CASENOTE

PROSECUTOR v DUSKO TADIC

Motion for Review
International Criminal Tribunal for the Former Yugoslavia

I. INTRODUCTION

This case deals with Article 26 of the Statute of the International Criminal Tribunal of the former Yugoslavia (ICTY Statute) and Rules 119-120 of the Rules of Procedure and Evidence, including their combined effect when the ICTY is considering a motion for review.

The case involves a discussion of the application of the four preliminary criteria that must be satisfied before a motion for review is allowed. It is clear that the finality of an earlier (original) decision of the ICTY is a pre-requisite before this tribunal will permit a motion to review the case. This is because the review is an extraordinary way of appealing a decision, effectively allowing the accused or prosecutor to have a case re-examined if exceptional circumstances exist.[1] This is a difficult task in persuasion because it requires the ICTY to examine and apply the combined effect of Article 26 and Rules 119-120 to each new fact, which in turn requires four preliminary criteria to be satisfied. The criteria are:

1. there must be a new fact;
2. the applicant requesting the review did not know that the new fact existed during the original proceedings;
3. the applicant's lack of due diligence did not cause the non-discovery of the new fact; and
4. the new fact could have been a decisive factor in the original decision.

In this case, the Appeal Chamber's analysis of the new facts demonstrates the difficulty in balancing the importance of the finality

[1] Appeals Chamber, 30 July 2002, Case No IT-94-1-R at para 24. For the original judgment see Prosecutor v Dusko Tadic, Opinion and Judgment, Case No IT-94-1-T, 7 May 1997, available at <www.un.org/icty/tadic/trialc2/judgment/index.htm> (visited November 2002) (original judgment).

of the original decision and the need to consider a motion for review within the context of the criteria as applied to each alleged new fact.

II. BACKGROUND[2]

In 1993, the ICTY was created pursuant to Security Council resolution 827 and *Tadic* was the first case to be heard by this tribunal.

Dusko Tadic was a Serb nationalist from Bosnia-Herzegovina who grew up in Kozarac. In life, he had several roles, from café owner in his hometown and member of the Serb Democratic Party (SDS) to President of the SDS Local Board, Secretary of the Kozarac Local Commune and representative on the Prijedor Municipal Assembly. It was this last role that entrusted him with the re-establishment of civilian control in Kozarac. When he was transferred to the police station in Kozarac, he was given charge of population resettlement where he advocated a cleansing/securing effort to rebuild the centre of Kozarac. However, a rift soon developed between him and the Prijedor authorities that resulted in his eviction from his apartment.[3]

During March-June 1993, the military made many attempts to forcibly enlist Tadic for military service. He was eventually posted to the war zone near Gradacac but escaped the following day. During the ensuing two months, he hid to escape further mobilisation and in August 1993 he resigned as representative to the Prijedor Municipal Assembly and as Secretary to the Kozarac Local Commune. He then moved to Germany where in 1994 the German police arrested him. In 1995 he was transferred to the International Tribunal in The Hague to face charges under the ICTY Statute.[4]

At his trial, Tadic was charged with the ethnic cleansing of Muslims. It was alleged he participated with Serb forces in the attack, destruction and plunder of Bosnian Muslim and Croat residential areas, the seizure and imprisonment of Muslims and Croats in the Omarska, Keraterm

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[2] For the contextual background to the conflict in Yugoslavia see Prosecutor v Dusko Tadic, Opinion and Judgment, Case No IT-94-1-T, 7 May 1997, paras 54-153, available at <www.un.org/icty/tadic/trialc2/judgment/index.htm> (visited November 2002).
[3] Refer generally ibid para 1.
[4] Ibid.

and Trnopolje camps, and the deportation and expulsion by force or threat of force of the majority of Muslim and Croat residents from Prijedor.[5] He was found guilty and given a 20-year prison sentence.[6]

III. THE TRIAL

At the trial, Tadic was more specifically charged with personal responsibility on all 31 counts of persecution, murder, beatings and other offences alleged to have been committed in Yugoslavia in 1992. It was alleged he committed crimes against humanity, grave breaches of the 1949 Geneva Conventions[7] and violations of the laws or customs of war.[8]

The trial lasted six months and involved 125 witnesses and 473 exhibits, reflecting a detailed exploration of some of the legal issues raised for the first time before the ICTY.[9] On 7 May 1997, Trial Chamber II[10] found Tadic guilty of crimes against humanity under Article 3 of the ICTY Statute[11] and guilty of violations of the laws or

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[5] Ibid.

