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DEATH OF AN APPELLANT – THE TERMINATION OF THE APPELLATE PROCEEDINGS IN THE CASE OF RASIM DELIC AT THE ICTY

> Eingehüllt in feuchte Tücher, prüft er die Gesetzesbücher
> und ist alsobald im klaren: Wagen durften dort nicht fahren!
> Und er kommt zu dem Ergebnis: "Nur ein Traum war das Erlebnis.
> Weil", so schließt er messerscharf, "nicht sein kann, was nicht sein darf."[1]
>
> *Christian Morgenstern,* Die unmögliche Tatsache

I INTRODUCTION

Rasim Delic had been indicted before and convicted by a Trial Chamber of the ICTY. He appealed against his conviction, but died before the Appeals Chamber could decide on his appeal. His son wished to continue the appeal to clear the name of his father. The Appeals Chamber in two connected decisions of 29 June 2010[2]

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[1] Translation by Max Knight in: The Gallows Songs (Christian Morgenstern's Galgenlieder), A Selection Translated, with an introduction, University of California Press, 1964 – the full text of this poem is available online at www.jbeilharz.de/morgenstern/morgenstern_poems.html (last accessed 2 July 2010). The above quote translates as follows:

> Tightly swathed in dampened tissues he explores the legal issues,
> and it soon is clear as air: Cars were not permitted there!
> And he comes to the conclusion: His mishap was an illusion,
> for, he reasons pointedly, that which must not, can not be.

[2] *Prosecutor v. Rasim Delic*, Decision on the Outcome of the Proceedings, Case No. IT-04-83-A, 29 June 2010 (hereinafter: *Delic I*), and Decision on Motion for Continuation of the Appellate Proceedings, same date and case no. (hereinafter: *Delic II*).

decided to terminate the appellate proceedings, ordered that the trial judgment should be considered as final and refused Delic's son standing to continue the appeal. This short note will take a look at the approach taken by the ICTY in handling this issue and conclude that, not for the first time,[3] the judges jumped too short in their interpretation of more intricate issues of procedural law and needlessly laid themselves open to yet another challenge that the preoccupation with the completion strategy and the legacy of the ICTY is too large a factor that influences the determination of procedural outcomes in the wind-up stage of the Tribunal.

II THE DECISIONS IN OVERVIEW

In *Delic II*, the Appeals Chamber stated that Delic's son could not be a party to the proceedings in his father's case and thus denied his motion to continue his father's appeal for lack of *locus standi*. The reasons for that were given in *Delic I*, which dealt with the questions of

(a) what the effect of the death of the appellant was on the appellate proceedings and
(b) what the effect of the outcome of the appellate proceedings was on the trial judgment.

None of these specific matters had ever been addressed before by any international criminal court and the ICTY had to dig deep into the basis of its underlying legal precepts and into comparative research to come up with a solution – regrettably it did not dig deep enough. Question (a) was answered after some cursory comparative research into other international criminal case law sources. The solution was not to allow the proceedings to continue in any form, but to terminate them on account of the appellant's death. Question (b) was answered by what one might term the mathematical method:

"Trial judgment – terminated appeal = trial judgment".

This, in the view of the Appeals Chamber, translated into the following equation in numerical terms:

"1 – 0 = 1".

[3] See Michael Bohlander, *No Country for Old Men? – Age limits for judges at international criminal tribunals*, 1 Indian Yearbook of International Law and Policy (2009) 326.

That equation, it is submitted, was incorrectly solved because it was based on incorrect parameters: If you ask the wrong questions you get the wrong answer. The Chamber's solution was based on a rather eclectic selection of civil and common law jurisdictions,[4] with an emphasis – as so often with the ICTY – on the arguments of the latter. To which extent they were actually followed shall be examined presently. The Chamber finally neglected to take into account potential ramifications of its attitude and it is consequently unprincipled in its approach, as I will try to show below.

