IN THE TRIAL CHAMBER

Before:
Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar:
Hans Holthuis

Decision of:
13 May 2005

PROSECUTOR

v.

SLOBODAN MILOSEVIC

CONTEMPT PROCEEDINGS AGAINST KOSTA BULATOVIC

DECISION ON CONTEMPT OF THE TRIBUNAL

Office of the Prosecutor:

Ms. Carla Del Ponte
Mr. Geoffrey Nice

The Accused:

Mr. Slobodan Milosevic

Counsel for Kosta Bulatovic:

Mr. Stéphane Bourgon

Court Assigned Counsel:

Mr. Steven Kay, QC
Ms. Gillian Higgins

***Amicus Curiae*:**

Prof. Timothy McCormack

1. Kosta Bulatovic, ("Respondent") was a Defence witness in the case of *The Prosecutor v. Slobodan Milosevic*. He is charged with contempt of the Tribunal. The charge is in these terms:

> Kosta Bulatovic, born in 1937 in the village of Dobrusa in northern Metohija, is charged that, on 19 and 20 April 2005, being a witness before Trial Chamber III of the International Tribunal, he knowingly and wilfully interfered with the administration of justice, by contumaciously refusing to answer questions asked by the Prosecution, contrary to Rule 77(A)(i) of the Rules[.][1]

2. The Respondent initially gave evidence on 14 April 2005. He was examined in chief and partially cross-examined before the case was adjourned over the weekend. When the trial resumed on 19 April, the Accused was absent through illness. Mindful of the determination of the Appeals Chamber that, "if Milosevic's health problems resurface with sufficient gravity, however, the presence of Assigned Counsel will allow the trial to continue even if Milosevic is temporarily unable to participate ",[2] the Trial Chamber decided to proceed to hear the remainder of the evidence of the Respondent in the absence of the Accused. In announcing that Decision the Presiding Judge said:

> If the decision of the Appeals Chamber is authoritative for anything, it seems to us that it authorizes the completion of a witness's testimony in the temporary absence of the accused.[3]

   The Respondent had completed his examination-in-chief, assigned Counsel were present to protect the interests of the Accused, the Respondent had already had to remain for a significant period in The Hague, and the evidence was likely to be completed in a matter of an hour or so. The Trial Chamber ordered that a video recording and transcript of the proceedings should be delivered to the Accused to enable him to review the remainder of the evidence of the Respondent, and declared that, should it be necessary, the Respondent could be recalled.

3. When the Respondent resumed his place in court, he refused to answer questions posed by the Prosecutor. He was advised in detail of the decision made by the Trial Chamber, and the reasons therefor, and was advised further of the possibility that he might be held in contempt were he to maintain that position, which could result in the imposition of a period of imprisonment or a fine. The Respondent maintained his refusal to respond to questions.[4] He repeatedly stated as his reason for refusing to answer that he would give evidence only in the presence of the Accused.[5] The proceedings were then adjourned overnight to enable him to reflect on the position he was in and to take legal advice.[6] When the trial resumed on 20 April 2005, the Respondent was again advised of his obligation to answer questions and of the prospect that he could be found in contempt and punished therefor. He again refused to answer any questions.[7] He stated that "I stand by the decision I presented to you yesterday."[8]

4. The Trial Chamber adjourned to reflect upon these developments. It reviewed the stance taken by the Respondent in the context of the provisions of Rule 77 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), which provides in relevant part:

> (A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who
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> > (i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;
>
> […]
>
> (C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:
>
> > (i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;
> >
> > (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or
> >
> > (iii) initiate proceedings itself.
>
> (D) If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:
>
> > (i) in circumstances described in paragraph (C)(i), direct the Prosecutor to prosecute the matter; or
> >
> > (ii) in circumstances described in paragraph (C)(ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.
>
> (E) The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.
>
> (F) Any person indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.

5. The Chamber considered that the Respondent had, on the face of it, contravened Rule 77(A) by refusing to answer questions, and determined, in terms of Rule 77(C), that it had reason to believe him to be in contempt of the Tribunal. The Chamber further decided, in the particular circumstances, that it was appropriate to initiate proceedings in terms of Rule 77 (C)(iii), to be prosecuted by the Chamber itself in terms of Rule 77(D)(ii).[9] The charge

against the Respondent was formulated and issued in a written order, as well as read out to the Respondent in open court.[10]