[6] Refer speech delivered by Chief Justice Spigelman at the Red Cross Gala Dinner to celebrate the 50th Anniversary of the Geneva Conventions, University of Sydney, 12 August 1999, <ww.lawlink.nsw.gov.au/sc%5Csc.nsf/pages/sp_120899> (visited November 2002).

[7] Article 2 of the International Criminal Tribunal of the former Yugoslavia Statute states "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

[8] Note 13.

[9] Ibid.

[10] Per Stephen and Vohrah JJ; McDonald P dissenting.

[11] Article 5 of the ICTY Statute states: The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civil population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.

customs of war under Article 5 of the same Statute.[12] In fact, he was found guilty of eleven counts of persecution and beatings but not guilty of nine counts of murder. Eleven other charges were dismissed on the ground that he could not be charged with grave breaches of the 1949 Geneva Conventions since the victims were not classified as protected persons under Article 4 of the 1949 Geneva Convention IV.[13] His conviction in this case became "the first determination of individual guilt or innocence with serious violations of international humanitarian law by an international tribunal."[14]

Tadic appealed to the Appeals Chamber against his conviction on two grounds: (1) his right to a fair trial had been prejudiced because there was no equality between the prosecution and defence; and (2) the Trial Chamber had erred in finding him guilty of murdering two Muslim men. On 15 July 1999, his appeal was dismissed and, further, he was convicted of nine other counts of grave breaches of the 1949 Geneva Conventions in the prosecution's cross-appeal.[15]

Tadic's motion for review rested on the misconduct of his former counsel, Milan Vujin. Vujin had been found guilty of contempt of the Tribunal on 31 January 2000,[16] which allegations arose from Vujin's conduct during the appeals against the judgment of 7 May 1997 and the

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[12] Article 3 of the ICTY states: "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

[13] Article 4 of the Fourth Geneva Convention is included as a relevant provision under Article 2 of the International Criminal Tribunal of the former Yugoslavia Statute.

[14] See Tadic Case: The Verdict, ICTY Press Release CC/PIO/190-E, The Hague, 7 May 1997 available at <www.un.org/icty/pressreal/p190-e.htm> (visited November 2002).

[15] Tadic Case: The Judgment of the Appeals, ICTY, Press Release TH/P.I.S/419-e, The Hague, Chamber, 15 July 1999, available at <www.un.org/icty/pressreal/p419-e.htm> (visited November 2002).

[16] Prosecutor v Milan Vujin, The Judgment, In the Appeals Chamber, 31 January 2000, Case no- IT-94-1-A-R77.

sentencing judgment of 14 July 1997.[17] In the judgment, Vujin was found (unanimously) to have acted as follows:[18]

> Put to the Appeals Chamber case which he knew to be false in support of an application for the admission of additional evidence and the weight to be given to statements by Radic and in relation to the responsibility of others for the killings of two policemen for which Tadic was convicted; and
> Manipulated proposed witnesses by seeking to avoid any identification by them of persons who may have been responsible for the crimes of which Tadic was convicted. He persuaded them to lie or withhold the truth when making statements in connection with the identification of such persons who may have been responsible for the crimes and also bribed a witness to lie or withhold the truth.

As a result, the ICTY fined Vujin and directed the Tribunal to consider dropping him from the list of assigned counsel and to report his conduct to his professional body. Further, the ICTY ordered that various documents on this case be made public wherever possible. Subsequently, the Appeals Chamber upheld this contempt judgment on 27 February 2001.

IV. BASIS OF THE MOTION FOR REVIEW

On 18 June 2001, Tadic filed a request for review of his entire case based on the Appeals Chamber's finding on Vujin's contempt proceedings. The main contentions were:

1. Vujin had acted against Tadic's interests while conducting investigations leading to the first trial and first sentencing judgment;
2. Vujin had wilfully given the Chief of Prijedor Police Station a list of potential witnesses who could have testified in his favour despite the fact that Vujin knew it was against Tadic's interests;

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[17] International Criminal Tribunal of the former Yugoslavia, Press Release CC/P.I.S/467-E, The Hague, "Milan Vujin, Former Counsel for Dusko Tadic, Found in Contempt of the Tribunal and Fined 15,000 Dutch Guilders", 31 January 2000 at http://www.un.org/icty/pressreal/p467-e.htm (visited 11 November 2002).
[18] Ibid.

3. Vujin had manipulated various witnesses aimed at concealing the real perpetrators; and
4. Vujin's conduct had "struck at the heart of the criminal justice system" as stated by the Appeals Chamber in the contempt judgment.

