadic Request for Review") and

resubmitted, in a more detailed form, by counsel for Tadic (the "Defence") on 5 October 2001 (the "Motion for Review").[2]

2. On 7 May 1997, Tadic was convicted by Trial Chamber II of crimes against humanity and violations of the laws or customs of war on eleven counts of the Indictment, as set out in its "Opinion and Judgement" (the "Trial Chamber Judgement").[3] On 15 July 1999, Tadic was convicted by the Appeals Chamber of grave breaches of the Geneva Conventions of 1949 on nine further counts of the Indictment, as set out in its "Judgement" (the "Appeals Chamber Judgement" or the "Final Judgement").[4] On 26 January 2000, following the "Judgement in Sentencing Appeals", Tadic was sentenced to twenty years' imprisonment on Counts 1, 29, 30, and 31 of the Indictment, to be served concurrently with various lesser penalties. [5] At present, Tadic is serving sentence in Germany.

3. On 31 January 2000, the Appeals Chamber rendered its "Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin" (the "Contempt Judgement"). The Appeals Chamber found Vujin guilty of contempt in relation to a number of manipulations of witnesses and evidence.[6] The Appeals Chamber (in a different composition) upheld this finding in its Judgement of 27 February 2001.[7] As will be discussed in detail, it is in the light of the findings of the Contempt Judgement and the possibility that his counsel acted against his interests that Tadic is now seeking a review of his entire case.

4. On 18 June 2001, the Applicant filed the Tadic Request for Review with the Appeals Chamber. The Office of the Prosecutor ("Prosecution") responded on 29 June 2001[8] and the Defence replied on 3 July 2001.[9] In its reply, the Defence maintained that, in the interests of justice, a "properly argued application for Review, drafted by Counsel, should be filed," and requested the Appeals Chamber to take no action on the Tadic Request for Review until the filing of a motion for review drafted by counsel.[10]

5. On 5 October 2001, the Defence filed the Motion for Review before the President of the International Tribunal (the "President") pursuant to Article 26 of the Statute of the International Tribunal and Rule 119 of the Rules of Procedure and Evidence of the International Tribunal (the "Rules"). On 29 October 2001, the President assigned the case to a bench of five Judges of the Appeals Chamber and transferred the Motion for Review to that Bench. On 5 November 2001, the Appeals Chamber designated Judge Fausto Pocar as the Pre-Review Judge. In this capacity, Judge Pocar, on 6 November 2001, granted the requests by the Prosecution for extension of time[11] and page limit[12]. On the same day, the Prosecution filed its Response (the "Response").[13] On 14 December 2001, Judge Pocar recognised (in fairness to the Applicant) as validly done the filing of a reply by the Defence (the "Reply")[14] although it was in fact filed later than scheduled.

II. Submissions of the Parties

(a) The Applicant

6. In the Tadic Request for Review, Tadic seeks a review of his entire case. He claims that Milan Vujin ("Vujin"), one of the counsel of his defence team, acted against his

interests while conducting investigations during the pre-trial and pre -appeal phases of his case. In particular, Tadic submits that in the Contempt Judgement , the Appeals Chamber found that Vujin wilfully gave to Simo Drljaca ("Drljaca"), chief of the Prijedor Police Station, a list of potential witnesses who could have testified in Tadic's favour, despite knowing that this was against Tadic's interests .[15] He further stresses that Vujin was "found guilty of various manipulations throughout ShisC appeal preparations and the investigation conducted at that time with the aim of concealing the real perpetrators…". [16] Lastly, Tadic remarks that the Appeals Chamber itself at paragraph 167 of the Contempt Judgement stated that: "The conduct of [Vujin]... strikes at the very heart of the criminal justice system. The Appeals Chamber has not considered the extent to which the interests of Tadic may in fact have been disadvantaged by the conduct in question. That is a matter which would require substantial investigation, and no such investigation was either suggested or undertaken in these proceedings."[17]

7. In the Motion for Review, the Defence submits that the new facts relied upon are "the findings set out in the Contempt Judgement."[18] In this regard, the Defence points to the following findings of the Contempt Judgement . First, Vujin put before the Appeals Chamber in support of his Rule 115 application ("Rule 115 Application") [19], a case that was known to him to be false in relation to the weight to be given to statements by Mlado Radic ("Radic"). Second, Vujin put before the Appeals Chamber in support of his Rule 115 Application a case that was known to him to be false in relation to the responsibility of Goran Borovnica for the killing of two Muslim policemen of which Tadic had been accused. Third, Vujin manipulated witnesses A and B by seeking to avoid any identification in their statements of persons who may have been responsible for the crimes for which Tadic had been convicted. Fourth, Vujin gave a list of defence witnesses list to Drljaca, who, as Michaïl Wladimiroff (one of the Tadic's counsel during the trial) testified in the contempt proceedings, obstructed the Defence in building its case because "armed with the list, Drljaca would act to make the witnesses impossible to find".[20] Fifth, Vujin "whilst preparing his own defence to the allegations of contempt, had deliberately contacted individuals whom he was forbidden to contact by the terms of a Scheduling Order dated 10th February 1999."[21] Sixth, Vujin's misconduct during both the preparation of the trial and of the appeal, was "not only intended to interfere with the interests of justice, but was also against [Tadic's] interests."[22]