III THE ARGUMENTS OF THE APPEALS CHAMBER CONSIDERED

3.1 *Termination of the Proceedings*

The Appeals Chamber in its short *Delic I* decision in essence terminated the proceedings based on an interpretation of its jurisdiction *ratione personae* by arguing firstly that a dead person is not a "natural person" within the meaning of Article 6 of the Statute, secondly, that Article 25 talks about hearing appeals "from persons convicted" which excludes participation by other persons, and thirdly, that neither the Statute nor the Rules of Procedure and Evidence (RPE) provide for the continuation of an appeal after the death of an appellant/defendant, either *ex officio* or at the behest of a next of kin (at para. 6). None of these arguments stick.

Firstly, the term "natural person" is clearly used to delineate the ICTY's jurisdiction against any attempt to establish jurisdiction over corporate entities or so-called "legal persons", i.e. companies etc.[5] A natural person means a man or a woman. A dead man is still a man. The second and third arguments of the Appeals Chamber need to be

[4] Namely Azerbaijan (!), Sweden, Austria, France, Germany, Canada, UK, USA, New Zealand, Australia and a case from the ECHR – see *Delic I*, notes 31 et seq.

[5] This is amply supported by the Report of the UN Secretary-General of 3 May 1993 – S/25704, at para. 50:

> By paragraph 1 of resolution 808 (1993), the Security Council decided that the International Tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. In the light of the complex of resolutions leading up to resolution 808 (1993) (see paras. 5–7 above), the ordinary meaning of the term "persons responsible for serious violations of international humanitarian law" would be natural persons to the exclusion of juridical persons.

considered together. To attempt a definition of who can be a potential party to the proceedings merely via Article 25 is, firstly, too short in my view, which is readily apparent if one looks at cases where other persons with an interest other than the Prosecution or the Defence could and did get involved – for example, the ICRC in the *Simic* case,[6] albeit there as an *amicus curiae*, or the right of a State to object under Rule 54*bis* RPE and the right of states to request review under Rule 108*bis* RPE. In the case of *Slobodan Milosevic*, for example, the *amici curiae* who were his *de facto* defence counsel, were given the right to make motions etc. that would have been open to the accused,[7] so full party status is not always required to be able to seize the tribunal legally of a matter. Secondly, the third argument in and of itself represents an almost duplicitous recourse to the lack of written law, an issue which has never greatly troubled the ICTY when it saw fit to exercise powers not explicitly provided for in the Statute or the RPE, by invoking the mantra of "inherent powers".[8] It is difficult to see why the Appeals Chamber could not have done so in this case, especially given the available guidance from other international and national systems, to which we now turn.

In paras. 7–8 and the accompanying footnotes the ICTY looks at other international criminal jurisdictions and cases that deal with the death of an accused before trial judgment; in all of these the Appeals Chamber sees authority for stopping the proceedings, whilst, however, recognizing that none of them actually deal with the scenario encountered here. The ICTY refers to the Special Court for Sierra Leone (SCSL) which had previously emphasized that criminal responsibility was "individual and personalised" and that unlike in civil proceedings

> a judgement in criminal proceedings does not, and cannot constitute, nor can it confer a successional or testamentary right because it is indeed the exclusive legal privilege and prerogative attached to the person or the individual who was the subject matter of the Prosecution that stands abated following his death.

[6] *Prosecutor v. Blagoje Simic* et al., Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, Case. No. IT-95-6-T of 27 July 1999.

[7] *Prosecutor v. Slobodan Milosevic,* Order Inviting Designation of Amici Curiae, Case No. IT-05-24-T, of 23 November 2001.

[8] A similarly unhelpful argument is the one based on the ban on trials in absentia under Rule 118(B) RPE in footnote 19. Given the rationale behind this ban, this argument is entirely beside the point and does not merit detailed critique.