The motion for review was also based on alleged new facts as set out in the findings of the contempt judgment. Consequently, Tadic's counsel presented the following arguments as the basis for this motion:

1. The contempt judgment amounted to new facts not known at the relevant time.
2. The new facts could have been a decisive factor when the Trial and Appeals Chambers were reaching their original decisions.
3. The nature of the proven misconduct was such as to render both trial and appeal unfair.
4. The decision in *Kupreskic,*[19] as a new legal principle, constituted a new fact and should be applied. *Kupreskic* had held that where an indictment did not include an allegation concerning a material fact of the prosecution's case, then any allegation pertaining to that fact should not be taken into account as a basis for finding criminal liability. Hence, Tadic argued that, as the killing of two policemen was not pleaded in the indictment, he could not be found guilty on these counts.

In response, the prosecution presented the following arguments:

1. The material contained in the Request for Review did not constitute new facts.[20]
2. The only matters that could constituted new facts were the findings of the Appeals Chamber that Vujin had put before the Tribunal a case that was known to him to be false, that he had manipulated two witnesses[21] and that he had knowingly acted contrary to Tadic's interests.[22]

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[19] Prosecutor v Zoran Kupreskic, Judgment Case no IT-95-16-A.

[20] Within the meaning of Rule 119 of the International Criminal Tribunal of the former Yugoslavia Rules of Evidence and Procedure.

[21] By seeking to avoid in their statement any identification of persons who might have been responsible for the crimes for which Tadic had been convicted.

[22] In giving the list of defence witnesses to the Chief of Prejidor Police thereby

3. None of the allegedly new facts could have amounted to a decisive factor in reaching the decision.
4. Even if Vujin had acted contrary to Tadic's interests, this in itself without more would not impact on the decision to uphold the conviction.

V. PRELIMINARY DISCUSSION

The case considered Article 26 of the ICTY Statute[23] and Rule 119[24] of Rules of Procedure and Evidence on requests for review. It also considered Rule 120[25] that, when read together with Rule 119, formed the basis of the four criteria that should be satisfied before a convicted person or the prosecution could be granted a review of the judgment.

The review tribunal discussed the four essential criteria for a review referred to above. To elaborate, a new fact must exist, first of all. This requires the party requesting the review to show the existence of a new fact that is defined as "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings".[26] This

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obstructing defence efforts to interview those witnesses.

[23] Article 26 of the International Criminal Tribunal of the former Yugoslavia Statute states "Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chambers 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 judgment."

[24] Rule 119 of the International Criminal Tribunal of the former Yugoslavia Rules of Procedure and Evidence states "(A) 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 judgment has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgment. 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; (B) Any brief in response to a request for review shall be filed within forty days of the filing of the request; (C) Any brief in reply shall be filed within fifteen days after the filing of the response."

[25] Rule 120 of the International Criminal Tribunal of the former Yugoslavia Rules of Procedure and Evidence states "If 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 judgment, and pronounce a further judgment after hearing the parties."

[26] Prosecutor v Goran Jelisic, Decision on Motion for Review, Case no IT-96-21-R-R119, 25 April 2002.

new fact must have been missing from the factors that the deciding body could have taken into account when reaching its verdict.

Secondly, the party requesting the review at the time of the original proceedings must not have known that the new fact existed. It is irrelevant whether the new fact existed before the original proceedings or arose during such proceedings because it is only relevant that the party requesting the review and the tribunal did not know about it.[27]

Thirdly, the failure to discover the new fact must not have been due to a lack of diligence by the party requesting the review. However, this requirement, and the requirement that the new fact must have been unknown to the requesting party during the original proceedings, may both be disregarded in wholly exceptional circumstances and in the face of a possible miscarriage of justice.[28]

The fourth and final criterion requires the new fact to have been a possible decisive factor when the original decision was reached. This is significant because, even if the second and third criteria are not met, the tribunal may still grant a motion for review based solely on this criterion if it believes that a miscarriage of justice may occur otherwise. This being so, it seems a bit strange that Tadic failed on all counts in his request for a review when there appeared to be a serious question on a possible miscarriage of justice based on Vujin's conduct.

VI. THE JUDGMENT

Tadic first contended that Vujin had presented a case that was known to Vujin to be false since it was based on a false premise, namely, the false statements of Radic, a witness in the original proceedings.[29]

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[27] Prosecutor v Hazim Delic, Decision on Motion for Review, Case no IT-95-10-R, 2 May 2002.

