(c) Case Analysis

From 'Kidnapped' Witness to Released Accused 'for Humanitarian Reasons': The Case of the Late General Djordje Djukić

Keywords: International Criminal Tribunal for the Former Yugoslavia; international humanitarian law; peace treaty; war crimes.

1. INTRODUCTION AND FACTS

On 6 February 1996, the government of Bosnia and Herzegovina informed the Implementation Force (IFOR) that eight Serbs, who were reported missing since 20 January, were held in custody by the Bosnian authorities as war crimes suspects. None of them had already been indicted for war crimes by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague. Among the eight detainees were two high-ranking Serb officers: General Djordje Djukić and Colonel Aleksa Krsmanovic. They were said to have been arrested accidentally by Bosnian police officers during a routine traffic control on 30 January 1996.

After being invited by the Bosnian government to participate in the investigation, the ICTY asked that government to arrest the two officers provisionally on its behalf on 7 February. On 12 February, NATO ordered IFOR to make an aircraft available for transporting the two officers from Sarajevo to The Netherlands for further investigation. Both officers were sent to The Netherlands the same day, one could say 'under the cover of darkness'. After their arrival in The Netherlands, they were immediately taken into custody in special UN cells at the Scheveningen jail, albeit not as accused suspects but as 'witnesses for the prosecution'. However, the prosecutor sought their cooperation in giving evidence for the responsibility for war crimes of the political and military Serb leadership, both in Bosnia and in Belgrade, in vain.

Unlike Colonel Krsmanovic, General Djukić was officially charged by the prosecutor with war crimes on 1 March. Colonel Krsmanovic was kept in detention until 4 April 1996, when the ICTY ordered his release that

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day if he was not sent back to Sarajevo before midnight. This order caused the prosecutor some problems, since neither NATO nor the UN was willing to make an aircraft available. Ultimately, the Colonel flew back to Sarajevo in an aircraft chartered by the ICTY. He was once again put in Sarajevo central prison.

When General Djukić appeared to be incurably ill, he was provisionally released on April 19 and allowed to go home to join his family. He died a few weeks later. The ICTY then removed his case from the cause list.

The General Framework Agreement for Peace in Bosnia and Herzegovina (GFA) was signed on 14 December 1995 in Paris by the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia as parties, and by the European Union and the members of the Contact Group - France, Germany, the Russian Federation, the United Kingdom, and the United States - as witnesses.[1] The GFA consists of eleven articles, eight of which 'welcome and endorse' the Dayton arrangements concerning the military aspects of the peace settlement and regional stabilization (Article II), the boundary demarcation between the Serbian entity of the Republika Srpska and the Muslim entity of the Federation of Bosnia and Herzegovina (Article III), the election programme for Bosnia and Herzegovina (Article IV), the constitution of Bosnia and Herzegovina (Article V), the establishment of an arbitration tribunal and a number of commissions, including a Commission on Human Rights (Article VI), the observance of human rights and the protection of refugees and displaced persons (Article VII), and the implementation of the peace settlement (Article VIII). According to Article IX of the GFA:

> [t]he Parties shall cooperate fully with all entities involved in the implementation of this peace settlement, as described in the Annexes to this Agreement, or which are otherwise authorized by the United Nations Security Council, pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.[2]

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1. Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, with an Introductory Note by Paul C. Szasz, 35 ILM 75-183 (1996).
2. *Id.*

This article raises the question whether the ICTY should be considered, first and foremost, to be an independent court of justice, or an entity "involved in the implementation of this peace settlement", or as one "otherwise authorized by the United Nations Security Council." It leaves aside whether "the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law" empowers the ICTY to demand the cooperation of the parties and all entities involved in the implementation of the peace process of its own accord, or as otherwise authorized by the Security Council. This is not a matter of legal hairsplitting. The corresponding provision in the Agreement on the Military Aspects of the Peace Settlement - Article X of Annex 1-A of the GFA - did mention the ICTY explicitly.[3]