8. Furthermore, the Defence submits that the findings reached in the Contempt Judgement amount to new facts not known to it at the relevant time. According to the Defence , until the Appeals Chamber had made its findings in the Contempt Judgement, Vujin's misconduct was not proven and not known to be true and, therefore, could not constitute a new fact, because it amounted to mere suspicion. [23] The Defence further claims that the new facts could not have been discovered through the exercise of due diligence, since the Contempt Judgement's findings were reached only after a lengthy hearing.[24]

9. The Defence maintains that the new facts could have been a decisive factor for both the Trial Chamber and the Appeals Chamber in reaching their original decisions . In particular, the Defence, with regard to the question whether Goran Borovnica and not Tadic was responsible for the killing of two policemen, submits that this issue goes to the very heart of his conviction for the killings on Count 1 of the Indictment, because

the basis upon which the Applicant was convicted on Count 1 of the Indictment is limited to one witness and is thus very tenuous. Indeed, the decision by the Appeals Chamber to uphold Tadic's conviction was made in ignorance of the false case put forward by Vujin and his "witness persuasion".[25]

10. The Defence, with regard to Vujin's manipulation of Radic and Witnesses A and B, recalls that these witnesses all testified in relation to the alleged events in Omarska for which the Applicant was convicted. The Defence remarks that, although the full extent of Vujin's misconduct cannot be known, the nature of the proven misconduct was such as to render both the trial and the appeal of Tadic unfair.[26]

11. In its Reply, the Defence submits as a new fact a legal finding of the Appeals Chamber in its judgement of 23 October 2001 in the *Kupreskic* case (the "*Kupreskic* Judgement"). It recalls that, in that judgement, the Appeals Chamber noted that the Indictment did not include an allegation concerning an attack on a house of a Bosnian Muslim, which attack was a material fact of the Prosecution's case, and held that the "allegation pertaining to this event Sthe attack on a Muslim's houseC should not have been taken into account as a basis for finding Zoran and Mirjan Kupreskic criminally liable for the crime of persecution."[27] The Defence suggests that the same approach be adopted in the present case, as the killing of the two policemen by Tadic was not pleaded in the Indictment.

(b) The Prosecution

12. In response to the Tadic Request for Review, the Prosecution submits that the material contained therein does not constitute new facts within the meaning of Rule 119 of the Rules. It states that the disclosure of the witness list to Drljaca occurred prior to the start of trial but was not brought to the attention of the Trial Chamber, notwithstanding that Tadic and his lead defence counsel, Wladimiroff , were aware of it.[28] The Prosecution also claims that the issue of the "names of people who were directly involved in and responsible for the … offences" is dealt with in the Contempt Judgement and does not constitute a new fact.[29]

13. The Prosecution contends that the only matters put forward by the Defence that may constitute "new facts" are the findings of the Appeals Chamber that Vujin committed specific acts of misconduct. It claims that the wider allegations in the Motion for Review as to Vujin's pre-trial and pre-appeal misconduct are matters of speculation and cannot be deemed to be new facts. In the Prosecution's view, the new facts introduced by the Appeals Chamber are therefore limited to the following findings in the Contempt Judgement. First, in support of his Rule 115 Application, Vujin put forward to the Appeals Chamber a case which was known to him to be false in relation to the weight to be given to statements made by Radic. Second, in support of his Rule 115 Application, Vujin put forward to the Appeals Chamber a case which was known to him to be false in relation to the responsibility of Goran Borovnica for the killing of two Muslim policemen. Third, Vujin manipulated Witnesses A and B by seeking to avoid any identification by them of persons who may have been responsible for the crimes for which Tadic had been convicted. Fourth, Vujin knowingly acted contrary to the interests of Tadic when he gave the list of defence witnesses to Drljaca, thereby obstructing Defence efforts to interview those witnesses.[30]

14. The Prosecution notes that another finding of the Appeals Chamber in the Contempt Judgement, namely that Vujin's conduct was "against the interests of his client", is limited to the specific acts of misconduct relating to the Contempt Judgement and, therefore, cannot be used to make a more generalised finding that Vujin acted against his client's interests.[31]

15. The Prosecution submits that none of the allegedly new facts could have amounted to a decisive factor in reaching the decision. As to the statements made by Radic , the Prosecution asserts that because Tadic was the person who obtained Radic's first statement, he was a co-perpetrator in this act of misconduct, and therefore cannot allege that this was a new fact not known to him. The Prosecution adds that the Appeals Chamber in its Decision on the Rule 115 Application of 15 October 1998 (the "Rule 115 Decision") rejected Radic's statements because the witness was found to have been available at trial. Thus, since these statements are not part of the trial or appeal records, neither the Appeals Chamber nor the Defence would be entitled to make reference to these statements for the purposes of review.[32] The Prosecution further states that, even if Radic's statement was falsified, this would have had no bearing on Tadic's ability to fulfil the test of unavailability under Rule 115 of the Rules. Lastly, it submits that this particular instance of misconduct cannot be said to have been directed against Tadic's interests, since the Appeals Chamber found that Vujin had tampered with the date of the first statement such that that statement could support Tadic's appeal as additional evidence.[33]