[28] Prosecutor v Barayagwiza, Trial Chamber, International Criminal Tribunal for Rwanda, Decision on Prosecutor's Request for Review or Reconsideration, Case no ICTR-97-19-AR72, 31 March 2000.

[29] This was in support of Tadic's Rule 115 of the International Criminal Tribunal for the former Yugoslavia Application, Prosecutor v Dusko Tadic, Appellant Brief in Relation to Admission of Additional Evidence on Appeals Under Rule 115, Defense, Case No IT-94-1-R, 4 February 1998. Rule 115 was amended by decision of the Judges at extraordinary plenary session of the International Tribunal held on 30 September 2002, pursuant to Rule 6 (B) of the Rules of Procedure and Evidence and

Although the Appeals Chamber found that this could be regarded as a new fact under Rule 119, it was rejected as a ground for review because Tadic himself should have been aware of the statement's falsity. The review tribunal concluded that even if Tadic was unaware of the statement, it was discoverable by using ordinary diligence.

The review tribunal also considered the real possibility of a miscarriage of justice occurring if a review was not granted and enquired whether the new fact could have otherwise been a decisive factor when the Trial Chamber was reaching its verdict. However, the tribunal found that this new fact would not have assisted Tadic in his guilty verdict concerning Omarska Camp because Radic's statements did not form part of the evidence upon which the Appeals Chamber had relied. Further, even if the Appeals Chamber was aware of Vujin's false evidence, it was unlikely that it would have been considered in Tadic's favour.

Tadic contended secondly that Vujin had forwarded a case that he knew to be false concerning the responsibility of two others for killing two policemen. The review tribunal found that this constituted a new fact within the meaning of Rule 119. In this regard, the tribunal found it unlikely that Tadic knew about the falsity of the evidence or could have known this by exercising ordinary diligence. However, although Tadic might not have personally known about the false evidence during the contempt proceedings it was found that Tadic's co-counsel, Michail Wladimiroff, had probably known this. In fact, it was Wladimiroff who reported Vujin's misconduct to the tribunal. As such, Tadic could have discovered this fact by exercising due diligence.

In spite of this, the review tribunal decided that it would be unfair to be too rigid in interpreting Rule 119. As a result, the tribunal considered the question whether the new fact could have been a decisive factor in reaching the original decision. It found that the Trial Chamber did not rely on Radic's false statement but had been persuaded by the evidence of another witness. Consequently, it was extremely unlikely that even if the Trial Chamber had been aware of the false evidence, it was a decisive factor in its decision. The review tribunal stated:[30]

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will come into force on 17 October 2002. For additional information see http://www.un.org/icty/legaldoc/index.htm.

[30] Prosecutor v Dusko Tadic, Decision on Motion for Review, In the Appeals Chamber, Case No IT-94-1-R, 30 July 2002, para 39.

> 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).

In the review tribunal, Tadic had argued that, in light of *Kupreskic,*[31] the Appeals Chamber should not have upheld his conviction since the facts underpinning the charges were inadequately pleaded or not pleaded at all in the indictment. The tribunal rejected this argument and instead relied on *Jelisic*[32] stating:[33]

> [L]egal developments in the case law cannot be deemed to constitute new facts within the meaning of Rule 119, for the term "new fact" refers primarily to materials of an evidentiary nature rather than legal findings reached in another case.

Tadic's third contention was based on the finding that Vujin had manipulated two witnesses, A and B, in the identification of persons who were possibly responsible for the crimes of which he was convicted. Since the review tribunal deemed this to be a new fact after considering the issue of due diligence in the fact's discovery, it proceeded to consider if this new fact could have been a decisive factor when the original trial decision was delivered.

In relation to Witness A, the review tribunal found that Wladimiroff as co-counsel had been aware of Vujin's misconduct, noting that he was the one who had informed the ICTY of this fact thereby prompting the replacement of Vujin as Tadic's counsel. In these peculiar circumstances, the review tribunal stated that fairness required the adoption of a flexible interpretation regarding the second and third criteria under Rule 119. Further, it observed that regarding Witness B, those two criteria were also satisfied. Accordingly, it concluded that there was no evidence suggesting that Tadic or Wladimiroff knew or could have known with certainty that Vujin had manipulated Witness B.

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[31] Prosecutor v Zoran Kupreskic, Judgment, Case no IT-95-16-A.

[32] Prosecutor v Goran Jelisic, Decision on Motion for Review, Case No IT-96-21-R-R119, 25 April 2002.