It is telling that, unlike the GFA, this agreement and other Dayton Agreements were only concluded between the Republic of Bosnia and Herzegovina and its component entities, i.e., the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter referred to as the parties). They were merely 'welcomed and endorsed' by the Republic of Croatia and the Federal Republic of Yugoslavia (FRY) as parties to the GFA. It is even more telling that according to Article XII, "the IFOR Commander is the final authority in theatre regarding interpretation of this agreement on the military aspects of the peace settlement, of which the appendices constitute an integral part."[4]

The content of Article IX of the GFA seems to reduce the chance that the presidents of Croatia and the FRY will come to trial themselves. It may thus become a textbook case of diplomacy and the art of ambiguity. In any case, it does not seem to exclude the possibility that the parties to the GFA and their witnesses will consider the arrest and transfer of war criminals, in the context of the agreement as a whole, as pure means at their discretion to manage and adjust the peace settlement. This room of manoeuvre was apparently (ab)used by the entity known as the 'Federation of Bosnia and Herzegovina' and IFOR in respect of the late General Djukić.

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3. *Id.* Art. X of Annex 1-A reads: "The Parties shall cooperate fully with all entities involved in the implementation of the peace settlement, as described in the General Framework Agreement, or which are otherwise authorized by the United Nations Security Council, including the International Tribunal for the Former Yugoslavia."
4. *Id.*, Art. XII.

2. TRANSFER OF WITNESSES

The Multinational Implementation Force (IFOR) was set up by the Security Council at the request of the Republic of Bosnia and Herzegovina and its component entities, i.e., the Federation of the same name and the Republika of Srpska, in order to establish a durable cessation of hostilities and to ensure the compliance by the parties with the Agreement on the Military Aspects of the Peace Settlement (Annex I-A of the GFA) and the Agreement on Regional Stabilization (Annex 1-B of the GFA).[5]

Compliance with these agreements does not include the arrest by IFOR of individuals on suspicion of war crimes or crimes against humanity.[6] Arrest by the parties themselves of each other's enemies would only run the risk of undermining the peace settlement. The drafters of the Dayton Agreements were fully aware of such a risk. This may explain why only an indictment by the ICTY is decisive in excluding persons from membership in, or contact with, the Joint Military Commission, or from public office in the territory of Bosnia and Herzegovina.[7] This responsibility of the ICTY implies, of course, that the Tribunal should not confirm unilateral acts by one of the parties, such as the arrest of an opponent as a potential war criminal, particularly if they concern the arrest of a person who was not yet indicted. Djukić certainly had a point when he contested

5. *Id.*, Annex 1-A, Art. 1(1) and (2.c).
6. The assistance programme of the International Police Task Force (IPTF), provided for in Art. III of Annex 11, does not include the arrest of such persons either.
7. According to Art. VIII(2.a) of Annex 1-A, the Joint Military Commission serves as the central body for all Parties to this Annex to bring any military complaints, questions, or problems that require resolution by the IFOR Commander, such as allegations of cease-fire violations or other non-compliance with this Annex. Section (c) states that the Commission shall not include any person who is now, or who comes, under indictment by the ICTY. The Constitution of Bosnia and Herzegovina, laid down in Annex 4, states in Art. IX(1) that "[n]o person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina."

the legality of the ICTY's transfer and detention orders in this particular case. After all, according to Article 29(2) of the Statute of the ICTY:

> [s]tates shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:
> (a) the identification and location of persons;
> (b) the taking of testimony and the production of evidence;
> (c) the service of documents;
> (d) the arrest or detention of persons;
> (e) the surrender or the transfer of the accused to the International Tribunal.[8]

At the time of his arrest, Djukić was not an accused person. In other words, there was no legal ground for his surrender or transfer by Bosnia and Herzegovina or IFOR to the ICTY. The Tribunal only intended to seek his cooperation as a witness, whose surrender or transfer was not provided for in the Statute itself. By virtue of Article 15 of the Statute, however, "[t]he judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phases of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters."[9]

One may wonder whether this article grants unlimited power to the ICTY to adopt whatever rules of procedure and evidence it deems necessary. It is questionable, for instance, whether the transfer of a detained witness should be provided for in the Statute itself. In this connection, it seems that Article 19 of the International Law Commission's Draft Statute for a Permanent International Criminal Court does limit the power of the judges. It determines the scope and content of the rules of the Court as follows:

> 1. Subject to paragraphs 2 and 3, the judges may by an absolute majority make rules for the functioning of the Court in accordance with this Statute, including rules regulating:
> (a) the conduct of investigations;
> (b) the procedure to be followed and the rules of evidence to be applied;

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8. United Nations: Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 32 ILM 1159, at 1200 (1993).
9. *Id.*, at 1181.