6. When the Accused returned to court on 25 April, the Respondent concluded his evidence.

7. The trial took place on 6 May 2005. When the Respondent first appeared before the Tribunal on the charge on 20 April 2005, his counsel, Mr. Bourgon had argued that the matter should be referred to another Trial Chamber, since, at the core of the question whether the Respondent was in contempt of the Tribunal, was the issue whether the Chamber's Order that the trial should proceed in the absence of the Accused was valid. He submitted, at that stage, that the Trial Chamber had erred in ordering that the trial should continue in the absence of the Accused, that the proceedings on 19 and 20 April 2005 were accordingly fundamentally null and that the Respondent was thus under no obligation to answer. At the outset of his submission on 6 May 2005, Mr. Bourgon properly conceded that that issue could not be raised as a defence to the charge since it had been disposed of by the Trial Chamber at the hearing on 20 April 2005 following the presentation of the charge against the Respondent.[11] Prior to the Respondent's refusal to answer the Prosecution's questions, the Trial Chamber had determined that the trial should proceed in the absence of the accused for the sole purpose at that stage of hearing the balance of the Respondent's evidence. Therefore, it was not appropriate for the Trial Chamber to review that decision in the context of the proceedings for contempt.

8. However, undaunted, Mr. Bourgon submitted that the propriety of the decision to continue with the evidence arose separately as a preliminary point in relation to jurisdiction in terms of Rule 72(A)(i).[12] He submitted that the Trial Chamber had no jurisdiction to hear the trial in view of the Order on which the resumption of evidence proceeded. However, Mr. Bourgon had omitted to take account of the terms of Rule 72(D), which defines "a motion challenging jurisdiction" as referring "exclusively to a motion which challenges an indictment on the ground that it does not relate to:

> (i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;
> (i) the territories indicated in Articles 1, 8 and 9 of the Statute;
> (ii) the period indicated in Articles 1, 8 and 9 of the Statute;
> (iii) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute."

The challenge to jurisdiction mounted on the basis of the nullity of the original Decision to proceed to hear the evidence did not fall within the definition of a preliminary motion challenging jurisdiction. The Motion advanced was thus incompetent and Mr. Bourgon was advised that it was not open to him to make it.[13]

9. When the trial got under way, the issue was accordingly a simple one: did the Respondent knowingly and wilfully interfere with the administration of justice before the Tribunal by contumaciously refusing to answer questions?

10. Mr. Bourgon led evidence from two witnesses, Dragutin Milovanovic, a close friend of the Respondent who had accompanied him to The Hague on each occasion as his support person, and Professor Branko Rakic, a legal advisor to the Accused, Mr. Milosevic.[14] Their evidence related to the state of mind of the Respondent on 19 and 20 April. Mr. Bourgon's principal submission, following the evidence, was that one of the three essential elements

necessary for proof of the charge was not established. He accepted that the first two were — that the Respondent was a witness before the Trial Chamber and that he had refused to answer questions. On the other hand, he submitted that it had not been established that, in doing so, he had knowingly and wilfully interfered with the administration of justice and that he had done so by contumaciously refusing to answer the questions. For that degree of *mens rea* to be established it was necessary to show, either by direct evidence or inference, that the Respondent actually knew that he was interfering with the administration of justice.[15] It was for that reason that the majority of the Trial Chamber in the contempt proceedings against Witness K12 had decided that for conduct to be "contumacious" it had to be "perverse".[16] Judge Kwon, in his Dissent, had approached the matter differently by determining that "contumacious" did not require something in addition to conduct that was done "knowingly and willingly" but merely proof of an obstinate refusal to answer questions "without a reasonable excuse".[17] Mr. Bourgon urged upon the Trial Chamber the interpretation favoured by the majority.

11. Mr. Bourgon also enlisted, in support of his submission the Judgement of the Appeals Chamber in *The Prosecutor v. Aleksovski* to the effect that, for contempt to be established, a respondent must be held to have acted "with specific intent to interfere with the Tribunal's administration of justice".[18] This representation, however, was an inaccurate statement of the Appeals Chamber's holding in the *Aleksovski* contempt proceedings: the arguments about *mens rea* in that case focused on whether or not the respondent had actual knowledge of, or acted in wilful blindness of, the Trial Chamber's order;[19] it was the Trial Chamber seised of contempt proceedings in the *Brdanin* case which held that "[f]or each form of criminal contempt, the Prosecution must establish that the accused acted with specific intent to interfere with the Tribunal's due administration of justice."[20]

12. Reference was also made to *The Prosecutor v. Hadzihasanovic and Kubura*, in which no action was taken against a witness who indicated at the outset of his evidence that he would not answer. It was submitted that it was unfair to proceed with a complaint of contempt against the witness because he was in the middle of his evidence, whereas in cases where issues of this nature arose at the beginning the Prosecution tended not to insist on their position.[21] The Trial Chamber does not consider that submission to have any relevance to the situation where a specific order is made by the Trial Chamber and that order is not complied with.

