

IT-03-69-AR73.2  
A87 - A77  
16 MAY 2008

87  
A

**UNITED  
NATIONS**



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

Case No.: IT-03-69-AR73.2

Date: 16 May 2008

Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Mehmet Güney  
Judge Andréia Vaz  
Judge Theodor Meron

**Registrar:** Mr. Hans Holthuis

**Decision of:** 16 May 2008

**PROSECUTOR**

v.

**JOVICA STANIŠIĆ  
FRANKO SIMATOVIĆ**

***PUBLIC***

**DECISION ON DEFENCE APPEAL OF THE DECISION ON FUTURE COURSE OF  
PROCEEDINGS**

**Office of the Prosecutor**

Mr. Dermot Groome  
Ms. Doris Brehmeier-Metz  
Mr. Gregory Townsend  
Mr. John Docherty

**Counsel for the Accused**

Mr. Geert-Jan Alexander Knoops and Mr. Wayne Jordash for Mr. Jovica Stanišić  
Mr. Zoran Jovanović and Mr. Vladimir Domazet for Mr. Franko Simatović

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Appeals Chamber” and “International Tribunal”, respectively), is seized of the “Defence Appeal of the Decision on Future Course of Proceedings,” filed on 23 April 2008 (“Appeal”) by counsel for Jovica Stanišić (“Defence”).<sup>1</sup>

## I. PROCEDURAL HISTORY

2. On 9 April 2008, Trial Chamber III (“Trial Chamber”) rendered the Impugned Decision, finding that the health condition of Jovica Stanišić (“Accused”) regularly interferes with the right to a fair and expeditious trial, warranting derogation from his right to be present in court, and accordingly informed the Registry to establish a video-conference link to enable the Accused to participate in his trial proceedings from the United Nations Detention Unit (“UNDU”) when he is too unwell to be physically present in court.<sup>2</sup> On 16 April 2008, the Trial Chamber granted the Defence certification for leave to appeal the Impugned Decision.<sup>3</sup> On 5 May 2008, the Office of the Prosecutor (“Prosecution”) filed a response to the Appeal.<sup>4</sup> The Defence filed a reply on 8 May 2008.<sup>5</sup>

3. The Appeals Chamber notes that the trial in this case commenced on 28 April 2008 and that the Accused has neither attended the proceedings nor participated in them via the video-conference link.<sup>6</sup> The Appeals Chamber further notes that on 8 May 2008, the Trial Chamber issued an order establishing a procedure for monitoring and reporting on the ability of the Accused to attend court or participate in the court proceedings via the video-conference link.<sup>7</sup>

<sup>1</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR73.2, Defence Appeal of the Decision on Future Course of Proceedings, 23 April 2008 (“Appeal”).

<sup>2</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Future Course of Proceedings, 9 April 2008 (“Impugned Decision”), paras 14-15.

<sup>3</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Defence Motion Requesting Certification for Leave to Appeal, 16 April 2008 (“Certification Decision”).

<sup>4</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR73.2, Prosecution’s Response to “Defence Appeal of the Decision on Future Course of Proceedings,” filed publicly with confidential annex, 5 May 2008 (“Prosecution Response”).

<sup>5</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR73.2, Confidential Defence Reply to Prosecution’s Response to “Defence Appeal of the Decision on Future Course of Proceedings” With Annex A, 8 May 2008 (“Defence Reply”).

<sup>6</sup> See *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Order Establishing a Procedure for the Monitoring of and Reporting on the Accused Stanišić’s Ability to Attend Court in Person and/or to Participate in the Court Proceedings Via the Video-Conference Link, 8 May 2008 (“Order of 8 May 2008”), p. 2.

<sup>7</sup> Order of 8 May 2008.