This is a *non sequitur*, and a circular argument at that. It can conceptually not be the judgment that would confer a right to contest it by way of appeal, but the legal framework within which that judgment is handed down. The ICTY had just admitted that there were no rules which decided the matter clearly one way or the other. If anything, the – semantically rather warped – emphasis by the SCSL on the "privilege" and "prerogative" of the accused to be the subject of a prosecution would militate in favour of putting it at the disposal of that privileged individual to make provision for his heirs to keep contesting his conviction. This becomes obvious, for example, if the judgment contained an order seizing assets for the purpose of making restitution or allowing compensation to the victims under Article 24(3) of the Statute and Rules 98ter(B), 105 and 106(C) RPE: If these assets belong to the heirs rightfully because the deceased had not acquired them by criminal conduct, the position espoused by the ICTY interferes with the rights of innocent third parties and bars them from raising the issue by terminating the appeal and, as will be discussed shortly, making the trial judgment final and binding, with all the consequences that entails.

That the ICTY's conclusion is also in contrast with the practice of other international courts is borne out by the 1996 decision of the ECtHR in *Sadik v. Greece*, a case concerning an alleged violation of the freedom of expression under Article 10 ECHR, where the court stated at para. 26 of its judgment[9]:

> The Court notes, firstly, that the applicant was convicted by the Greek courts of disturbing, through his writings, the public peace and the peace of the citizens of Western Thrace. Without prejudice to its decision on the objection relating to non-exhaustion of domestic remedies, the Court considers that Mr Ahmet Sadik's widow and children have a legitimate moral interest in obtaining a ruling that his conviction infringed the right to freedom of expression which he relied on before the Convention institutions.
>
> Furthermore, it notes that the applicant was sentenced to fifteen months' imprisonment, commutable to a fine of GRD 1,000 per day of detention, which sum he paid. Like the Delegate of the Commission, the Court considers that the applicant's heirs also have a definite pecuniary interest under Article 50 of the Convention (art. 50).
>
> The Court accordingly finds that Mrs Isik Ahmet and her two children, Mr Levent Ahmet and Miss Funda Ahmet, have standing to continue the present proceedings in the applicant's stead.

[9] *Sadik v Greece*, Application no. 18877/91, Judgment of 15 November 1996.

Freedom of expression is a right that is very closely and intimately tied to the individual person, yet it did not stop the ECtHR from allowing the deceased applicant's next of kin to continue the case, especially if their own interests were involved, albeit indirectly. The value to be drawn from the comparison with the international and especially the SCSL case law and terminology is thus slim at best. Nonetheless the Appeals Chamber tersely states in para. 8:

> In light of the foregoing, the Appeals Chamber finds that, as a matter of principle, the appellate proceedings before this Tribunal should be terminated following the death of the appellant for lack of jurisdiction.

It is difficult to see just where the Appeals Chamber actually established the "principle" on which it bases its decision. The simple jurisdiction argument is fallacious. For all its stark brevity, the *Dokmanovic* decision terminating the proceedings after the accused had died just before the judgment was to be pronounced, may have been closer to the mark:

> THE TRIAL CHAMBER
> NOTING the coroner's report as to the death of Slavko Dokmanovic submitted to the Trial Chamber by the Registry on 30 June 1998,
> CONSIDERING that in the case of the death of an accused, the proceedings *are* terminated,
> HAVING CONSULTED the Office of the Prosecutor and the defence counsel who represented the deceased prior to his death,
> HEREBY TERMINATES THE *TRIAL PROCEEDINGS AGAINST* SLAVKO DOKMANOVIC.[10]

The fact of the matter is that the death of the accused puts a procedural and factual bar to any further proceedings *against him*, but not necessarily to the proceedings *concerning him*. The court retains jurisdiction in the latter sense. Imagine yet again a scenario where the court had seized property of the accused as evidence: There must be a way for the court to release that property to his heirs if it is no longer needed as evidence, and for similar issues. It would be artificial to initiate *new* proceedings – and maybe even a new docket no.? – for these matters. This matter is closely intertwined with the issue of the effect on the existing trial judgment to which we turn now.

[10] *Prosecutor v. Mile Mrksic et al.*, Order Terminating Proceedings Against Slavko Dokmanovic, Case No. IT-95-13a-T of 15 July 1998 – emphasis added.