13. Turning to the factual circumstances,[22] Mr. Bourgon submitted that they demonstrated that the Respondent was unaware that his conduct would interfere with the administration of justice. When he returned to court on 19 April 2005 he was faced with an unexpected situation where effectively two people were missing from the court, the person accused and the person representing him, albeit they are one and the same. Later that day, in a meeting with Professor Rakic, he enquired who would be questioning him in place of the Accused at the end of his evidence. When he was told that that job would fall to Mr. Kay, he asked if he might see him. He was told that he could not do so. He was worried that he might cause damage to the case of Mr. Milosevic if he answered questions in these circumstances. He had thought it was possible that, by continuing to give evidence, he might cause damage to his testimony and, as a result, do the opposite of what he aimed to do when he came to give evidence, *viz.* tell the truth. Reference was made to particular examples in the cross-examination, which took place on the return of the Accused on recovering from illness, of misunderstandings of the evidence which would have been left uncorrected had the Accused not been present when they occurred. Mr. Bourgon relied also on a statement made by the Respondent when he completed his evidence on 25 April 2005 to the effect that he had

come as a defence witness with the best of intentions and was leaving with a clear conscience.

14. He submitted that it was thus not possible to tell from the record of the proceedings that the Respondent knew that he was interfering with the administration of justice. Moreover, in light of Assigned Counsel's submissions that it would not be possible to proceed with another witness,[23] any delay in the proceedings was not the result of his conduct but a natural consequence of the illness of the Accused which was itself simply incidental to the trial proceedings.

15. In a submission made on 19 April 2005, when the problem initially arose, Mr. Nice for the Prosecutor suggested that the Respondent's position was an example of an "intent" to control the agenda of the court. The Trial Chamber does not consider that there is any basis in the circumstances of this case for that submission. The Chamber takes note of the evidence of Mr. Milovanovic and Professor Rakic, and concludes that their testimony provides support for the various propositions made by Mr. Bourgon about the Respondent's state of mind on 19 and 20 April 2005. Although he was given a number of opportunities to present an explanation for his refusal to comply with the Trial Chamber's Order and failed to do that, the Trial Chamber will nonetheless deal with the question of the *mens rea* of the Respondent on the basis that the various thoughts referred to in the evidence and submissions may have been in his mind in court.

16. Nevertheless, the Chamber has no hesitation in concluding that the Respondent plainly acted with the necessary *mens rea* to establish that he is guilty of contempt of the Tribunal. The Trial Chamber made its decision to proceed to complete the evidence of the Respondent, having carefully considered the situation that had arisen on 19 April 2005. When the Prosecutor endeavoured to cross-examine him, the Respondent took the stance, from which he never departed, that he would not answer any question in the absence of the Accused. The significance of complying with an order of the court was explained to him. He was advised of the arrangements made to enable the Accused to review the evidence on video, and in the form of a transcript, so that the Accused could deal with any issues that required clarification. He was also advised that the Accused could apply to recall him if something were left in an unsatisfactory state. He remained obdurate. He adhered to that position on the following day, when given every opportunity to proceed, and, following a consultation with counsel, he maintained his position. It is the opinion of the Trial Chamber that in the circumstances of this case, the test of "knowingly and wilfully" interfering with the Tribunal's administration of justice by "contumaciously" refusing to answer questions was satisfied when the Respondent deliberately refused to comply with an order of the Trial Chamber to answer questions and persisted in that refusal when fully advised of the position and given a further opportunity to respond. Since the Chamber had made an order which it considered to be within its powers and appropriate in the circumstances, the Respondent was bound to answer the questions put by the Prosecutor, whatever his views of that order and the propriety of proceeding in the absence of the Accused. It is no excuse for refusing to answer questions in court for a witness to claim that he disagrees with a procedural decision made which has led to his being examined.[24]

17. Where the issue is one of compliance with an order of the court, the "knowledge" required is knowledge of the making of the order requiring that the Respondent should answer. There is no question of special knowledge of the consequences of such refusal being required. It is an obvious consequence of refusing to comply with an order of the Chamber that the administration of justice is interfered with. No higher standard was set by the Appeals Chamber in *Aleksovski*.[25] If the submissions of Mr. Bourgon about the reasons behind the

stance taken by the Respondent have any relevance at all, it is in relation to the question of penalty. Proper control of court proceedings by the Chamber is an essential part of the administration of justice. Any defiance of an order of the court interferes with the administration of justice. What the Respondent's conduct amounted to was a determination and declaration that he would give evidence only on his own conditions. In other words, he would control the circumstances in which he would give evidence. He thus defied the authority of the court and created the risk that the authority of the Trial Chamber would be undermined and the administration of justice would be brought into disrepute.

18. Such conduct constitutes serious contempt of the Tribunal and would normally merit the immediate imposition of a custodial sentence in order to mark the gravity of the offence and to deter the Respondent, and others who might be tempted to follow the same course, from defying the authority of the Trial Chamber. But for one feature of the present case, that is the course that the Trial Chamber would have followed. The circumstance that is considered significant is that the Respondent currently suffers from serious health problems which would make the service of a sentence of imprisonment more burdensome in his case than in that of the average person.