## II. STANDARD OF REVIEW

4. The Appeals Chamber recalls that decisions relating to the general conduct of trial proceedings are matters within the discretion of the Trial Chamber.<sup>8</sup> The Impugned Decision, which concerns whether the Trial Chamber's ruling that the Accused's health condition could be accommodated by his participation via video-conference link from the UNDU is consistent with the statutory right of the Accused to be present in court, is such a discretionary decision to which the Appeals Chamber must accord deference. This deference is based on the recognition by the Appeals Chamber of "the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case."<sup>9</sup>

5. In order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber has committed a "discernible error" resulting in prejudice to that party.<sup>10</sup> The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.<sup>11</sup> The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.<sup>12</sup>

## III. APPLICABLE LAW

6. An accused appearing before the International Tribunal is entitled to certain minimum guarantees pursuant to Article 21(4) of the Statute of the International Tribunal ("Statute"). Article 21(4)(d) of the Statute grants the accused the right "to be tried in his presence." The Appeals Chamber has interpreted this right as meaning that an accused has the right to be *physically*

<sup>8</sup> See *Prosecutor v. Slobodan Milošević*, 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 ("Milošević Decision of 1 November 2004"), para. 9.

<sup>9</sup> See *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletic's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 4. See also *Milošević Decision of 1 November 2004*, para. 9.

<sup>10</sup> See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, 8 December 2006 ("Šešelj Decision of 8 December 2006"), para. 18 (citing *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005, para. 6).

<sup>11</sup> Šešelj Decision of 8 December 2006, para. 18 (citing *Milošević Decision of 1 November 2004*, para. 9).

<sup>12</sup> See *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008, para. 6; See also Šešelj Decision of 8 December 2006, para. 18; *Milošević Decision of 1 November 2004*, para. 9; *Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("Milošević Decision of 18 April 2002"), para. 5.

present.<sup>13</sup> This right, however, is not absolute.<sup>14</sup> An accused can waive or forfeit the right to be physically present at trial.<sup>15</sup> For example, under Rule 80(B) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), the Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct, following a warning that such conduct may warrant the removal. The Appeals Chamber has observed that the right of an accused to be present at trial pursuant to Rule 80(B) of the Rules can be restricted “on the basis of substantial trial disruptions.”<sup>16</sup> The Appeals Chamber has further found that this Rule is not limited to intentional disruptions.<sup>17</sup> However, in assessing a particular limitation on a statutory guarantee, such as the right to be physically present at trial, the Appeals Chamber bears in mind the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective.<sup>18</sup>

#### IV. DISCUSSION

##### (A) Scope of the Appeal

7. The Appeals Chamber recalls that on 10 March 2008, the Trial Chamber issued a decision in which it found the Accused fit to stand trial.<sup>19</sup> The Appeals Chamber further recalls that on 17 March 2008, the Trial Chamber denied the Defence request for certification to appeal the Fitness Decision on the ground that the Defence failed to show how it involved an issue for which immediate resolution by the Appeals Chamber could materially advance the proceedings.<sup>20</sup> Additionally, during the hearing of 8 April 2008, the Trial Chamber concluded that there was no

<sup>13</sup> See *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera’s Interlocutory Appeal Concerning His Right to be Present at Trial, 5 October 2007 (“*Nzirorera* Decision”), para. 11 (citing *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 (“*Zigiranyirazo* Decision”), paras 11-13).

<sup>14</sup> See *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 96 *et seq.* See also *Zigiranyirazo* Decision, para. 14; *Milošević* Decision of 1 November 2004, para. 13.

<sup>15</sup> *Zigiranyirazo* Decision, para. 14 (citing *Milošević* Decision of 1 November 2004, para. 13).

<sup>16</sup> *Zigiranyirazo* Decision, para. 14 (citing *Milošević* Decision of 1 November 2004, para. 13).

<sup>17</sup> *Milošević* Decision of 1 November 2004, para. 14 (finding that “it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety”).

<sup>18</sup> See *Zigiranyirazo* Decision, para. 14 (citing *Milošević* Decision of 1 November 2004, para. 17). See also *Nzirorera* Decision, para. 11.

<sup>19</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, *Confidential and Ex Parte* Decision on Motion Re Fitness to Stand Trial, 10 March 2008 (“*Fitness* Decision”), para. 130.