16. The Prosecution submits that the Defence has not shown how the mounting of a false case in the Rule 115 Application by Vujin establishing Goran Borovnica's responsibility for the killing of the two policemen, could have been a decisive factor for the Appeals Chamber in its decision to uphold the Trial Chamber's finding that Tadic had killed the two policemen. In particular, the Prosecution recalls, *inter alia*, that at trial Witness W testified that Borovnica and not Tadic had killed the two policemen. During the contempt proceedings, however**,** evidence was given that during the appeal preparations, Witness W told Vujin that his identification of Borovnica at trial had been false, as Momcilo ("Ciga") Radanovic had killed the two policemen.[34] In this regard, the Prosecution points out that the Appeals Chamber rejected a motion submitted by Clegg and Livingston, counsel for the Applicant, prior to the appeal seeking to admit evidence from Witness W that he had lied at trial.[35] According to the Prosecution, the rejection of this evidence forecloses any argument that this could have been a decisive factor for the Appeals Chamber in reaching its decision.[36]

17. With regard to the manipulation by Vujin of Witnesses A and B, the Prosecution denies that this could have been a decisive factor in the Appeals Chamber's decision to uphold the Trial Chamber's findings concerning the events at Omarska. The Prosecution recalls that, in the Contempt Judgement, it was proven that Vujin instructed Witnesses A and B not to name names. It stressed, however, that Vujin had also attempted to admit other statements offering similar evidence on the existence of a look-alike or *Doppelgänger* of Tadic, known as Danicic, and that these statements were all rejected by the Appeals Chamber. In light of this fact, the Prosecution claims that even if Witnesses A and B had mentioned the name Danicic in their statements as author of the crimes instead of Tadic, it is unlikely that this could have made a difference in the Appeals Chamber's decision to reject their statements.[37]

18. Lastly, the Prosecution, with regard to the fact that Vujin gave the list of defence witnesses to Drljaca, thereby obstructing Defence efforts to interview those witnesses, claims that the Defence has made no submissions on how this could have been a decisive factor. It argues that, even if the Appeals Chamber had been aware of this misconduct, the only remedy available to the Applicant at that stage would have been to "obtain the statements and seek to admit them under Rule 115 on the basis that they were unavailable *as a consequence of Vujin's misconduct* ."[38] The Prosecution concludes by observing that this alleged "new fact", without more, is not capable of impacting upon the decision to uphold the conviction.[39]

III. Applicable Law

19. Article 26 of the Statute of the International Tribunal, concerning review proceedings , states that:

> [W]here a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Rule 119 governs requests for review and states:

> Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place.

Rule 120 further provides that:

> [I]f a majority of Judges of the Chamber constituted pursuant to Rule 119 agree that the new fact, if proved, could have been a decisive factor in reaching a decision , the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

20. The combined effect of these provisions of the Statute and the Rules is, as stated by the ICTR Appeals Chamber in *Barayagwiza*[40] and by the ICTY Appeals Chamber in *Delic*[41] and *Jelisic*[42], that in order for the deciding body to proceed to the review of its decision, the moving party must satisfy four preliminary criteria:

1. there must be a new fact;
2. that new fact must not have been known by the moving party at the time of the original proceedings;
3. the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and
4. the new fact could have been a decisive factor in reaching the original decision .

IV. Discussion

(i) Preliminary Considerations

21. The Defence seeks the review of the entire *Tadic* case, including the judgement of both the Trial Chamber and the Appeals Chamber. To this effect, it has filed the Motion for Review with the President so that, in the absence of the Chambers who originally heard the case, *ad hoc* Chambers may be constituted .[43] By contrast, the Prosecution submits that since Rule 119 of the Rules provides for a review of the final judgement, only the Appeals Chamber's Judgement would be subject to review.[44] These submissions call for clarification on the part of the Appeals Chamber.

22. As indicated by Rule 119 of the Rules and in *Barayagwiza*,[45] the proper forum for the filing of a request for review is the judicial body which rendered the final judgement. This body may be either the Trial Chamber (when the parties have not lodged an appeal) or the Appeals Chamber, when the judgement has been appealed. In the latter case, it will be then for the Appeals Chamber to determine , as it does pursuant to Rule 122 of the Rules when the judgement sought to be reviewed is under appeal, whether it can deal with the motion for review itself or whether it is necessary to refer the case to a reconstituted (to the extent possible) Trial Chamber, or, should this not be possible, to a new Trial Chamber.

23. The absence, in whole or in part, of the Judges composing the Chamber which rendered the final judgement does not eliminate the competence of that body to deal with a request for review. Thus, in the absence of the Judges who composed the Trial Chamber or the Appeals Chamber which originally rendered the final judgement, a request for review shall still be filed with either of these two bodies and not with the President. Once a request for review is filed with the competent body, it will be for the President to appoint Judges to deal with the request for review as he does in the case of interlocutory appeals and appeals on the merits. Due to the need to have Judges who are familiar with the facts of the case, the President will appoint the Judges who originally heard the case. As set out in Rule 119 of the Rules, should these Judges no longer be at the International Tribunal or be prevented from hearing the requests for review for other reasons, the President will assign new Judges to replace the original ones.

24. In his Order assigning a bench of five Judges of the Appeals Chamber to deal with the Motion for Review, the President indicated that only a final judgement is subject to review.[46] The finality of a decision is a pre-requisite to the exercise of review.[47] That is so because the review is an extraordinary way of appealing a decision, and its purpose is precisely that of permitting an accused or the Prosecution to have a case re-examined in the presence of exceptional circumstances, even after a number of years has elapsed. Indeed, no time limit is set in the Rules for the filing of a motion for review by an accused, and a time limit of one year is given to the Prosecution.