3.2 *Finality of the Trial Judgment*

The really problematic discussion in the Appeals Chamber's *Delic I* decision is that centred around the effect of the termination of the proceedings on the trial judgment: The solution of the Appeals Chamber is problematic under any aspect of the legal argument it employs. The main criticism is twofold: Firstly, the law of the RPE, if properly construed, exhaustively deals with the matter at hand, and secondly, the sources cited by the Appeals Chamber in its comparative exercise under Article 38 of the ICJ Statute in footnotes 31–35 in their majority point, if anything, in another direction, and the comparative research may have been superfluous to begin with.

The fundamental mistake in the Appeals Chamber's argument which infected all successive parts of the solution is hidden in para. 9, where the court acknowledges that neither the Statute nor the RPE make explicit provision for the question under discussion, i.e. the finality or not of the trial judgment, but then goes onto declare:

> The Appeals Chamber is further mindful of the fact that pursuant to Rule 102(A) of the Rules, the enforcement of the trial judgment shall be stayed as soon as notice of appeal is given "until the decision on the appeal has been delivered". However, the Appeals Chamber has found that the death of the appellant results in the termination of the appeal proceedings; consequently, this provision is not applicable to the situation at hand.

This is yet another, albeit this time even more deleterious *non sequitur*. On a purely literal interpretation of Rule 102(A) RPE the conclusion is as follows: The trial judgment is unenforceable *because of the notice of appeal*, a decision on the appeal cannot be handed down anymore because the appeal is terminated, ergo the trial judgment *remains* unenforceable. The Appeals Chamber apparently, and unwittingly, falls into a semantic trap when it talks about the termination of the appeals proceedings: They are not nullified ab initio in their entirety, they are merely stopped – or in well-known legal Latin, the effect is *ex nunc*, not *ex tunc*. The notice of appeal is not extinguished and it is the *notice of appeal* that moves the proceedings to the appellate level and stays the enforcement of the trial judgment, i.e. triggers the devolutive and suspensive effect. The Appeals Chamber's view, taken literally, would have absurd consequences for all collateral decisions such as, for example, payment of fees to defence counsel for the appeal by the Tribunal: If the effect is *ex tunc*, those fees were paid without a proper basis and would have to be refunded to the Tribunal's account. This example clearly shows

that some features of the appeals process survive the death of the appellant and any termination of the proceedings.

Yet, the literal interpretation is not the only argument; it is supported by systematic interpretation. Rule 102(A) RPE in its last clause not cited by the Appeals Chamber orders that the convicted person remains in custody as provided in Rule 64 RPE. If the trial judgment had any effect after the notice of appeal, this provision would be superfluous, because then the appellant would be in detention qua imposed penalty, and not remanded in custody pending the appeal. Rule 118(A) in contrast orders that a judgment of the Appeals Chamber shall be enforced immediately. Taken together with Rule 102(A) RPE this shows that the RPE subscribe to the suspensive effect of an appeal: The judgment of the Appeals Chamber can be immediately enforced because there is no more appeal against it. The detention is now punitive enforcement of the penalty under the conviction and sentence, and no longer remand in custody during the proceedings with the aim of ensuring the accused's presence. Finally, read together, Rule 107 RPE and Article 21(3) of the Statute could also be interpreted to mean that the presumption of innocence applies at the appeal stage just as it does at trial, but that is admittedly a weaker argument because the "mutatis mutandis" in Rule 107 RPE could be used by common law-oriented judges to exclude just that conclusion. Thus literal and systematic interpretation both lead to a result diametrically opposed to the one favoured by the Appeals Chamber.