19. The Trial Chamber shall accordingly impose a sentence of four months imprisonment, but shall suspend the operation of that sentence for a period of two years, so that the sentence shall not take effect unless during that period the Respondent commits another offence anywhere that is punishable with imprisonment, including contempt of court.

A Separate Opinion by Judge Bonomy is appended to this Decision.

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

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Judge Patrick Robinson
Presiding

Dated this thirteenth day of May 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

Case No. IT-02-54-T-R77.4

IN THE TRIAL CHAMBER

Before:
Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar:

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Decision of:
13 May 2005

PROSECUTOR

v.

SLOBODAN MILOSEVIC

CONTEMPT PROCEEDINGS AGAINST KOSTA BULATOVIC

SEPARATE OPINION OF JUDGE BONOMY ON CONTEMPT OF THE TRIBUNAL

The Office of the Prosecutor:

Ms. Carla Del Ponte
Mr. Geoffrey Nice

Amicus Curiae :

Prof. Timothy McCormack

The Accused:

Slobodan Milosevic

Counsel for the Respondent:

Stéphane Bourgon

Court Assigned Counsel:

Mr. Stephen Kay, QC
Ms. Gillian Higgins

Decision on the Merits

1. I agree entirely with the Trial Chamber's Decision[26] but wish to make clear my opinion that, in the context of this case, it does not assist in defining "contumacious" to suggest, as was done in *Witness K12*, that it implies conduct that is "perverse".[27] The plain English meaning of

contumacious conduct is behaviour that is "stubbornly or wilfully disobedient to authority".[28]

The Initial Procedure

2. I wish also to explain my reasons for deciding that the appropriate course in this case was for the Trial Chamber to conduct the contempt proceedings.

3. After the Respondent was charged as set out in the Decision, he was given time to consult with counsel.[29] Once the court reconvened, Mr. Bourgon, for the Respondent, made two preliminary Motions.[30] First, he invited the Chamber to determine that the matter should be dealt with by another Chamber and to take no further part in the proceedings. Second, he submitted the matter should be adjourned to ensure that the rights of the Respondent, now accused, guaranteed under Article 6 of the European Convention on Human Rights, were respected. Following brief discussion, Mr. Bourgon accepted that the second Motion would be more appropriately made in terms of Article 14 of the International Covenant on Civil and Political Rights and Article 21 of the Statute of the Tribunal.[31]

Motion to Remit Case to Another Trial Chamber

4. In support of the first Motion Mr. Bourgon submitted that, at the core of the question whether the Respondent was in contempt of the Tribunal, lay the basic question whether the Chamber had jurisdiction to hold part of the Trial in the absence of the accused. Since the Chamber had already ruled that the trial should proceed, it had already rendered a decision on a matter which required to be determined in the contempt proceedings. The Respondent was not bound to answer any question if the proceedings were illegal. The Respondent's defence was thus one on which it would not be appropriate for the Trial Chamber to adjudicate. The Trial Chamber could not be seen to be an impartial adjudicating body.[32]

5. This argument is misconceived. The issue of the refusal by the Respondent to answer the Prosecutor's questions arose after the decision had been made to proceed to complete the Respondent's evidence. That matter had already been determined. It was not for review at the stage when the Respondent faced further cross-examination. The Presiding Judge carefully explained to the Respondent that that matter had already been determined. The Respondent replied that he had come to give evidence in the presence of his President, the accused, and would only do so in his presence. In my opinion, it was not appropriate for the Trial Chamber to revisit its decision to continue to hear the evidence of the Respondent in the absence of the accused in the context of the contempt proceedings. The Respondent may, of course, raise the matter on appeal. It will then be for the Appeals Chamber to decide, first of all, whether the Trial Chamber erred in deciding that the evidence should continue to be heard in the absence of the accused, and secondly, whether that does, in fact, affect the legitimacy of the requirement that the Respondent should answer. I, therefore, found no basis in this submission for considering that the Trial Chamber would be, or be seen to be, other than an impartial adjudicating body in dealing with the issue of contempt. On this matter I was in agreement with the approach of my colleagues.