> (c) any other matter which is necessary for the implementation of this Statute.
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> 2. The initial Rules of the Court shall be drafted by the judges within six months of the first elections for the Court, and submitted to a conference of States parties for approval. The judges may decide that a rule subsequently made under paragraph 1 should also be submitted to a conference of States parties for approval.
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> 3. In any case to which paragraph 2 does not apply, rules made under paragraph 1 shall be transmitted to States parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States parties have communicated in writing their objections.
>
> 4. A rule may provide for its provisional application in the period prior to its approval or confirmation. A rule not approved or confirmed shall lapse.[10]

In other words, the rules for the future Permanent International Criminal Court may only regulate matters that are necessary for the implementation of the Statute. Moreover, they need the approval of a conference of states.

3. SIGNIFICANCE OF RULES OF PROCEDURE AND EVIDENCE

The Rules of Procedure and Evidence, as adopted by the ICTY on 11 February 1994, did not provide for the transfer of a detained witness. Rules 90 and 91 only dealt with the testimony of witnesses and with a false testimony under solemn declaration. The Rules were amended, further amended, and revised several times. The 'further amendment' of 18 January 1996 added Rule 90 *bis*, which stated:

> (A) Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the detention unit of the Tribunal, conditional on his return within the period decided by the Tribunal.
>
> (B) The transfer order shall be issued by a Judge or Trial Chamber only after prior verification that the following conditions have been met:
>
> (i) the presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;
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> (ii) transfer of the witness does not extend the period of his detention as foreseen by the requested State.

10. Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May-22 July 1994, at 64.

> (C) The Registry shall transmit the order of transfer to the national authorities of the State on whose territory, or under whose jurisdiction or control, the witness is detained. Transfer shall be arranged by the national authorities concerned in liaison with the host country and the Registrar.
> (D) The Registry shall ensure the proper conduct of the transfer, including the supervision of the witness in the detention unit of the Tribunal; it shall remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the detention of the witness in the detention unit and, as promptly as possible, shall inform the relevant Judge or Chamber.
> (E) On expiration of the period decided by the Tribunal for the temporary transfer, the detained witness shall be remanded to the authorities of the requested State, unless the State, within that period, has transmitted an order of release of the witness, which shall take effect immediately.
> (F) If, by the end of the period decided by the Tribunal, the presence of the detained witness continues to be necessary, a Judge or Chamber may extend the period on the same conditions as stated in Sub-rule (B).[11]

The ICTY thus allotted itself far-reaching competence that might be at odds with Article 9(1) and Article 17 of the International Covenant on Civil and Political Rights (ICCPR), according to which no one shall be subject to arbitrary arrest or detention or arbitrary and unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation.[12]

Djukić's defence attorney did not raise such objections, but limited himself to stating that the Tribunal had not acted in conformity with its own Article 90 *bis*.[13] This holds true all the more, since the ICTY rejected his motion for immediate release on the ground of illegal arrest by the "authorities of the Muslim-Croatian Federation" with the argument that the "Tribunal, pursuant to its Statute and Rules, is not competent to rule on the legality of a decision by a national court."[14]

In other words, an illegal decision by a national court to detain a person may give the ICTY the opportunity to request the temporal transfer of a detained witness. In so doing, the Tribunal runs the risk of being abused by one of the parties as a means of giving a 'shadow of

11. UN Doc. IT/32/Rev. 7.
12. ICCPR, 6 ILM 368 (1967).
13. Case No. IT-96-19-Misc.1, Application for the Immediate Release of General Djukić, 26 February 1996, filed by Mr. Milan Vujin: "[...] according to the rules of Article 90 *bis* the Tribunal may request personal appearance of every detained person. In this concrete case, however, there are no records that the Tribunal has done that."
14. *Id.*, Decision of Trial Chamber I, 28 February 1996.