As was mentioned above, the sources (notes 31 et seq.) used by the Appeals Chamber in its comparative exercise do not in their majority support the Chamber's ultimate conclusion, neither for the termination nor the finality issues. Of the jurisdictions mentioned, only one, namely Australia, operates a system similar to the one the Appeals Chamber proposes.[11] All other countries either have a mandatory or discretionary system in place to allow the appeal to continue in one form or another, or they erase the effect of the trial judgment, in the case of the USA even that of the entire proceedings. The ECtHR is, in the view of the Appeals Chamber, also of the opinion that, for example, under German law a trial judgment does not become final if appealed. However, it needs pointing out that the *Nölkenbockhoff* ECtHR case cited by the Appeals Chamber in footnote 32 dealt with

[11] The Appeals Chamber in note 35 appears to cite the position in the UK *before* the change in the law in 1995 which allowed for a continuation of the appeals proceedings, i.e. a repealed law, in support of its own view – despite acknowledging that the law was amended!

an entirely different matter: It was about reimbursement of costs of the defence and compensation for detention on remand which the ECtHR held was neither a penalty nor an equivalent measure under Article 6(2) ECHR and consequently the ECtHR found no violation of the presumption of innocence. The ECtHR also held that Article 6(2) did not guarantee a right of the defendant to reimbursement of his costs. Had it been a penalty, that case might have taken a different turn. The Appeals Chamber's apparent reliance in that footnote on the finding of no violation of Article 6(2) in *Nölkenbockhoff* appears thus somewhat misplaced.

To emphasise this rather counterintuitive picture again: All but one source cited by the Appeals Chamber speak against its radical and stark solution. How the judges managed to arrive at the conclusion that their view was in any way sanctioned by Article 38 ICJ Statute is consequently a mystery. They do, indeed, admit as much in para. 13 when they say that they could not "identify any rules of customary international law" that were applicable to the present scenario. But if the judges had to exercise any discretion, surely the evidence they themselves unearthed should have made them exercise it differently.

The problematic consequences of the Appeals Chamber's conclusion are highlighted even more if one tweaks the facts a bit, taking up the above example of asset seizures and transposes that to the ICC environment under Article 57(3)(e) of its Statute that allows pre-trial asset freezing for potential future compensation of victims by way of reparation payments: Suppose that the accused A is a totally different person from the real perpetrator P (it has happened before at the ICTY), and that evidence for this only becomes available at the appeals stage after A has been convicted. If A's relatives or heirs have no standing at all as the ICTY seems to suggest, they will not even be able to initiate review proceedings unless they manage to get the Prosecution to do it on A's behalf – hardly a satisfactory idea. If the ICC followed the ICTY's lead on this, the court could go on disposing of the seized assets of A – and now of A's heirs – with impunity on the formal basis that A was finally convicted, no appeal is possible and that A's heirs cannot initiate review. I doubt whether any of the ICC judges would view this as a just outcome.

3.3 *Incidental Issues – Burden of Proof and Presumption of Innocence at the Appeals Stage*

In para. 14 the Chamber opens up another side-show by arguing that the different burdens of proof in the trial and appellate stages support

the solution found, i.e. at trial the burden is on the prosecution to prove beyond reasonable doubt, whereas at the appellate level it is on the party alleging an error in the trial judgment. This is again an incorrect because imprecise approach. The burden of proof remains the same throughout the entire proceedings from indictment to appellate decision; what changes is the burden of presentation: Of course, it is the appellant who has to raise issues that the Appeals Chamber needs to look at, but if he succeeds in raising them and by his evidence creating doubt in the minds of the judges to a balance of probabilities, the burden of proof of guilt beyond reasonable doubt which still remains on the Prosecution cannot be satisfied: If a certain alleged fact detrimental to the defendant's position is as likely to be true as not to be true then there is reasonable doubt. The whole burden of proof argument fails anyway when the appeal is about points of law: It is for the court to know the law, or in Latin *iura novit curia* (The court knows the law.) or *da mihi factum, dabo tibi ius* (Give me the facts, I will give you the law.). There is no burden of "proving the law" (leaving aside the distinct issue of "proving" the content of foreign law in domestic proceedings). The questionable tradition of some common law countries to allow their judges to rely on the legal submissions of the parties and not to go looking for the law on their own does not detract from that fact. The Appeals Chamber consequently acknowledges in para. 14 that this whole argument is a lot weaker when the appeal is a trial de novo.