6. That approach is in keeping with the provisions relating to the procedure to be followed in the investigation and prosecution of contempt before the Tribunal in the Practice Direction of 6 May 2004,[33] which envisages that the contempt case will normally be heard by the Chamber before which the contempt allegedly occurred. Contempt may take many forms. Indeed the offence encompasses a wide variety of conduct, some of which is otherwise clearly criminal and some of which is not criminal. It comprises conduct which affects the administration of the court or is

otherwise disciplinary in character, and conduct which goes to the root of the issues being litigated before the court. It includes conduct which must be dealt with immediately if it is to be dealt with effectively, and it includes conduct that may appropriately be dealt with by ordinary criminal procedures within their proper time limits. It may comprise conduct in the face of the court and conduct occurring at a location far removed from the court, such as communications with witnesses or the publication of inappropriate reports in newspapers. It may involve the behaviour of persons on the public benches, counsel, a witness or the accused himself. Various forms of contempt require investigation before proceedings are commenced. Even in such circumstances the Practice Direction envisages that the normal course will be for the Chamber in which the contempt allegedly occurred should adjudicate the matter. Paragraph 13 provides:

> Upon completion of the investigation of an alleged contempt of the International Tribunal pursuant to Rule 77(C)(i) or (ii) of the Rules, and where sufficient grounds have been determined by a Chamber in order to proceed against a person for contempt, the Chamber in which the contempt allegedly occurred shall adjudicate the matter unless there are exceptional circumstances such as cases in which the impartiality of a Chamber may be called into question, warranting the assignment of the case to another Chamber.

It is clear, therefore, that both the Rules of Procedure[34] and the Practice Direction envisage that the Chamber before which a witness has allegedly committed contempt should ordinarily adjudicate the matter.

7. Having said that, the Practice Direction also recognises that there are circumstances where the case should be assigned to another Chamber. While these are described as "exceptional", the example given of the impartiality of a Chamber possibly being called into question suggests that this course may be appropriate in more than " exceptional" circumstances. A court must always act impartially. That means that the members of the court must not only be "subjectively" impartial, but also be perceived "objectively" to be impartial. There is a general presumption that a court is free of subjective or personal prejudice or bias unless there is evidence to the contrary. However, it may be difficult to demonstrate objective impartiality where the court appears to have already made decisions on matters of fact which are challenged in the contempt proceedings. It is not uncommon for issues of contempt to involve factual disputes. Indeed the same may also be said in relation to matters of law which are controversial. The Chamber was mindful of these issues in this case.[35] In dealing with the matter, the Trial Chamber did not consider that there were any grounds for calling the impartiality of the Chamber into question in the particular circumstances of this allegation. The Chamber confined its determination of the proper approach to the particular circumstances of this case. The variety of circumstances in which contempt may be committed inevitably rules out a "one size fits all" approach to handling such allegations.

8. It is vital to the proper administration of justice that a court maintains its authority over the conduct of proceedings before it.[36] To enable the court to enforce its authority in the face of resistance to its directions, the court must be able to take action to try to secure the implementation of its directions. One example is where a witness, having been duly sworn, endeavours to avoid his obligation to tell the whole truth by evasion, such as by giving deliberately confusing answers or answers which do not address the question posed but deal with peripheral, albeit related, events in a way that is designed to obfuscate the issues being explored. That sort of conduct, prevarication falling short of lying under oath or perjury, must be addressed by the presiding court. The conduct is frequently obvious and indisputable, carried out in the face of the court, and can potentially undermine the effective exercise of the court's jurisdiction to dispose of the primary business before it. The witness's demeanour may contribute to the impression communicated to the judge and instruct the view that the witness is prevaricating. Suitably advised by the trial judge of the risks associated with prevarication, the witness will often purge any contempt by giving evidence without

further prevarication.

9. The position is similar in the present case. The Respondent refused to continue his testimony at a stage where the Trial Chamber had decided that it was in the interests of justice and the fair and expeditious conduct of the proceedings that his evidence should continue. Since the primary consideration thereafter was that the proceedings should continue, the determination of the question whether the Respondent was in contempt was plainly for the Trial Chamber and was plainly a determination to be made expeditiously with a view to demonstrating the court's authority and ensuring the progress of the trial. In the event that its directions are not implemented, then the court must have power to take action to maintain its authority. It must try to ensure that no party involved in the proceedings is prejudiced by the witness's attitude and that the interference with the administration of justice be kept to a minimum. It is a vital part of the court's armoury in doing so to be able to advise the witness of the potential of being held in contempt by the court and punished for that contempt in the event that the position does not change. Should the court go on to hold that the witness was in contempt and punish the witness, then the witness has resort to appeal should he consider that he was wrongly accused and convicted of contempt. The initial assessment of the behaviour of the witness is one which must essentially be made by the presiding tribunal, which is well placed to determine the issue after ensuring that the rights of the witness to a fair hearing, and all rights associated therewith, are fully observed.

10. While I consider that the court before which the conduct occurs ought to deal with the question of contempt in the two situations I have outlined, I do not mean to suggest that that will always be the appropriate case. Since contempt can occur in so many quite diverse situations, inevitably there will be many cases where it will not be appropriate for the presiding court to deal with the issue of contempt before it.