<sup>20</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, *Confidential and Ex Parte* Decision on Defence Motion Requesting Certification for Leave to Appeal, 17 March 2008, para. 6.

need to reconsider the Fitness Decision,<sup>21</sup> and the Defence submitted that, in consideration of the best interests of the Accused, it would not seek to reopen that Decision.<sup>22</sup>

8. In the Prosecution Response, the Prosecution asserts, *inter alia*, that the Defence bases most of its arguments on issues outside the scope of the Appeal.<sup>23</sup> The Prosecution observes that the Trial Chamber did not certify the issue of the Accused's fitness to stand trial and opines that the only issue certified is whether the Trial Chamber properly exercised its discretion when it established the video-conference link with the UNDU.<sup>24</sup> Specifically, the Prosecution argues that the Defence arguments under grounds one and three of the Appeal seek to reopen the fitness issue.<sup>25</sup> In its Reply, the Defence asserts that, contrary to the Prosecution's assertion, its arguments do not incorrectly conflate the fitness issue with the issue of the Accused's ability to attend court.<sup>26</sup>

9. The Appeals Chamber recalls that in the Certification Decision, as noted by the Prosecution, the Trial Chamber stressed that the Impugned Decision did not address the Accused's fitness to stand trial.<sup>27</sup> The Appeals Chamber further recalls that the Trial Chamber certified the Impugned Decision on the basis that, in accordance with Rule 73(B) of the Rules, "the issue as to the consistency of the video-conference link with the right of the Accused to be present in court is one that affects the fair and expeditious conduct of the proceedings or the outcome of the trial," and "an immediate resolution by the Appeals Chamber may materially advance the proceedings."<sup>28</sup> The Appeals Chamber interprets the Certification Decision as certifying the Defence request to appeal the Impugned Decision in its entirety, recognizing that the scope of certification does not include the issue of the Accused's fitness. Nonetheless, the Appeals Chamber considers that the Accused's health condition and the Trial Chamber's establishment of the video-conference link to enable the Accused to participate in his trial from the UNDU are closely interrelated.

10. The Appeals Chamber does not agree with the Prosecution that the Defence arguments under grounds one and three of the Appeal attempt to reopen the fitness issue or otherwise go beyond the scope of the Appeal. The Appeals Chamber interprets ground one of the Appeal, in sum, as asserting that the Trial Chamber erred in failing to consider all evidence relating to whether

<sup>21</sup> T. 867, 8 April 2008. See also Appeal, para. 42; Prosecution Response, para. 3.

<sup>22</sup> T. 858 and 865, 8 April 2008. Specifically, the Defence submitted that, *inter alia*, "it's primarily the argument of the Defence that seen from the best interests of the accused, we, in this stage at this point will not argue reopening of the fitness issue as such..." and "what we learned today from Dr. De Man's evidence is that any further examination through a potential renewal of the fitness issue and/or inviting other experts to assess the condition of Mr. Stanišić can be contra-indicative and even function as a catalyst for the well being of Mr. Stanišić..." See also Appeal, para. 40; Prosecution Response, para. 3.

<sup>23</sup> Prosecution Response, p. 4.

<sup>24</sup> Prosecution Response, para. 11.

<sup>25</sup> Prosecution Response, paras 13-19.

<sup>26</sup> Defence Reply, para. 3.

<sup>27</sup> Certification Decision, para. 4.

the establishment of the video-conference link was consistent with the rights of the Accused,<sup>29</sup> and specifically, in “fail[ing] to appreciate the significance of the medical evidence, which was relevant to the question of whether the proposed course was appropriate.”<sup>30</sup> The Appeals Chamber further notes that the main argument of the Defence in ground three of the Appeal is that the Trial Chamber erred by disregarding a reasonable alternative – namely, to adjourn the proceedings for three to six months as per the recommendation of Dr. De Man – when it ordered the establishment of the video-conference link.<sup>31</sup> Contrary to the Prosecution’s assertion, the Appeals Chamber does not consider that this argument amounts to a challenge of the Trial Chamber’s decision not to reconsider the Fitness Decision but rather construes it as support for the general assertion of the Defence that in disregarding a reasonable alternative, the Trial Chamber erred in its application of the proportionality principle.<sup>32</sup> Accordingly, although the Defence refers to the fitness issue in the Appeal,<sup>33</sup> the Appeals Chamber has considered only those arguments directly related to the right to be present at trial.