The Chamber's treatment of the issue of whether the presumption of innocence applies to persons convicted at first instance is secondary against the above-mentioned background, yet it is also poorly researched and given the fact that it comes from the Appeals Chamber may have repercussions in future cases. It is thus useful to tackle that argument, too, in some detail. The question is intricately linked to the issue of the effect of the trial judgment and the suspensive effect of an appeal. Opinions about that differ from country to country[12]

[12] It would have been helpful for the Appeals Chamber to have had recourse to the Green Paper of the European Commission on the presumption of innocence – COMM (2006) 174 final – and the replies by individual countries and organisations, all available at http://ec.europa.eu/justice_home/news/consulting_public/presumption_of_innocence/news_contributions_presumption_of_innocence_en.htm (last accessed 4 July 2010), especially Question 8 on the duration of the presumption where the following picture would have emerged: There is a clear split between the civil law and common law countries in Europe. The former all put the emphasis on the final, i.e. unappealable judgment (answers received from Germany, Austria, Czech Republic, France, Hungary, Italy, Poland, Slovakia, Turkey [answer not fully clear]). The following organisations replied in the same vein: Amnesty International, Deutscher Anwaltverein,

according to their understanding[13] of what constitutes a finding of

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Footnote 12 continued
Bundesrechtsanwaltskammer, Centro Studi di Diritto Penale, European Judicial Network. The only answers that chose the first conviction as the critical point were those from Ireland and the Bar Council of England and Wales; they did, however, point out that the presumption is revived once a conviction is quashed. The Bar Council expressly emphasised that this position is intricately linked to the fact that there is no automatic right of appeal from a conviction in the Crown Court, but only with leave of the latter or the Court of Appeal. This is in contradiction to the law in Ireland, where there is a right to appeal against conviction on indictment, much like in the civil law jurisdictions, and the adaptation of the common law position does not make the same sense as in England and Wales. The impact of the domestic appeals model on the operational scope of Article 6(2) is clearly brought out, for example, in the case of *Callaghan v. UK*, European Commission of Human Rights, Decision of 9 May 1989, Application no. 14739/89.

[13] William Schabas adduces the fact that the ECtHR in *Engel et al. v. Netherlands*, Ser. A., No. 22, 8 June 1976, at paras. 89 et seq, declared that the presumption of innocence does not attach to the sentencing stage after a conviction, in his *The International Criminal Court – A Commentary on the Rome Statute*, 2010, 785, as an argument for finding it "difficult to conceive of how a person who has been found guilty can at the same time be presumed innocent" (*ibid.*). Its reasons based on a purely literal interpretation of Article 6(2) at para. 90 were the following:

> In reality, this clause does not have the scope ascribed to it by the two applicants. As its wording shows, it deals only with the proof of guilt and not with the kind or level of punishment. It thus does not prevent the national judge, when deciding upon the penalty to impose on an accused lawfully convicted of the offence submitted to his adjudication, from having regard to factors relating to the individual's personality.

It would appear that the ICTY's own previous jurisprudence would not wholeheartedly support that approach: In *Prosecutor v Delalic et al.*, Judgement of 20 Feb 2001, Case No. IT-96-21-A, at para. 763 the Appeals Chamber stated that it "agree[d] that only those matters which are proved beyond reasonable doubt against an accused may be [...] taken into account in aggravation of that sentence". This was confirmed by the Trial Chamber in *Prosecutor v. Kunarac et al.*, Judgment of 22 February 2001, Case no. IT-96-23-T and IT-96-23/1-T, at para. 846 et seq. Leaving aside the accuracy of the interpretation of the principle behind Article 6(2) by the ECtHR, this does not necessarily mean that the ECtHR would apply the same reasoning with regard to an appeal *against conviction as opposed to sentence*. Curiously enough, the latter is precisely the position Schabas takes in his commentary on Article 66, marginal no. 13 and 14, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Court*, 2nd ed., 2008: Marginal no. 13 is almost *verbatim* identical to the above-mentioned citation from his own commentary of 2010, but he goes onto state at marginal no. 14 that the ECtHR actually subscribes to the presumption's application in the appeals stage, referring to *Nölkenbockhoff;* that comment is absent from his own 2010 ICC Commentary. The ECtHR had actually declared this to be the case in much stronger terms already in the case of *Delcourt v*