legality' to its otherwise illegal unilateral acts, meant to endanger the peace settlement. In order to prevent such a consequence, the Tribunal should abide by the provisions of Article 90 *bis*. It is somewhat embarrassing to read in the decision of the Trial Chamber of 1 March 1996 the consideration "that according to Rule 90 *bis* of the Rules, this Chamber does not have powers of review for the above orders [of transfer and detention]."[15] After all, the scope and content of the Rules of Procedure and Evidence are the sole responsibility of the ICTY itself.

As for the Statute, this document does not support the view that the Tribunal has no competence to rule on the legality of a decision taken by a national court. This was overlooked by the Trial Chamber in its ruling on the application for the immediate release of Djukić. Admittedly, "it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts. [...] Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws an procedures."[16]

However, despite the concurrent jurisdiction of the ICTY and national courts, the former have precedence over the latter. The characterization of the Higher Court of Sarajevo of Djukić's alleged acts as war crimes or crimes against humanity do not necessarily provide an easy pretext for the ICTY to request his transfer as a detained witness to the ICTY in order to require his cooperation in preparing the indictment of General Ratko Mladić. What is more, according to Article 10(2) of the Statute:

> [a] person who has been tried by a national court for acts constituting a serious violation of international humanitarian law may be subsequently tried by the International Tribunal only if:
> (a) the act for which he or she was tried was characterized as an ordinary crime; or
> (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.[17]

15. Case No. IT-96-19-Misc.1, Decision of Trial Chamber I, 1 March 1996.
16. Secretary-General's Report, *supra* note 8, at 1176-1177.
17. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1995).

This exception to the *non bis in idem* rule implies that the ICTY has at least some competence to rule on the legality of a decision taken by a national court. Otherwise, it would not be possible for the ICTY to decide whether an act was rightly characterized as an ordinary crime or whether the national court proceedings were impartial and independent.

4. FROM WITNESS TO ACCUSED

On 29 February 1996, the Prosecutor of the Tribunal charged Djukić with a crime against humanity and a violation of the laws of war. In his indictment, the Prosecutor frankly admitted that it was his intention to request an extension of the detention as a detained witness. However

> on further consideration, we have reached the conclusion that that would not be proper or appropriate in the face of the unequivocal statement on Wednesday, by General Djukić, to the effect that he is not prepared to provide any information to the Office of the Prosecutor with regard to any of its investigations. [...] Being unable to continue to regard General Djukić as a witness we have had the opportunity of considering evidence we have against him in respect of offences falling within the jurisdiction of the Tribunal.[18]

The indictment hardly deserved that name. The allegations were too general, and they were criticized not only by the defendant but also by the ICTY, albeit rather mildly, when the Trial Chamber took note of:

> the imprecise and ambiguous nature of the indictment, specifically in paragraph 7 where it is alleged, with no other precision, that from May 1992 to about December 1995, "Bosnian Serb military forces, on a widespread and systematic basis, deliberately or indiscriminately fired on civilian targets that were of no military significance in order to kill, injure or terrorise and demoralise the civilian people of Sarajevo". Because he is said to have participated in the planning and preparation, or in some other manner aided and abetted the planning and preparation, of those acts and operations, General Djukić is accused of having committed a crime against humanity [...].[19]

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18. Annex of CC/PIO/039-E, Further Submissions With Regard to the Application of General Djukić Made by the Prosecutor, 1 March 1996.
19. Case No. IT-96-20-T, Decision by Trial Chamber I on Preliminary Motions of the Accused, 26 April 1996.