## (B) The Appeal

11. Turning to the merits of the Appeal, the Defence asserts that reversal of the Impugned Decision is warranted on the ground that the Trial Chamber erred in its approach to the question of whether the “use of a video-conference link and other technology was an *appropriate and proportionate means of securing the rights of Mr. Stanišić*, while also protecting the rights of Mr. Simatović.”<sup>34</sup> The Defence accordingly requests the Appeals Chamber to: “(i) adjourn the proceedings for a minimum of three months to allow the Accused time to recover from his psychiatric disorder, and (ii) to give due regard to any independent medical evidence after this period has elapsed before determining when the trial should commence....”<sup>35</sup> In Response, the Prosecution submits that the Defence fails to show that the Trial Chamber abused its discretion in ordering the establishment of a video-conference link to allow the Accused to participate in the proceedings from the UNDU on days that he is too unwell to attend court.<sup>36</sup>

---

<sup>28</sup> Certification Decision, paras 6-7.

<sup>29</sup> See, e.g., Appeal, para. 50.

<sup>30</sup> Appeal, para. 57.

<sup>31</sup> Appeal, para. 81.

<sup>32</sup> See, e.g., Appeal, para. 83, in which the Defence concludes that “... a reasonable Tribunal properly directing itself to the importance of the fundamental right could not have concluded that the substantial derogation from a seriously ill Accused’s right to be tried in his presence was proportionate when the delay to the proceedings ... could potentially have been only an additional delay of two months ... as compared to the impact of the impugned Decision.”

<sup>33</sup> See, e.g., Appeal, paras 54, 56, and 58.

<sup>34</sup> Appeal, paras 1 and 49.

<sup>35</sup> Appeal, para. 81.

<sup>36</sup> Prosecution Response, para. 1.

12. As previously indicated, in its first ground of Appeal, the Defence submits that the Trial Chamber erred in failing to consider medical evidence that was critical to determining whether the establishment of the video-conference link was appropriate and consistent with the rights of the Accused.<sup>37</sup> The Defence further opines that the Trial Chamber improperly focused on the issue of the Accused's physical inability to travel to court rather than the way in which the Accused's overall medical condition impacted his ability to effectively participate through the video-conference link.<sup>38</sup> In its second ground of appeal, the Defence argues that the Trial Chamber erred by failing to give weight to the need to ensure effective participation by the Accused and by giving undue weight to the desire to commence the proceedings.<sup>39</sup> The Defence further argues that the Trial Chamber erred in assessing whether there had been substantial and persistent disruptions to the trial proceedings that justified derogation from the Accused's right to be present, contending that contrary to the Trial Chamber's conclusion, the Accused's medical situation delayed the trial for approximately three weeks rather than six weeks.<sup>40</sup> Additionally, in its third ground of appeal, the Defence submits that upon concluding that derogation from the Accused's right to be present was appropriate, the Trial Chamber had a duty to impair the right no more than was strictly necessary to achieve the desired result.<sup>41</sup> The Defence asserts that instead, the Trial Chamber effectively removed the right of the Accused to be present without any attempt to implement viable alternatives such as the adjournment of the proceedings for three to six months, which was recommended by Dr. De Man.<sup>42</sup> The Defence contends, *inter alia*, that the Impugned Decision renders the Accused's full participation in the trial impossible, prevents proper confrontation of witnesses, who will be prevented from seeing and facing the Accused when testifying, and deprives the Accused the right to testify in his own defence.<sup>43</sup>

13. The Prosecution asserts that the Trial Chamber properly applied the proportionality principle when it chose to establish the video-conference link, carefully considering the physical condition of the Accused, investigating five options for dealing with that condition,<sup>44</sup> and finally opting for the solution that was least restrictive to the rights of the Accused while still ensuring the expeditious conduct of the trial.<sup>45</sup> The Prosecution further asserts that the Trial Chamber did not err

---

<sup>37</sup> Appeal, paras 50 and 57.