guilt, for example, within the meaning of Article 6(2) ECHR.[14] The view that takes a trial verdict as erasing the presumption is, on the one hand, problematic in a judge-only context: It may have to do with the judge and jury model in common law jurisdictions, where the finding of guilt is made by the jury who do not give reasons for their decisions, and any attack on the verdict is thus made either on the basis of the

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Footnote 13 continued
Belgium, Decision of 17 January 1970, Application no. 2689/65, at para. 25:

> [A] criminal charge is not really "determined" as long as the verdict of acquittal or conviction has not become final. Criminal proceedings form an entity and must, in the ordinary way terminate in an enforceable decision. Proceedings in cassation are one special stage of the criminal proceedings and their consequences may prove decisive for the accused. It would therefore be hard to imagine that proceedings in cassation fall outside the scope of Article 6 para. 1 (art. 6-1).
> Article 6 para. 1 ... of the Convention does not, it is true, compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 [...]. There would be a danger that serious consequences might ensue if the opposite view were adopted; [...] In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 would not correspond to the aim and the purpose of that provision [...].

On the whole debate see also Robert Esser, *Auf dem Weg zu einem europäischen Strafverfahrensrecht* (2002), 759 et seq.

[14] It bears mentioning that the two decisions adduced by the Appeals Chamber in note 36, *Milutinovic* and *Popovic*, do not both talk directly about the presumption of innocence. The *Milutinovic* decision states at the cited para. 9:

> The Appeals Chamber has also emphasized that the fact that some accused have been granted provisional release for comparable reasons pending their trial cannot be automatically applied by analogy to persons who have already been convicted by a Trial Chamber and who are seeking provisional release pending the appellate proceedings.

This more adequately relates to the question of an increased flight risk, as the *Milutinovic* decision cited by the Appeals Chamber acknowledges itself at para. 13. The *Popovic* decision comes closer to the Appeals Chamber's view by stating more or less apodictically at the cited para. 11:

> The Appeals Chamber considers that the *Lazarevic* decision was one taken under Rule 65(I) in relation to a person who has already been convicted by the Trial Chamber and whose case is now on appeal, whereas Gvero is an accused on trial who still benefits from the presumption of innocence [...].

application of the substantive law or of the procedure leading to the verdict, which means that in fact the professional judge's handling of the trial and his summing-up to the jury are the object of the attack, not the verdict itself. On the other hand, the situation in some jurisdictions, e.g. England and Wales, where appeal after conviction on indictment is only by way of leave, may certainly be a structural argument against a continuing presumption *within the context of that system*.[15] However, it does not represent a universally accepted interpretation.[16] As long as a jurisdiction provides for an appellate process *as of right* that can extinguish a (jury) verdict through some avenue or other, common sense would suggest that the situation is in essence not that different from those systems where the triers of fact and law are identical and that consequently put the emphasis on the finality of the conviction.[17] It appears that some form of diffuse common law concept of the functions and effect of the trial verdict has been adopted by the ICTY without sufficient analysis of the context or even a full appraisal of the international and domestic standards.[18]

To support this diagnosis, the following is of relevance: A search of all decisions, orders and judgments on the ICTY Court Records Database on 4 July 2010 turned up no detailed discussion of this matter in any judgment, and merely axiomatic statements supporting the English common law position in the 115 decisions and orders containing the search term "presumption of innocence". Most if not all of the decisions dealing with the issue of the pre- and post-trial-conviction nature of the presumption had to do with provisional release and there the difference between an accused on trial and after conviction was highlighted. In this context it should not be overlooked that the main issue for provisional release after conviction is not the presumption of innocence but the increased flight risk of a convicted accused faced with the increased probability of a lengthy custodial sentence. It may have been an oversight that the Appeals Chamber did not mention in its discussion a decision on provisional release by Judge Almiro Rodrigues of 23 January 1998 in *Aleksovski*, in which he makes clear reference to the presumption being applicable to all stages of the proceedings until *final* judgment.[19]

[15] See above notes 12 and 13.