25. As indicated above, in order for a Chamber to conduct a review of a judgement , it must be satisfied that all four criteria set out in Rule 119 of the Rules have been met. The first criterion requires the moving party to show the existence of a new fact. As stated in *Jelisic*,[48] a new fact may be defined as "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings". The requirement that the new fact has not been in issue at trial means that it must not have been among the factors that the deciding body could have taken into account in reaching its verdict. To this effect, as noted in *Delic*,[49] it is irrelevant whether the new fact already existed before the original proceedings or during such proceedings. What

is relevant is whether the deciding body and the moving party knew about the fact or not.

26. With regard to the second and third criteria of Rule 119 of the Rules, the Appeals Chamber notes that the ICTR Appeals Chamber in *Barayagwiza* conceded that there could be new facts, which, although not known to the Chamber at the time of the decision, may be known to the moving party or could be discovered through the use of ordinary diligence. Thus, it considered that the second and third parts of the four part test under Rule 119 were "[i]n the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice…directory in nature."[50] Hence, *Barayagwiza* established that a Chamber, in order to prevent a miscarriage of justice, may grant a motion for review based solely on the existence of a new fact which could have been a decisive factor in reaching the original decision. However, in the words of the ICTR Appeals Chamber, "wholly exceptional circumstances" must exist for these two criteria to be regarded as merely directory in nature. In *Delic* , the Appeals Chamber observed that: "It is only when the decision made was of such a nature in the circumstances of the case as to have led to a miscarriage of justice that this Chamber will not hold the accused accountable for his counsel's conduct".[51] Further, it noted that if "the accused suggests that the evidence was not put before the Tribunal through lack of due diligence, he must establish that its exclusion would lead to a miscarriage of justice".[52]

27. In light of this case law, the Appeals Chamber, whenever it is presented with a new fact that is of such strength that it would affect the verdict, may, in order to prevent a miscarriage of justice, step in and examine whether or not the new fact is a decisive factor, even though the second and third criteria under Rule 119 of the Rules may not be formally met.

28. With the above in mind, the Appeals Chamber shall now turn to the analysis of the parties' submissions.

(ii) Analysis

29. The Defence submits that certain conclusions reached by the Appeals Chamber in the Contempt Judgement constitute new facts within the meaning of Rule 119 of the Rules warranting a review of the Applicant's entire case. Thus, the first task of the Appeals Chamber is to establish whether the allegedly new facts satisfy the requirements of Rule 119 of the Rules. To this effect, each of these facts will be addressed in turn.

(a) Vujin put forward to the Appeals Chamber in support of the Rule 115 Application a case which was known to Vujin to be false in relation to the weight to be given to statements by Mladjo Radic.[53]

30. This finding was reached in the Contempt Judgement of 31 January 2000. By contrast , the Final Judgement in this case was rendered on 15 July 1999. Thus, even though four out of five of the Judges were common to both the Bench of the Appeals Chamber that rendered the Final Judgement and the Bench that rendered the Contempt Judgement , they could have not known the findings of the Contempt Judgement in 1999. Nor could the Judges who rendered the Final Judgement be

expected without violation of the principles governing the judicial function, to rely upon the information they were gradually acquiring in the contempt proceedings to decide the merits of the *Tadic* appeal case.

31. For these reasons, the Appeals Chamber agrees with the Defence in holding that , as also conceded by the Prosecution, the above finding of the Contempt Judgement should be regarded as a new fact within the meaning of Rule 119 of the Rules. The question before the Appeals Chamber is therefore whether or not the new fact meets the remaining criteria of Rule 119 of the Rules.

32. At the outset, the Appeals Chamber notes that Radic did not testify at trial , but two statements by him were submitted by Vujin as part of the Rule 115 Application , in support of the Applicant's contention that he had never been to the Omarska camp and the possibility that there existed a Tadic look-alike. In the Contempt Judgement, the Appeals Chamber determined that Radic's first statement had not been made to Vujin in Prijedor on 10 March 1998 as indicated in the Rule 115 Application . In fact, it had been made at the United Nations Detention Centre following Radic's arrest, and to the Applicant himself as a fellow inmate. The Appeals Chamber further determined that the Applicant testified that Vujin had told him to date that statement 10 March 1998 and to indicate that it had been made to the Applicant personally at Prijedor.[54] These facts reveal, in the opinion of the Appeals Chamber, that the false aspect of Radic's first statement was well known to the Applicant at the time of the appellate proceedings, because , as emphasised by the Prosecution, the Applicant had a role in it. The same must be true with regard to the second of the statements given by Radic, in which Radic confirmed that the earlier statement he had given was true despite the fact that both Vujin and as said above, the Applicant knew it was not. On this basis, the Applicant could have deduced the falsity of the case put by Vujin in relation to both statements. For this reason, the Appeals Chamber concludes that this part of the finding of the Contempt Judgement cannot be deemed to be a "new fact not known to the moving party" or that could have not been discovered through the use of the ordinary diligence under Rule 119 of the Rules.