[33] Prosecutor v Dusko Tadic, Decision on Motion for Review, In the Appeals Chamber, Case No IT-94-1-R, 30 July 2002, para 41.

The review tribunal went on to consider both Witness A and Witness B within the context of the later discovery of a new fact and its impact on the original decision when it was unknown during trial. The tribunal stated that the issue of witnesses identifying those responsible for crimes, such as those that Tadic was convicted of, had been put squarely before the bench during the original trial, where it was rejected as not being a decisive factor in warranting the admission of additional evidence. As a result, the review tribunal found that the testimony of Witnesses A and B had not been a decisive factor when the original decision was reached.

Tadic's fourth contention was related to Vujin knowingly acting contrary to his (Tadic's) interests when Vujin gave a list of defence witnesses to the Chief of Prejidor Police Station, thereby obstructing the defence efforts to interview those witnesses. Although the review tribunal considered this a new fact within Rule 119, it was found that according to Tadic's diary entries in 1996 that Wladimiroff's testimony had corroborated, Tadic knew that Vujin had given this list to the Chief. As such, Tadic had known this fact during the original trial.

However, since Wladimiroff had in fact successfully convinced Tadic that his defence would be better off without Vujin upon learning of Vujin's misconduct, the review tribunal considered it fair to enquire whether or not this would have been a decisive factor in the trial proceedings. On this point, the tribunal stated that Tadic's arguments did not show convincingly that the new fact had impacted sufficiently on Tadic's conviction for the tribunal to allow a review on this criterion. It noted also that the "unfortunate circumstance" could have been remedied during the trial or on appeal. Therefore, it found that the negative effect of Vujin's acts on the fairness of the proceedings was adequately counterbalanced by the fact that the defence had a concrete opportunity to conduct new investigations and seek additional evidence to be admitted during the appeal. Consequently, the new fact was not found to be a decisive factor within the meaning of Rule 120.

Tadic's fifth contention was that Vujin, whilst preparing his own defence in the contempt proceedings, had deliberately contacted two individuals whom he was forbidden to contact by the terms of a Scheduling Order (namely, the footnote reference in the Order identifying the relevant individuals). The review tribunal found this to

be a new fact, noting that there was no evidence to suggest that either Tadic or his counsel knew of this or could have known it by exercising due diligence. However, the tribunal also noted that there was no finding in relation to one of the individuals named in the contempt judgment. As such, the tribunal held that reasonable doubt existed in relation to whether Vujin had possibly acted with the motive of preventing another witness from making a statement. In view of this, the tribunal held that Vujin's conduct regarding these two individuals did not play any role when the decision on appeal was made.

Tadic's sixth and final contention was based on the general finding that Vujin's conduct was intended to interfere with the interests of justice and was against Tadic's interests. The contempt judgment had stated that Vujin's conduct "has been against the interests of his client". The review tribunal stressed that this related only to the specific cases of misconduct found in the contempt judgment and did not constitute a general finding that during Tadic's entire trial Vujin had acted against the interests of his client. Nonetheless, the review tribunal found that the statement made in the contempt judgment constituted a new fact within the meaning of Rule 119. However, when determining if this was sufficient to result in a review, the review tribunal rejected it because in April 1996, Tadic had sidelined Vujin, who therefore did not assist during Tadic's trial that had started on 7 May 1997. As a result, it could be reasonably inferred from this that the four lawyers who assisted Tadic during the trial could have adequately protected his interests and conducted further investigations, thereby counter-balancing Vujin's initial (mis)conduct.

In fact, in April 1997 Tadic had re-hired Vujin as lead counsel and dismissed Wladimiroff and the other members of his defence team. Towards the end of 1998, Vujin was subsequently replaced as counsel, which allowed the new counsel to prepare an adequate defence.[34] Although Vujin could have manipulated Tadic, the review tribunal considered that the concerns expressed to Tadic in 1996 by his co-counsel, Wladimiroff, were sufficient to put Tadic on notice of the risks involved in his decision to re-hire Vujin. As a result, the tribunal found that the second and third criteria of Rule 119 had not been met.

[34] Four of the new facts took place in 1998 and the fifth took place in 1999.

For the above reasons, the review tribunal dismissed Tadic's Motion for Review.