[16] See above notes 12 and 13.

[17] See the *Delcourt* case, above note 13.

[18] See above notes 12 and 13.

[19] *Prosecutor v. Zlatko Aleksovski*, Decision Denying a Request for Provisional Release, Case no. IT-95-14/1-T, of 23 January 1998, at pp. 3–4.

Rodrigues came from Portugal, a European civil law jurisdiction. Given what was said above, the law of the ICTY certainly subscribes to the suspensive effect of the notice of appeal *and it has an appeal against conviction as of right* (Article 25(1) of the Statute). It should consequently apply the presumption of innocence throughout the appeals stage, not the approach of some common law countries that use appeal after conviction on indictment by way of leave from the *iudex a quo* or *iudex ad quem*.

IV CONCLUSION

It is hard to avoid the impression that the argument employed by the Chamber was result-driven and must be seen in the context of the completion strategy. The legal argument is so superficial and weak – and one could go so far as to say wrong – that no other reason readily suggests itself. Apparently, it was not palatable to accept the simple fact that a judgment was rendered moot just because an accused had died. It is difficult to see why this should be such a problem. Was there a need for worldly punishment to extend beyond the grave by putting the seal of final approval to a personal stigmatization in the form of a judicial document? Any seasoned national judge will have experienced a similar situation where the development of events beyond his or anyone's control made a decision of his into maculature. One does not like it, but life goes on. Or it may be that some judges thought that the historical record, which some of them apparently still intend to create through trials based on selective evidence, could not be allowed to suffer such a setback based on the application of mundane and everyday procedural principles. Was it a concern that the trial judgment would no longer be available for use under the headings of *res judicata* or judicial notice? We may never know. As it stands, the decision is reminiscent of the poem by Christian Morgenstern cited at the beginning: "that which must not, cannot be".

The ICTY, and all other international criminal courts, regardless of their expected remaining mandate periods, should urgently revisit their procedural law and clarify the situation; some of them have a number of old accused where the problem might arise at any time. The different scenarios as well as the domestic picture so far in evidence (although there is a need for more extensive research) should help advocate a flexible attitude and avoid mechanistic approaches. The pertinent provisions of the individual Statutes and/or Rules of

Procedure and Evidence might be augmented by a clause such as the following, as a starting point for discussion:

Rule/Article XX
Death of the accused

(1) If the accused dies before the trial judgment has been pronounced, the proceedings shall be discontinued by order of the Court without any prejudice to the accused's character and estate.
(2) If the accused dies after the trial judgment has been pronounced but before an appeal has been lodged by him, the Court may allow his heirs or next of kin to lodge the appeal if this is in the interests of justice, particularly if the interests of innocent third parties are involved. The appeal may be restricted to those interests by the appellants or the Court. The Prosecution may lodge the appeal on behalf of the accused and join the appeal by the above-mentioned persons. If none of these are initiated, subsection (1) above shall apply mutatis mutandis with the proviso that the judgment shall have prejudicial effect.
(3) If the accused dies after an appeal has been lodged by him but before the appeal has been finally disposed of, the trial judgment shall be treated as having no effect and shall not prejudice the accused's character and estate. Subsections (1) and (2) 1st to 3rd sentences above shall apply mutatis mutandis.
(4) Subsection (2) above shall apply mutatis mutandis in the case of review proceedings.
(5) For all purposes under the Statute and Rules of this Court, the persons mentioned under subsection (2) 1st sentence above shall enjoy the same rights as the accused, mutatis mutandis, for the proceedings mentioned in this Rule.