The Trial Chamber rightly stated that these are serious allegations "for which the accused is entitled to receive all necessary information to prepare his defence." Referring to the decision of the ICTY in de *Tadić* case, the Trial Chamber considered:

> that the indictment against General Djukić does not demonstrate the level of precision as required in the Tadić case. In fact, it does not contain any identification of the acts or omissions of General Djukić in the preparation or planning of the acts for which he is charged. It does not provide any indication of the nature of "the other inhumane acts" he is alleged to have committed.[20]

Nevertheless, the Trial Chamber rejected the preliminary motion of the defence, based on the inexact nature of some of the information contained in the indictment, and limited itself to inviting the Prosecutor "to amend paragraph 7 of the indictment in accordance with the Statute and the Rules."[21] One may wonder whether this rejection was in conformity with Article 14(3.a) of the ICCPR, according to which, in the determination of any criminal charge, the accused shall be entitled to a number of minimum guarantees, including being informed "promptly and in detail" of the nature and cause of the charge against him.[22] There is all the more reason to do so, since the Prosecutor did not deem it fit to formally request the Higher Court of Sarajevo to defer to the competence on the ICTY. Djukić complained in vain that such a request was not lodged.[23] The Prosecutor argued that "the Rules are silent as to any link between deferral and indictment." Moreover, he was of the opinion that the pertinent Rule gave him the discretionary power whether and when to ask for the deferral.[24]

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20. *Id.*
21. *Id.* Paragraph 7 of the Indictment reads: "From about May 1992 to about December 1995, in Sarajevo, Bosnian Serb military forces, on a widespread and systematic basis, deliberately or indiscriminately fired on civilian targets that were of no military significance in order to kill, injure, terrorize and demoralize the civilian people of Sarajevo. By these acts and omissions in relation to the shelling of civilian targets in Sarajevo, Đorde Dukić [sic] committed: Count 1: a crime against humanity, punishable under Article 5(i) (inhumane acts) of the Statute of the Tribunal. Count 2: a violation of the laws and customs of war, punishable under Article 3 of the Statute of the Tribunal."
22. ICCPR, *supra* note 12.
23. Case No. IT-96-20-T, Defence Motion, 4 March 1996.
24. *Id.*, Response of the Prosecutor, 14 March 1996. Rule 9 of the Rules of Procedure and Evidence states: "[...] the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such a court defer to the competence of the Tribunal."

The Trial Chamber rightly had a different view:

> [i]t appears, that even before the sentence is rendered, the mere fact of two trials being held simultaneously for the same crime against the same accused is likely to prejudice the rights of the accused as stated in Article 14 of the International Covenant on Civil and Political Rights and reiterated in Article 21 of the Statute of This Tribunal, particularly paragraph 4 (b) of that Article according to which the accused has the right 'to have adequate time and facilities for the preparation of his defence [...]'.[25]

Nevertheless it rejected the motion for deferral made by the defence, because the Prosecutor "has correctly emphasised that, pursuant to Rule 9 of the Rules, he has the power to assess the suitability and timing for submitting to the Trial Chamber a proposal for deferral."[26] In so doing, it considered, however, that the Prosecutor must take care "not to place the Defence in a position which, in the future, might prejudice the rights of General Djukić, as recognised in Article 21 of the Statute."[27] The issue was superseded by the Prosecutor's motion of 19 April to withdraw the indictment.[28]

5. RELEASE FOR HUMANITARIAN REASONS

Rule 51(A) allows the Prosecutor to "withdraw an indictment, without leave, at any time before its confirmation, but thereafter only with leave of the Judge who confirmed it or, if at trial, only with leave of the Trial Chamber."[29] On 19 April 1996, the Prosecutor availed himself of this possibility because of "the rapidly deteriorating health of the accused as a result of cancer."[30]

The Judge declined jurisdiction to withdraw an indictment because the trial had begun and the accused had already entered a plea. In his opinion, it was the Trial Chamber that had to decide upon the request.[31] The Trial

25. *Id.*, Decision by Trial Chamber I, 26 April 1996 on Preliminary Motions of the Accused.
26. *Id.*
27. *Id.*
28. *Id.*, Prosecutor's Motion to Withdraw the Indictment, 19 April 1996.
29. *See supra* note 11.
30. Case No. IT-96-20-T, Prosecutor's Motion to Withdraw the Indictment, 19 April 1996.
31. *Id.*, Judge Karibi-Whyte: Decision Declining Jurisdiction to Withdraw an Indictment, 19 April 1996.