11. To support his submission Mr. Bourgon also cited certain guidance from the Judicial Studies Board of England and Wales ("JSB") and the Judgement of the European Court of Human Rights, Second Section, in the case of *Kyprianou v. Cyprus*.[37] The JSB guidance relates to lower courts in England and Wales and is of little or no assistance in the circumstances of the present case.[38] *Kyprianou* bears to make an authoritative statement that contempt should always be dealt with by a different tribunal from that before which it is alleged to have occurred.[39] The Judgement of the Second Section awaits review by the Court's Grand Chamber. The Second Section considered that, in situations where a tribunal is faced with misbehaviour on the part of any person in the courtroom, which may constitute a criminal offence of contempt, the correct course dictated by the requirement of impartiality under Article 6.1 of the Convention is to refer the question to the competent prosecuting authorities for investigation and, if warranted, prosecution and to have the matter determined by a different bench from the one before which the problem arose. However, that statement is *obiter* in relation to circumstances which are far removed from those that the Court was considering. The circumstances of the present case do not relate to offensive behaviour in relation to which there may be factual issues to be determined. They relate to a polite but firm determination to answer questions only if the circumstances in court are such as the Respondent anticipated that they would be. In my opinion the decision in *Kyprianou* does not extend to such circumstances and does not provide a basis for insisting upon a separate tribunal to adjudicate upon contempt whenever that contempt occurs in the courtroom.

Motion to Adjourn

12. In support of his second Motion,[40] that the proceedings should be adjourned to ensure respect for the basis rights of the Respondent, Mr. Bourgon submitted that the Respondent could not be ready to answer the contempt charge immediately, as his defence team might need to prepare

lengthy legal submissions which might involve detailed research and he might even need to call his own witnesses. When asked what further legal arguments might be made beyond those supporting the first Motion, Mr. Bourgon referred to "possible guidelines or guarantees" that the Respondent may have been given when he was invited on behalf of the accused to testify before the Tribunal. These might give him an excuse for refusing to answer questions. In addition, one of the associates acting for the accused had met with the Respondent on the evening of 19 April, that is after his first appearance and before his second appearance when he refused to answer questions, and the circumstances of that meeting would require to be investigated. Mr. Bourgon also referred to the health of the accused without specifying any particular issue. Finally he submitted that the Respondent had the right to counsel of his own choice and might wish to consult a lawyer from his own country.

13. These submissions fell to be considered in the context of whether it was necessary to adjourn the proceedings for more than a day or two to enable adequate investigation and preparation of the Respondent's case to be undertaken. Again I considered Mr. Bourgon's submissions to be misconceived. Again they started from the point of view that the whole basis on which the Respondent came to the Tribunal and commenced and was instructed to continue to give evidence should be explored in the context of the contempt proceedings. No other matter was suggested as requiring investigation than the question whether the Accused was entitled to decline to answer because the situation in court was not as he wished or expected it to be. I did not rule out the possibility that some of the submissions made by Mr. Bourgon on this, and indeed in support of the first Motion, may go to the question of the appropriate penalty to be imposed in the event that contempt is established. On the other hand none is relevant to the question whether the accused was bound to answer the questions posed by the Prosecutor. I therefore dissented from the decision of my colleagues to grant an adjournment until 5 May. In my opinion, an adjournment of a day or two would have been sufficient.

14. The idea that there should be a lengthy adjournment to enable the Respondent to arrange to consult, and have attend here, a lawyer of his choice and from his own country is equally misconceived. The right of the accused to counsel of his choice has to be seen in the context in which the need for counsel arises. If he has the resources, he has the right to make arrangements for the attendance of counsel within the timescale that is available in the context of the proceedings. Where it is appropriate for the matter of contempt to be dealt with urgently and expeditiously, then his choice is necessarily limited to those who are available to deal with the matter within the timescale. Should he be unable to meet the expenses of legal advice, then the Chief of the Office of Legal Aid and Defence Matters would provide counsel and in doing so would give the Respondent the opportunity to select from a list of those recognised by the Tribunal and available to undertake the task. An adjournment until 25 or 26 April would have been sufficient to ensure respect for the rights of the Respondent. Since the issue was one of the maintenance of the authority of the Trial Chamber, it required to be dealt with urgently.