<sup>38</sup> Appeal, para. 54.

<sup>39</sup> Appeal, para. 73.

<sup>40</sup> Appeal, paras 77 and 80.

<sup>41</sup> Appeal, para. 84.

<sup>42</sup> Appeal, paras 81 and 84.

<sup>43</sup> Appeal, para. 85.

<sup>44</sup> The Prosecution notes that the Trial Chamber considered the options of: (1) severing the cases of the Accused; (2) allowing the case to remain in the pre-trial phase for a period of three to six months; (3) ordering another round of medical examinations to re-assess the Accused's fitness to stand trial; (4) providing the video-conference link; and (5) commencement of the trial on the basis that the Accused was found to be fit to stand trial. *See* Prosecution Response, para. 33.

<sup>45</sup> Prosecution Response, p. 7 and para. 39.

in its consideration of the disruption caused by the Accused's health condition, asserting, *inter alia*, that the precise period of delay, whether three or six weeks, is not significant given that there was strong evidence that the Accused's health condition would persist.<sup>46</sup> The Prosecution points out that derogation from the right to be present is reasonable under some circumstances, noting, *inter alia*, that the *Milošević* Decision of 1 November 2004 confirmed that an Accused's right to be present at trial can be restricted on the basis of substantial trial disruptions and that the Appeals Chamber has clarified that such disruptions are not limited to intentional disruptions but may be related to the health of the Accused.<sup>47</sup> The Prosecution further submits that the particular features of the video-conference link, which include a camera angle showing the witness at all times, the use of a video screen showing the e-Court display and another screen showing the LiveNote transcript, which permits the Accused to view exhibits and the trial transcript in real time, a telephone line that allows the Accused to communicate with his counsel at all times, and a microphone that enables the Accused to address the Trial Chamber, restrict the Accused's right to be physically present as minimally as possible.<sup>48</sup> The Prosecution concludes that the video-conference link and related technology ordered by the Trial Chamber create "a virtual presence that allows the Accused to participate fully and effectively in his case."<sup>49</sup>

14. In the Reply, the Defence largely reiterates the arguments it asserted in the Appeal<sup>50</sup> and submits further arguments regarding alleged abuses of the Trial Chamber's discretion that have taken place since the rendering of the Impugned Decision.<sup>51</sup> The Appeals Chamber declines to consider these further arguments given that they were not before the Trial Chamber when it issued the Impugned Decision.

15. The Appeals Chamber recalls that in the Impugned Decision, the Trial Chamber found that derogation from the right of the Accused to be present at trial was warranted given that his health condition regularly interferes with the right to a fair and expeditious trial.<sup>52</sup> The Prosecution correctly points out that derogation from the right to be present is reasonable under some circumstances and that derogation may be justified even on the basis of substantial trial disruptions on the part of an accused that are unintentional in nature.<sup>53</sup> The question before the Appeals Chamber is whether derogation from the right to be present through the establishment of a video-

---

<sup>46</sup> Prosecution Response, paras and 40-42.

<sup>47</sup> Prosecution Response, para. 45.

<sup>48</sup> Prosecution Response, para. 52.

<sup>49</sup> Prosecution Response, para. 53.

<sup>50</sup> See Defence Reply, paras 2-9.

<sup>51</sup> See Defence Reply, paras 10-18.

<sup>52</sup> Impugned Decision, para. 15.

<sup>53</sup> Prosecution Response, para. 45.



conference link that enables the Accused to participate in his trial from the UNDU was reasonable under the circumstances of this case.