Chamber rejected the application to withdraw the indictment. It considered:

> that no matter how critical the medical reasons cited may be, nothing in the Statute or the Rules authorises the withdrawal for those reasons of an indictment for major crimes which the International Tribunal must judge, and that, consequently, no ground exist for granting leave to the Prosecutor to withdraw that indictment.[32]

It is interesting to note that the Trial Chamber referred to the Nuremberg and Tokyo trials, during which "identical situations arose (Krupp von Bohlen und Halbach and Osawa) and that the International Military Tribunals did not consider it necessary to withdraw the indictments."[33] However, the Trial Chamber also considered that "solely for humanitarian reasons an order must be issued for the provisional release of General Djukić and authorisation granted to him to leave the territory of The Netherlands so he may join his family without delay."[34]

The Trial Chamber underlined that, according to Rule 89(A), the Chambers shall not be bound by national rules of evidence:

> [i]t can only take note of the assertion by the Prosecutor, according to which the probative value of this evidence [of the national court, PdW] is greater than any damage to the accused. However, the Trial Chamber recalls that the admissibility of that particular evidence during the trial on the merits will, *inter alia*, depend on its respect for the requirements of the proper administration of justice and that an appropriate balance of interests is necessary - public interest and the interest of the accused - and must necessarily be sought in light of the appropriate provisions of the Statute, the Rules and the applicable norms of international law. Consequently, the Trial Chamber rejects the preliminary motion based on the inadmissibility of the evidence from the accused or belonging to him.[35]

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32. *Id.*, Decision by Trial Chamber I Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996.
33. *Id.*
34. *Id.* The Trial Chamber applied Rule 65, according to which a Trial Chamber may order a release "only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person." It seems that this Rule does not require the hearing of the home state or the pertinent national court, as long as that court has not been formally requested to defer to the competence of the ICTY.
35. Case No. IT-96-20-T, 26 April 1996.

In his notice of appeal, the Prosecutor submitted that both Judge Karibi-Whyte, who had confirmed the indictment, and the Trial Chamber erred in their interpretation of Rules 51 and 65 of the Rules of Procedure and Evidence in determining that a request for the withdrawal of an indictment on humanitarian grounds, as submitted by the Prosecutor, is not authorized by the Rules and that a provisional release pursuant to Rule 65 is authorized under the facts of this case.[36] According to Rule 11 of the Rules of Procedure and Evidence, "[a]n Appellant's brief of argument and authorities shall be served on the other party and filed with the Registrar within ninety days of the certification of the record."[37] However, the death of General Djukić encouraged the ICTY to remove the case from the cause list.

6. CONCLUDING REMARKS

The Djukić case revealed a number of important shortcomings of both the Statute and the Rules of Procedure and Evidence of the ICTY. The Statute should have indicated the room for ICTY judges to manoeuvre when determining the scope and content of the Rules Procedure and Evidence to be adopted by them. It is questionable, for instance, whether the transfer of a detained witness to the ICTY should be considered not so much a matter of procedure and evidence as of a matter of substance. After all, the key question is whether the arrest of an individual by a party to the Dayton Agreements was in conformity with international law, particularly with the Dayton Agreements. As for the Rules of Procedure and Evidence, they should not be silent as to the link between deferral and indictment.

According to Article 55(1) of the ILC draft, a person transferred to the Court under Article 53 shall not be subject to prosecution or punishment for any other crime than the one for which that person was transferred.[38]

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36. Case No. IT-96-20-AR108, Notice of Appeal, 24 April 1994.
37. The brief of argument and authorities would have been served to General Djukić before 23 July 1996. His demise, however, did stop the trial.
38. *See* Report of the International Law Commission, *supra* note 10.

The ICTY Statute does not contain such a rule of speciality. Without such a rule, a detained witness goes without such protection.

The ICTY enabled General Djukić to die in freedom but not as a free man, for it remains open whether his accidental arrest by the Federation of Bosnia and Herzegovina and the legally negligent transfer by the IFOR to the Tribunal did not result in an unlawful attack on his honour and reputation. International administration of criminal justice must never become the plaything of international politics, even in respect of persons under suspicion of war crimes and crimes against humanity.

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