VII. CONCLUDING REMARKS

Although the combined effect of the criteria bounded by Article 26 and Rules 119-120 is intended to create a fairly straightforward test, the decision in the Motion for Review shows that the practical application of specific facts to the criteria may not be so easy. It would appear that by virtue of the Tribunal's wide discretionary powers in applying the facts to the criteria, it could be very difficult in reality to justify an order for review. It is understandable that a review should only be granted in exceptional circumstances since finality of decision is important. However, the requirement that justice must not only be done but be seen to be done weighs heavily in favour of granting a review in circumstances such as those presented in the present case.

It is hard to imagine what factors would constitute the grounds for the grant of a review if the clear and proven misconduct of counsel for a convicted accused were not enough. The misconduct itself was not just related to a lack of due diligence or to the need to act in the best interest of a client. In this case, the misconduct had gone directly to the investigations, pre-trial and pre-appeal where it was shown that witnesses had been manipulated, false statements obtained by coercion, crucial evidence given to a certain individual in the knowledge that it would cause the disappearance of other possible witnesses, and actions taken in direct conflict with the client's best interests. Those are grave matters that should constitute the possibility of a miscarriage of justice at least. Even if the review tribunal did not consider that these new facts could have been a decisive factor in reaching the original decision, it would have been preferable to allow a review of this case in light of the surrounding circumstances in the interest of ensuring that justice be *seen* to be done. Perhaps this would be asking too much and considered to be outside the ambit of the four criteria that required strict application.

This question should be asked: what if the outcome upon review was different? Regardless of any subjective feelings towards the accused, the interests of justice have to be served first and the rights of the accused upheld. This is the foundation upon which a criminal tribunal

should rest and any other position should be unacceptable. Therefore, in circumstances where there has been a possible miscarriage of justice and, indeed, a blatant disrespect and disregard for justice by a representative of the tribunal, namely, counsel in this case, serious consideration needs to be given to what standard the accused is judged by and how that standard is to be applied.

Consequently, what is the standard of proof that an accused or the prosecution has to meet in order to satisfy the requirements for the grant of a motion for an ICTY review? While Romano-Germanic criminal systems require guilt to be proven to a degree that satisfies *'l' intime conviction du judge,*[35] conviction and common law require guilt to be proven beyond reasonable doubt. It is interesting that when comparing the European Commission and the Court of Human Rights it is not clear which standard of proof is preferable in human rights cases. However, it seems that the International Military Tribunal at Nuremberg, the ICTY, and other *ad hoc* tribunals have required the standard of proof to be beyond a reasonable doubt. In fact, in their early judgments there were many references to the fact that "the Prosecution is bound in law to prove their case beyond a reasonable doubt."[36] *Tadic* therefore begs the question, just what does "beyond reasonable doubt" mean?

In *Celebici,*[37] the ICTY Trial Chamber had adopted a common law definition:

> A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances. It is that ability which is attributed to them which is one of the virtues of our mode of trial: to their task of deciding facts they bring to bear their experience and judgement.

However, it is noted that there is no jury trial in the ICTY or any of the other *ad hoc* tribunals. This means that the standard to be applied to

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[35] "the judges innermost conviction": Cassese A, International Criminal Law (2003, Oxford University Press, New York) 390.

[36] For example, see Prosecutor v Delalic et al (Case No IT-96-21-T), Judgment 2 September 1998, 37 International Legal Materials 1399 (1998) 601.

[37] Schabas WA, An Introduction to the International Criminal Court (2001, Cambridge University Press, Cambridge) 130-131.

"reasonable doubt" is that held by judges who are experienced in the law, not lay jurors who are not experienced in issues of fact and law. If this is so, does this therefore render the common law definition of "beyond reasonable doubt" as not strictly applicable to the ICTY? Or has it been modified to suit an international tribunal that has no jury? If the answer to these questions is yes, what then is the correct standard by which criminals are to be tried before the ICTY? This is an important point because knowledge of the correct standard that is applied in a trial is a fundamental right of the accused. The importance of the accused's rights was actually highlighted in Tadic's appeal where the Appeal Chamber stated:[38]

> For a Tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with the internationally recognised human rights instruments.

The denial of a review in this case will no doubt have ramifications for future motions for review since it has set the bar very high before the requirements under Article 26 and Rules 119-120 are satisfied. The decision may impact further upon the jurisprudence of the International Criminal Court (ICC) since the Rome Statute is silent on the standard of proof that is to be applied in the new permanent international court. It may also adversely affect any future *ad hoc* tribunals created along the lines of the ICTY. If this high bar becomes the norm, it may create a jurisdiction without realistic room for the grant of reviews.

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[38] Prosecutor v Dusko Tadic (Case No IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (1997) 105 International Law Reports 453.