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

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Judge Iain Bonomy

Dated this thirteenth day of May 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

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1 - *Prosecutor v. Milosevic, Contempt Proceedings Against Kosta Bulatovic*, Case No. IT-02-54-T-R77.4, "Order on Contempt Concerning Witness Kosta Bulatovic", 20 April 2005 ("Contempt Order"), p. 3.
2 - *Milosevic*, Case No. IT-02-54-AR73.7, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel", 1 November 2004, para. 20.
3 - *Milosevic*, Case No. IT-02-54-T, Transcript, T. 38591 (19 April 2005).
4 - *See generally id.*, T. 38592–T. 38597, T. 38606 (19 April 2005).
5 - *See supra* note 4.
6 - *Id*., T. 38606, T. 38608–T. 38609 (19 April 2005).
7 - *Id*., T. 38615–T. 38616 (20 April 2005).
8 - *Id*., T. 38616 (20 April 2005).
9 - *See Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR-R77, "Judgement on Appeal by Anto Nobilo against Finding of Contempt", 30 May 2001 ("*Aleksovski* Contempt Appeal"), para. 36:
Both the purpose and the scope of the law of contempt to be applied by this Tribunal is to punish conduct which tends to obstruct, prejudice or abuse its administration of justice in order to ensure that its exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded.
The law of contempt is not designed to buttress the dignity of the judges or to punish mere affronts or insults to a court or tribunal; rather, it is justice itself which is flouted by a contempt of court, not the individual court or judge who is attempting to administer justice. (footnotes omitted)
10 - *See* Contempt Order, *supra* note 1; *Milosevic*, Case No. IT-02-54-T, Transcript, T. 38617 (20 April 2005). *See also Aleksovski* Contempt Appeal, *supra* note 9, para. 56:
It is therefore essential that, where a Chamber initiates proceedings for contempt itself, it formulates at an early stage the nature of the charge with the precision expected of an indictment, and that it gives the parties the opportunity to debate what is required to be proved. It is only in this way that the alleged contemnor can be afforded a fair trial.
11 - *Contempt Proceedings Against Kosta Bulatovic*, *supra* note 1, Transcript of Hearing, T. 6–T. 8 (6 May 2005); *see Milosevic*, Case No. IT-02-54-T, Transcript, T. 38626– T. 38627, T. 38633– T. 38634, T. 38642 (20 April 2005).
12 - *Id*., T. 6, T. 8, T. 9–T. 14 (6 May 2005).
13 - *Id*., T. 14–T. 15 (6 May 2005).
14 - *See generally id*., T. 18–T. 42 (6 May 2005).
15 - *See generally id*., T. 43–T. 45 (6 May 2005).
16 - *See id*., T. 44 (6 May 2005) (referring to *Milosevic, Contempt Proceedings Against Witness K12*, Case No. IT-02-54-T-R77, Transcript of Hearing, T. 33 (18 November 2002)).
17 - Contempt Proceedings Against Witness K12, supra note 16, "Trial Chamber Finding in the Matter of Witness K12", 21 November 2002, Dissenting Opinion of Judge Kwon.
18 - *Contempt Proceedings Against Kosta Bulatovic*, *supra* note 1, Transcript of Hearing, T. 45–T. 46 (6 May 2005).
19 - *Aleksovski* Contempt Appeal, *supra* note 9, paras. 39, 42–48, 49–52.
20 - *Prosecutor v. Brdanin, Contempt Proceedings Against Milka Maglov*, Case No. IT-99-36-R77, "Decision on Motion for Acquittal Pursuant to Rule 98 Bis", 19 March 2004, para. 16; see also id., paras. 24, 29, 41.
21 - See *Contempt Proceedings Against Kosta Bulatovic*, *supra* note 1, Transcript of Hearing, T. 62–T. 63 (6 May 2005).
22 - *See generally id*., Transcript of Hearing, T. 49–T. 53, T. 55–56 (6 May 2005).
23 - *Id*., T. 63 (6 May 2005) (ostensibly referring to *Milosevic*, Case No. IT-02-54-T, Transcript, T. 38606–38608 (19 April 2005); *id*., T. 38642 (20 April 2005)).
24 - That is not to say that there are no circumstances in which a witness may claim a right to refuse to answer questions. He may claim privilege. In that event the Chamber would have a further decision to take on whether the witness should be required to answer. However, no issue of that sort arises here.
25 - *See* Aleksovski Contempt Appeal, *supra* note 9, paras 53–54:
[I]t is strictly unnecessary for the Appeals Chamber to determine whether it is necessary for the prosecution also to establish an intention to violate or disregard the order which was violated, but the issue is an

important one for future prosecutions for contempt and the matter has been fully argued. The Appeals Chamber accordingly proposes to express its opinion upon that issue. In most cases where it has been established that the alleged contemnor had knowledge of the existence of the order (either actual knowledge or a wilful blindness of its existence), a finding that he intended to violate it would almost necessarily follow. There may, however, be cases where such an alleged contemnor acted with reckless indifference as to whether his act was in violation of the order. In the opinion of the Appeals Chamber, such conduct is sufficiently culpable to warrant punishment as contempt, even though it does not establish a specific intention to violate the order. The Appeals Chamber agrees with the prosecution that it is sufficient to establish that the act which constituted the violation was deliberate and not accidental.