33. Nevertheless, the Appeals Chamber, applying the principles set out above, has inquired whether the new fact would have been a decisive factor in reaching the verdict. The Appeals Chamber observes that the finding that a false case was put forward in connection with Radic's statements (which were originally proffered to support the contention that Tadic was not in Omarska and the existence of a Tadic look-alike) does not assist the Applicant if his goal is to overturn the guilty findings concerning Omarska camp. First, the two statements did not form part of the evidence upon which the Appeals Chamber relied in convicting the Applicant. Secondly, it is unlikely that, had the Appeals Chamber known of the falsity of the case presented by Vujin at an earlier stage, it would have considered this circumstance in favour of the Applicant. In view of the foregoing, the Appeals Chamber finds that the new fact cannot be considered a decisive factor within the meaning of Rule 120 of the Rules.

(b) Vujin put to the Appeals Chamber in support of the Rule 115 Application a case which was known to him to be false in relation to the responsibility of Goran Borovnica for the killing of the two Muslim policemen of which Tadic had been accused.[55]

34. The legal proof of Vujin's misconduct in relation to the responsibility of Goran Borovnica for the killing of two Muslims policemen came only as a result of the Contempt Judgement. Thus, in the light of the reasoning exposed in the previous section, the Appeals Chamber considers the above finding of the Contempt Judgement to be a new fact within the meaning of Rule 119 of the Rules.

35. With regard to the knowledge of this fact by the moving party, the Appeals Chamber notes that in the Contempt Judgement, the Appeals Chamber found, *inter alia* , that Vujin had known at that time that Witness W had asserted that his evidence at trial naming Borovnica as killer of the two policemen was false and that the same witness was then saying that it was Momcilo ("Ciga") Radanovic (allegedly a Tadic look-alike) who had killed the two policemen.[56] Although it may not be excluded that Vujin told the Applicant about the falsity of the evidence proffered by Witness W, there is no evidence supporting such a hypothesis and thus it remains unlikely that the Applicant knew about it. Similarly, it is unlikely that the Applicant could know about it using ordinary diligence while being in detention in The Hague, far from the place where the "investigations" conducted by Vujin were taking place.

36. With regard to Witness D, co-counsel for the Applicant in the appeal phase, the Appeals Chamber notes that in the Contempt Judgement, the Appeals Chamber found that: "The Respondent [Vujin] accepted that there has been conflict between Witness D and himself in relation to his decision to put forward this part of the case [Witness W's evidence]". On this basis, it appears that, although Witness D may have known about Vujin's misconduct, he did try to minimise its negative impact by questioning the inclusion of Witness W's statement in the Rule 115 Application. It should also be noted that it was Witness D who, by bringing to the attention of the Registry Vujin's misconduct, prompted the decision of the Registry of 19 November 1998 dismissing Vujin as counsel for the Applicant.[57] The Appeals Chamber therefore finds that Witness D did in this case what due diligence required. In view of the foregoing, the Appeals Chamber considers that, although the second criterion of Rule 119 of the Rules with regard to Witness D may not be formally met, it would be unfair to interpret it in a rigid manner. Therefore, given that Witness D displayed due diligence, the Appeals Chamber will discuss whether or not the fourth of the criteria under Rule 120 of the Rules has been met.

37. To determine whether or not the new fact could have been decisive, the Appeals Chamber shall first of all examine the analysis conducted by the Trial Chamber to arrive at the guilty finding concerning the killings of two policemen. As summarised at paragraph 33 of the Contempt Judgement, the Appeals Chamber found that:

> [T]he evidence of Tadic's participation relied upon a sole witness, one Nihad Seferovic , although there was substantial evidence that Tadic had been in the general area over this period. The case put forward by Tadic at the trial was that he was not in Kozarac from 24 to 27 May 1992, and evidence was led from a number of witnesses who were there during that period and who said that they had not seen him. There was also a challenge to the ability of Seferovic, to view these events in the churchyard clearly. The Trial Chamber found beyond reasonable doubt that Tadic killed the two policemen in front of the Serbian Orthodox Church.[58]

38. The Trial Chamber therefore relied upon the evidence of one witness, Seferovic , to find Tadic guilty of the killings of the two policemen. It also found him guilty of numerous other acts which, along with the finding regarding the two policemen , it

used to support his conviction under count 1 (persecution as a crime against humanity).

39. Notably, the Trial Chamber did hear the testimony of Witness W, who stated that he was at Kozarac from 26 to 28 May and did not see Tadic there at any time. The Trial Chamber also noted that, during cross examination, Witness W added that he was stationed in the northern part of Kozarac.[59] In its Judgement, however, the Trial Chamber did not discuss Witness W's evidence concerning Borovnica. It was indeed persuaded by the evidence provided by Seferovic . Thus, it is extremely unlikely that, if the Trial Chamber had known that Witness W's assertion concerning Borovnica was false, this would have been a decisive factor in reaching its decision. Indeed, it is difficult to imagine that that factor could have played any role in the Trial Chamber's finding that Tadic killed the two policemen , and, more importantly, in its decision to convict Tadic under Count 1 (persecution as a crime against humanity). This view is supported by the finding of the Appeals Chamber that Tadic failed to show that Seferovic's reliability as a witness was suspect, or that his testimony was inherently implausible. The Appeals Chamber further stated:

> Since the Appellant did not establish that the Trial Chamber erred in relying on the evidence of Mr. Seferovic for its factual finding that the Appellant killed the two men, the Appeals Chamber sees no reason to overturn the finding.[60]

On this basis, the Appeals Chamber concluded that the Trial Chamber did not err in relying on the uncorroborated evidence of Seferovic.