16. The Appeals Chamber observes that in determining whether derogation from the Accused's right to be present at trial was justified, the Trial Chamber considered the proportionality principle.<sup>54</sup> Specifically, the Trial Chamber noted that any restrictions on a fundamental right "must be the least intrusive instrument amongst those which might achieve the desired result."<sup>55</sup> The Trial Chamber further considered that in the *Zigiranyirazo* Decision, the Appeals Chamber held that the need to ensure a reasonably expeditious trial is an objective of general importance and accordingly concluded that its task in the instant case was to "strike an appropriate balance between the reasonably expeditious resolution of the case and the need to protect the Accused's right to be present at his trial."<sup>56</sup>

17. The Appeals Chamber further observes that in balancing the right to an expeditious trial and the right of the Accused to be present at his trial, the Trial Chamber considered that the commencement of the trial had been delayed approximately one and a half months due to the health condition of the Accused, that future delays were to be expected in light of his health condition, that if the Trial Chamber were to postpone the proceedings each time the Accused was too ill to physically attend court, the trial would likely last an unreasonably long duration, and that the co-Accused in this case, Franko Simatović, is also entitled to a fair and expeditious trial.<sup>57</sup> In light of these factors, the Trial Chamber considered it necessary to establish a video-conference link at the UNDU "that will enable the Accused to participate in the proceedings from the UNDU on days that he is too unwell to attend court."<sup>58</sup>

18. The Appeals Chamber considers that in determining the future course of the proceedings in this case, the Trial Chamber's decision to balance the right of the Accused to be present with the right of both the Accused and his co-Accused to an expeditious trial was reasonable. However, the Appeals Chamber agrees with the Defence that in balancing these two rights, the Trial Chamber erred in failing to give sufficient weight to the right of the Accused to be present and according undue weight to the objective of commencing the proceedings. Regardless of whether the commencement of the trial was delayed for approximately three weeks, as the Defence contends, or for approximately a month and a half, as the Trial Chamber observed, the Appeals Chamber, while

---

<sup>54</sup> Impugned Decision, para. 10.

<sup>55</sup> Impugned Decision, para. 10 (citing the United Nations Human Rights Committee, compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/rev.6, 12 May 2003, p. 176).

<sup>56</sup> Impugned Decision, para. 11.

<sup>57</sup> Impugned Decision, paras 11-13.

recognizing the importance of preventing trial delays, does not find that the period of delay in the circumstances of this case had reached a level that was so substantial as to warrant derogation from the fundamental right of the Accused to be present at trial.

19. The Appeals Chamber emphasizes that the right to be present is a fundamental right, and although the Prosecution correctly points out that derogation from this right may be warranted in light of substantial trial delays, the Appeals Chamber agrees with the Defence that derogation is not appropriate when reasonable alternatives exist. The Appeals Chamber notes that in choosing to establish the video-conference link, the Trial Chamber excluded other potential options, including, as the Prosecution observes, allowing the case to remain in the pre-trial phase for three to six months.<sup>59</sup> The Appeals Chamber considers that, given the existence of this reasonable alternative, which could potentially secure the Accused's ability to fully exercise his right to be present at trial within a relatively short period of time, the Trial Chamber erred in choosing an alternative that restricted this right.

20. The Appeals Chamber further notes that in establishing the video-conference link to enable the Accused to participate in the proceedings from the UNDU when he is too unwell to physically attend court, the Trial Chamber failed to consider whether, given his physical and mental state, he would nevertheless be able to effectively participate in his trial via the video-conference link. The Appeals Chamber finds that a reasonable Trial Chamber would have considered this factor in its decision and accordingly finds that the Trial Chamber's failure to do so amounts to a discernible error.

21. Additionally, the Appeals Chamber observes that in providing for daily assessments of whether the Accused is mentally able to participate in the proceedings, the Trial Chamber's Order of 8 May 2008 largely responds to the concerns raised by the Defence; however, the Appeals Chamber considers that an adjournment is still the best solution insofar as it would more fully respect the fundamental right of an accused to be present at trial.

---

<sup>58</sup> Impugned Decision, para. 14.

<sup>59</sup> Prosecution Response, para. 33.

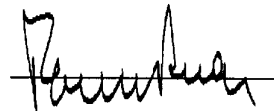
**V. DISPOSITION**

22. On the basis of the foregoing, the Appeals Chamber **REVERSES** the Impugned Decision and **GRANTS** the Defence request to adjourn the proceedings for a minimum of three months and to reassess the Accused's state of health before determining when the trial should commence.

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

Done this 16th day of May 2008,

At The Hague,  
The Netherlands.



Judge Fausto Pocar  
President

**[Seal of the International Tribunal]**