26 - *Prosecutor v. Milosevic, Contempt Proceedings Against Kosta Bulatovic*, Case No. IT-02-54-T-R77.4, "Decision on Contempt of the Tribunal", 13 May 2005 ("Decision").

27 - *See Prosecutor v. Milosevic*, Contempt Proceedings Against Witness K12, Case No. IT-02-54-T-R77, Transcript of Hearing, T. 33 (18 November 2002).

28 - See, e.g., *The Concise Oxford Dictionary* (10th ed., rev. 2001) (Oxford University Press: Oxford, New York).

29 - *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Transcript, T. 38617–T. 38619 (20 April 2005).

30 - *See generally id.*, T. 38619–T. 38639 (20 April 2005).

31 - *Id.*, T. 38627 (20 April 2005).

32 - *See generally id.*, T. 38619–T. 38627, T. 38633–T. 38639 (20 April 2005).

33 - Practice Direction on Procedure for the Investigation and Prosecution of Contempt Before the International Tribunal, Doc. No. IT/227, 6 May 2004 ("Practice Direction").

34 - *See* Rule 77 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), quoted in relevant part in the Decision, *supra* note 1, para. 4.

35 - *See, e.g., Milosevic*, Case No. IT-02-54-T, Transcript, T. 38633–T. 38634 (20 April 2005).

36 - *See Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR-R77, "Judgement on Appeal by Anto Nobilo against Finding of Contempt", 30 May 2001 ("Aleksovski Contempt Appeal"), para. 36.

37 - Application No. 73797/01, Judgement of 22 January 2004.

38 - Likewise, the Practice Note of the Lord Chief Justice referred to in *Kyprianou* gives no specific guidance other than in respect of contempt proceedings in lower courts.

The examples I have already given, *see supra* paras. 8–9, are not the only circumstances in which a court may deal with the issue of contempt before it and be perceived as an independent and impartial tribunal. A number of examples can be cited from England and Wales. In *R v Calum Iain Macleod*, [2001] Crim. L. R. 589, where the contempt alleged was that of the accused endeavouring to intimidate a witness outwith the courtroom, the Court of Appeal considered that there was no reason why the judge, who had not observed what had taken place outside the courtroom, should not be regarded as an independent and impartial tribunal for the purposes of the contempt proceedings. The Court went further and expressed the view that, even if the judge had formed a particular impression of the witness's credibility while she was giving her evidence in the main trial, this could not be seen as compromising his independence or impartiality when considering the evidence in relation to the alleged contempt. It was, therefore, appropriate for the trial judge to deal with the matter which had to be dealt with urgently to ensure that the trial progressed. That approach is in keeping with the spirit of the general statement made by Denning M.R., in the leading case of *Balogh v. St. Alban's Crown Court*, [1974] 3 All E.R. 283, 288:

This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the court and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately—so as to maintain the authority of the court —to prevent disorder —to enable witnesses to be free from fear—and jurors from being improperly influenced—and the like. …

[A] judge should act of his own motion only when it is urgent and imperative to act immediately. In all other cases he should not take it upon himself to move. He should leave it to the Attorney-General or to the party aggrieved to make a motion in accordance with the rules in R.S.C., Ord. 52. The reason is so that he should not appear to be both prosecutor and judge: for that is a role which does not become him well.

In the later case of *Griffin*, [1989] 88 Cr. App. R. 63, 69, the Court of Appeal said this:

We should add that certain *dicta* (for example, in *Balogh*) may be read as suggesting that the court has no jurisdiction to adopt the summary process unless the matter is urgent. We doubt whether this is strictly accurate. In our view the question of urgency or no is material, not to the existence of the jurisdiction but as to whether the jurisdiction should be exercised in preference to some more measured form of process.

39 - It should be noted, however, that the discussion of American law in paragraph 22 of the *Kyprianou* decision may not be a complete or entirely accurate review of the position in the United States. For example,

in *Mayberry v. Pennsylvania*, the case relied upon in *Kyprianou* to support the general rule it purports to propound, the United States Supreme Court emphasised that its holding was strongly linked to, and possibly limited by, the circumstances of the case before it, characterised by "downright insults of a trial judge":
This rule of caution [in exercising the contempt power] is more mandatory where the contempt charged has in it the element of *personal criticism or attack upon the judge.* … All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of *contempt by personal attack upon him*, may, without flinching from his duty, properly ask that one of his fellow judges take his place.
400 U.S. 455, 462, 464 (1971) (emphasis added). *See also Pounders v. Watson*, 521 U.S. 982, 987–988 (1997) (noting that "[l]ongstanding precedent confirms the power of courts to find summary contempt and impose punishment", and stressing "the importance of confining summary contempt orders to misconduct occurring in court. Where misconduct occurs in open court, the affront to the court's dignity is more widely observed, justifying summary vindication.").
40 - *See generally id.*, T. 38627–T. 38633 (20 April 2005).