40. In light of these considerations, the Appeals Chamber finds that the finding in the Contempt Judgement relating to the false case put forward by Witness W, concerning Borovnica's responsibility, can have no role to play in relation to the decision to convict *Tadic* of the killings of the two policemen. This is all the more so since Witness W's credibility is questionable following his admission before the Appeals Chamber that he knowingly gave false testimony at trial.

41. In connection with this finding of the Contempt Judgement, the Defence in the Reply has claimed that, in the light of the *Kupreskic* Judgement, the Appeals Chamber was not entitled to convict Tadic for the killings of the two policemen due the lack of pleading in the Indictment of the facts underpinning the charges against the Applicant. The Appeals Chamber holds that, as held in *Jelisic*, legal developments in the case law cannot be deemed to constitute new facts within the meaning of Rule 119,[61] for the term "new fact" refers primarily to materials of an evidentiary nature rather than legal findings reached in another case. For these reasons, this argument is rejected .

(c) Vujin manipulated Witnesses A and B by seeking to avoid any identification by them in statements of their evidence of persons who may have been responsible for the crimes for which Tadic has been convicted.[62]

42. For the reasons given in previous sections, the Appeals Chamber considers the above finding of the Contempt Judgement to constitute a new fact.

43. In the Contempt Judgement, the Appeals Chamber found that Vujin gave both Witnesses A and B the instruction not to name names.[63] With regard to Witness A,

however, the Appeals Chamber in the Contempt Judgement found that Witness D (Tadic's co-counsel) was informed as early as April 1998 by Witness A of Vujin's misconduct during the interviews for prospective witnesses held in March 1998. In view of this, it appears that the Defence already knew of the relevant misconduct as of April 1998. Thus, the second criterion of the criteria of Rule 119 of the Rules is not met.

44. Nonetheless, the Appeals Chamber remarks that it was Witness D who informed the Registry of Vujin's misconduct with regard to the events occurring at Prijedor Police Station in April 1998, thereby prompting the decision of the Registry to replace Vujin as counsel for Tadic. In the light of these peculiar circumstances the Appeals Chamber takes the view that, in this case, fairness requires the adoption of a flexible interpretation with regard to the second and third criteria under Rule 119 of the Rules. In view of the foregoing, the Appeals Chamber shall proceed to inquire as to whether or not the new fact with regard to Witness A is decisive . This will be done in conjunction with the question relating to Witness B.

45. With regard to Witness B, the Appeals Chamber observes that there is no evidence before it suggesting that either the Applicant or Witness D knew or could have known with certainty that Witness B was being manipulated by Vujin. For this reason, the Appeals Chamber finds that, in this case, the second and third criteria of Rule 119 of the Rules have been met.

46. As to the impact of Vujin's misconduct in relation to both Witness A and B on the Final Judgement, the Defence seems to be contending that, without Vujin's manipulations , Witnesses A and B could have named other individuals such as Danicic as perpetrators of the crimes in Omarska, thus exculpating Tadic.

47. In this regard, the Appeals Chamber notes that, as pointed out by the Prosecution , Vujin's brief on the admission of additional evidence on appeal did list numerous witnesses who could have proffered evidence as to the existence of a Tadic look-alike, namely, Danicic.[64] However, the Appeals Chamber in its Rule 115 Decision (rendered almost a year prior to the final Appeal Judgement) did not admit any of these statements into evidence. Thus , the issue of the Tadic look-alike and therefore the possibility that Danicic could have committed some of the crimes of which Tadic was convicted, was squarely before the Appeals Chamber, which did not consider it a decisive factor warranting the admission of new evidence. Therefore, even if Witnesses A and B were to have mentioned the name of Danicic as perpetrator of the crimes, the Appeals Chamber, already rejecting in its Rule 115 Decision statements to this effect by other witnesses, would logically have also rejected the statements of Witnesses A and B. For these reasons, the Appeals Chamber finds that this fact cannot be regarded as a decisive factor within the meaning of Rule 120 of the Rules.

(d) Vujin had knowingly acted contrary to the interests of Tadic when he gave a list of defence witnesses to Drljaca, the Chief of Prijedor Police, thereby obstructing defence efforts to interview those witnesses. [65]

48. For the reasons given in previous section, the Appeals Chamber agrees with the Defence that this finding constitutes a new fact within the meaning of Rule 119 of the Rules.

49. In the Contempt Judgement, the Appeals Chamber found, on the basis of Wladimiroff's testimony, that in an interview at the Prijedor police station, Wladimiroff had been told by Drljaca that Vujin had provided him with a list of witnesses, and Drljaca's hostility was apparent (he made it clear to Michaïl Wladimiroff that he was meddling in matters of the past and had no right to do so[66]). In addition, entries made by Tadic in his diary in January and February 1996, which were admitted into evidence and corroborate Michaïl Wladimiroff's testimony, show that Tadic knew that Vujin had given the list to Drljaca. In view of this, it appears that the new fact was known to the moving party at the time of the original proceedings . However, it should be noted that, as indicated in his testimony in the contempt proceedings, upon learning of Vujin's misconduct, Michaïl Wladimiroff successfully acted in order to convince Tadic that he was better off without Vujin. For these reasons, the Appeals Chamber considers it fair to inquire whether or not the new fact would have been was decisive factor.

50. In this regard, the Appeals Chamber remarks that the Defence has not put forward any specific argument to show why this new fact would be of such strength as to impact on Tadic's conviction. Nor the Defence has demonstrated how this initial unfortunate circumstance could not be remedied during trial or in appeal. Thus, given the fact that the Defence did have the concrete opportunity to conduct new investigations and, as a result, sought the admission of additional evidence in appeal, the Appeals Chamber considers that the negative influence of the new fact on the fairness of the proceedings was adequately counterbalanced both during trial and in appeal. In view of the foregoing, the Appeals Chamber holds the view that there has been no showing that the new fact was a decisive factor within the meaning of Rule 120 of the Rules.

(e) That Vujin whilst preparing his own defence to the allegations of contempt , had deliberately contacted individuals whom he was forbidden to contact by the terms of a Scheduling Order dated 10th February 1999.[67]

51. On 10 February 1999, the Appeals Chamber issued a Scheduling Order by which it initiated the contempt proceedings against Vujin. The Scheduling Order prohibited , *inter alia*, Vujin from contacting certain witnesses. Vujin nevertheless did so, and the Appeals Chamber, in its Contempt Judgement, found that his conduct in contacting two witnesses (Simo Kevic and GY) "was an arrogant action done in deliberate disregard of the prohibition against doing so in the Scheduling Order ."[68] In accordance with the approach followed so far, the Appeals Chamber holds that this is a new fact within the meaning of Rule 119 of the Rules.

52. The Appeals Chamber notes that there is no evidence suggesting that either the Applicant or the Defence knew this fact or that they could have known it through the use of due diligence. Indeed, at the relevant time, the Registry had already withdrawn Vujin (19 November 1998) as counsel for the Applicant, and it is thus highly unlikely that he had any contact with the Applicant or his new counsel such that he could eventually, inform them of his activities.

53. As to whether or not the new fact is decisive, the Appeals Chamber observes that in the Contempt Judgement, the Appeals Chamber made no findings in relation to Simo Kevic[69] (whose evidence has already been proffered before the Appeals

Chamber, but was rejected in the Rule 115 Decision). Further, the Appeals Chamber in the Contempt Judgement found that there was reasonable doubt as to whether Vujin had acted with the suggested motive of preventing Witness GY from making a statement.[70] In view of this, Vujin's conduct in relation to these two witnesses could not have played any role in the Appeals Chamber's reaching of the final decision in appeal .

(f) General finding that conduct of Vujin's was "not only intended to interfere with the interests of justice, but was also against [Tadic's] interests."[71]

54. The Appeals Chamber notes that, in the Contempt Judgement, the Appeals Chamber stated that: "in the present case, [Vujin's] conduct has been *against* the interests of his client."[72] In this regard, the Appeals Chamber stresses that this consideration relates only to the cases of misconduct discovered in the Contempt Judgement. It does not constitute a general finding that in the entire *Tadic* case, Vujin acted against Tadic's interests, as the Defence seems to be suggesting. Nonetheless, taken in this narrower form, the statement by the Appeals Chamber may be regarded as a new fact within the meaning of Rule 119 of the Rules, which was not before the Appeals Chamber that rendered the Final Judgement.

55. As to whether the moving party knew of the new fact or could have known of it through the use of ordinary due diligence, the Appeals Chamber recalls, that in his diary, Tadic himself noted that, formally, Vujin was taking part in his defence , but "only to the extent of ensuring that his case SdidC not cause broader consequences which would affect the true participants in the events which took place there in 1992…".[73] Furthermore, and more significantly , the Appeals Chamber observes that, in April 1996, Vujin was sidelined by Tadic .[74] Tadic did so, and during the trial , which started on 7 May 1997, Vujin did not assist Tadic.[75] In view of this, it may be reasonably inferred that the four lawyers (Wladimiroff , Orie, Kay, and De Bertodano) who assisted Tadic during trial could adequately protect his interests and conduct further investigations counter-balancing the initial conduct of Vujin.

56. However, in April 1997, Tadic re-hired Vujin as Lead Counsel. By contrast, Michaïl Wladimiroff was dismissed, together with the other lawyers composing the Defence team at that time. The Appeals Chamber observes that, by dismissing those lawyers , Tadic *de facto* gave Vujin another chance to act contrary to his interests . Indeed, four of the five new facts discussed in the previous sections took place in 1998 (the fifth occurred in 1999), when Vujin was acting as Lead-Counsel for Tadic. Fortunately, the prompt intervention by Witness D, which led to the replacement of Vujin at the end of 1998, allowed the new counsel to prepare an adequate defence, thus counter-balancing the influence of Vujin. The Appeals Chamber concedes that in choosing to re-hire Vujin, Tadic may have been manipulated by Vujin himself and thus may have not been entirely negligent. Nonetheless, the Appeals Chamber considers that the worries expressed to Tadic by Michaïl Wladimiroff in 1996 were sufficient to put Tadic on notice of the risks involved in his decision of rehiring Vujin.[76]

57. In these circumstances, the Appeals Chamber finds that the second and third criteria of Rule 119 of the Rules have not been met.

V. Disposition

58. For the foregoing reasons, the Motion for Review is dismissed.

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

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Judge Claude Jorda

President

Judge Mehmet Güney Judge Asoka de Zoysa Judge Fausto Pocar Judge Liu Daqun Judge Gunawardana

Dated this 30th of July 2002
At The Hague,

The Netherlands.

[Seal of the Tribunal]

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1 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-R, "Request for Review of My Complete Case and Review of the Trial Chamber and Appeals Chamber Proceedings Conducted Before the Hague Tribunal", 18 June 2001.
2 - Prosecutor v. Dusko Tadic, Case No.: IT-94-1-R "Motion for Review of the Convictions of *Dusko Tadic* set out in the Judgements of the Trial Chamber (IT-94-1-T) and of the Appeals Chamber (IT-94-1-A)", 5 October 2001.
3 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-T, "Opinion and Judgement", 7 May 1997.
4 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-A, "Judgement", 15 July 1999.
5 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-A and IT-94-1A*bis*, "Judgement in Sentencing Appeals", 26 January 2000.
6 - Prosecutor v. Dusko Tadic, Case No.: IT-94-1-A-R77, "Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin", 31 January 2000, p. 55.
7 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-A-R77, "Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin", 27 February 2001.
8 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-R, "Prosecution's Response to Request for Review filed by Dusko Tadic", 29 June 2001.
9 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-R , "Reply, on Behalf of Dusko Tadic, to Prosecution's Response to Request for Review", 3 July 2001.
10 - Id. at p. 2.
11 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-R , "Prosecution's Request on Motion for Review", 15 October 2001.
12 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-R , "Motion to Exceed Page Limit of Prosecution's Response to 'Motion for Review of the Convictions of *Dusko Tadic* set out in the Judgements of the Trial Chamber (IT-94-1-T) and of the Appeals Chamber (IT-94-1-A)'", 1 November 2001.
13 - *Prosecutor v Tadic*, Case No.: IT-94-1-R, "Prosecution Response to 'Motion for Review of the Convictions of *Dusko Tadic* set out in the Judgements of the Trial Chamber (IT-94-1-T) and of the Appeals Chamber (IT-94-1-A)'", 6 November 2001.
14 - *Prosecutor v Tadic*, Case No.: IT-94-1-R, "Decision Authorizing Response by the Prosecution and Allowing Further time to File a Reply", 14 December 2001.
15 - *Tadic* Request for Review, p.1
16 - *Ibid.*
17 - *Ibid.* at p. 2.

18 - Motion for Review, para 6.
19 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-R, "Appellant Brief in Relation to Admission of Additional Evidence on Appeals Under Rule 115", Defense, 4 February 1998.
20 - Motion for Review, para 17 (citing Contempt Judgement I, para. 104).
21 - Motion for Review, para 18.
22 - Motion for Review, para 20 (emphasis omitted).
23 - Id. at para 27.
24 - Id. at para 38.
25 - Id. at para 45.
26 - Id. at paras 49-54.
27 - *Prosecutor v. Zoran Kupreskic* et al., Case No.: IT-95-16-A, "Judgement", para. 113.
28 - Response, para 11.
29 - Id., para 14.
30 - Id. at para 26.
31 - Id. at para 29.
32 - Id. at para 38.
33 - Id. at para 40.
34 - Id. at para 48.
35 - "Motion (3) to Admit Additional Evidence on Appeal Pursuant to Rule 115 of the rules of Procedure and Evidence ", 19 April 1999. The Appeals Chamber rejected this Motion by an oral decision on 19 April 1999 (T. 20)
36 - Response, para 55.
37 - Id. at paras 63-65.
38 - Id. at para 70.
39 - Id. at para 72.
40 - *Prosecutor v Barayagwiza*, "Decision on Prosecutor's Request for Review or Reconsideration", ICTR-97-19-AR72, 31 March 2000, para 41.
41 - *Prosecutor v Hazim Delic*, Case No.: IT-96-21-R-R119, "Decision on Motion for Review", 25 April 2002, p. 7.
42 - *Prosecutor v Goran Jelisic*, Case No.: IT-95-10-R, "Decision on Motion for Review", 2 May 2002, p. 3.
43 - Motion for Review, para 2.
44 - Response, para 14.
45 - *Supra* n. 40, para 49.
46 - *Prosecutor v Dusko Tadic*, Case No. IT-94-1-R, "Ordonnance du président portant affectation de juges à la chambre d'appel", 5 October 2001, p. 2.
47 - *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Arrêt (Requête en révision de la décision de la Chambre d'appel du 31 mai 2000), 4 May 2001, p. 2.
48 - *Supra* n.42, p. 3.
49 - *Supra* n.41, p. 7.
50 - *Supra* n.40, para 65.
51 - *Supra* n.42, para 15.
52 - Id., para 15.
53 - Contempt Judgement, paras 131-134.
54 - Contempt Judgement, para 44.
55 - Id.at para 160.
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58 - Contempt Judgement, para 33.
59 - Trial Chamber's Judgement, para 395.
60 - Appeal Chamber's Judgement, para 67.
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62 - Contempt Judgement, para 160.
63 - Id. at para 160.
64 - *Prosecutor v Dusko Tadic*, "Appellant's Brief In Relation to Admission of Additional Evidence on Appeal Under Rule 115", 2 Feb. 1998.
65 - Contempt Judgement, paras 95-101.
66 - Id., para 96.

67 - Contempt Judgement, paras 125-128.
68 - Id. at para 128.
69 - Id. at para 149.
70 - Id. at para 147.
71 - Motion for Review, para 20.
72 - Id. at para 167.
73 - Id. at para 109.
74 - Contempt Judgement, para 103.
75 - Trial Chamber's Judgement, para 25.
76 - Contempt Judgement, para 108.