SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

Freetown – Sierra Leone

Before: Judge Bankole Thompson, Presiding Judge
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: 17 May 2004

THE PROSECUTOR

Against

SAM HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

CASE NO. SCSL-2004-14-PT

PROSECUTION RESPONSE TO MOTION TO COMPEL THE PRODUCTION OF EXCULPATORY WITNESS STATEMENTS, WITNESS SUMMARIES AND MATERIALS PURSUANT TO RULE 68

Office of the Prosecutor:

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Charles Margai

INTRODUCTION

1. The Prosecution files this response to the "Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68" dated May 2004 and filed on behalf of Allieu Kondewa on 5 May 2004 (the "Motion").

2. In the Motion, counsel for the Accused, Kondewa, submits that Prosecution violated its obligation under Rule 68 (B). The alleged violations consist of: the failure to make a statement disclosing to the defence the existence of any exculpatory evidence known to the Prosecution within 30 days of the initial appearance of the Accused and subsequent failure to make such statements on a continuous basis as required by Rule 68 (B); the violation of Rule 68 (B) by its ongoing non-disclosure of documents and witness statements that contain exculpatory evidence and its failure to disclose exculpatory material; the failure to provide the defence un-redacted copies of witness statements which contain exculpatory evidence; the failure to produce additional exculpatory materials within its possession pursuant to Rule 68; and that the contents of the letters accompanying disclosure materials served on the Accused fail to satisfy the requirements of Rule 68.

ARGUMENTS

a) Statement disclosing to the Defence the existence of any exculpatory evidence

3. In respect to the first violation alleged by the Defence in its Motion, the Prosecution submits that the requirement to "make a statement" under Rule 68 within 30 days of the initial appearance of the accused, disclosing to the Defence the existence of exculpatory or mitigating evidence is new and has only recently been introduced by the new Rules of Procedure and Evidence (the "Rules") adopted at the 5th Plenary session between the 11th and 14th of March 2004.

4. Under former Rule 68, the Prosecution's obligation was to "disclose to the defence *the existence of evidence* known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence," and that this is a continuing obligation. [Emphasis added]. The Prosecution submits that it has fully met its obligation under the Rule. The Prosecution has met this obligation by disclosing the exculpatory material itself, redacted where necessary to protect the identity of a witness, as required by the Witness Protection Order.

5. The Prosecution acknowledges that it has not made a made a "statement" as required by the recent change to Rule 68 in as much as no such statement was required at the time of the initial disclosures. The Prosecution will continue its usual practice to concomitantly disclose to the Defence the exculpatory material.

b) Ongoing disclosure obligation of exculpatory material and disclosure within 30 days of the initial appearance of the accused

6. The Prosecution entirely refutes the second violation by which the Defence alleges that the Prosecution did not comply with its ongoing disclosure obligation of documents and witness statements that contain exculpatory evidence. Contrary to what the Defence alleges, indeed, material has been disclosed to Defence in accord with Rules 66 and 68 on a continuous basis since July 30, 2003. In regard to exhibits, any exhibits that potentially contain exculpatory material that were not filed with the Court pursuant to its "Order to the Prosecution to file Disclosure Materials and other Materials in Preparation for the Commencement of Trial" dated 1 April 2004 were disclosed separately to the Defence on 30 April 2004.

7. Moreover, the Prosecution emphasizes that in compliance with Rule 68 and contrary to Defence's position, the Prosecution did disclose exculpatory/mitigating material known to the Prosecution at that time within 30 days of the initial appearance of the Accused. This material was filed with

the Registry on 30 July 2003 in accord with the Court's "Interim Order for the Transmission of the Disclosure Materials to the Registrar" dated 30 July 2003.

c) Disclosure of un-redacted copies of witness statements which contain exculpatory evidence

Statements from Witnesses the Prosecution Intends to Call at Trial

8. In accord with the "Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure" ("Decision for Protective Measures") dated 10 October 2003 and pursuant to the "Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial" dated 1 April 2004, the Prosecution disclosed witness statements "with redactions as necessary" of witnesses that appear on the Witness List.

9. The Prosecution did not redact exculpatory or mitigating testimony from these statements where doing so would not reveal the identity of the Witness.

10. Where, in the estimation of the Prosecution, exculpatory or mitigating material would reveal the identity of the Witness, the Prosecution made redactions as necessary to comply with the Witness Protective Measures Order.

11. The Accused argues that, where a witness provides exculpatory and/or mitigating evidence, Rule 68(B) requires the Prosecution to disclose the un-redacted witness statements. The Accused makes no distinction between witnesses the Prosecution intends to call at trial and those that the Prosecution does not intend to call.

12. It is the Prosecution's respectful submission that complying with the Accused's request would be tantamount to breaching the obligation imposed on the Prosecution by the Decision for Protective Measures. According to this decision the Prosecution is currently under the obligation to keep confidential the identity of Prosecution's witnesses until 42 days before the date of their

testimony. In order to do so, the Decision for Protective Measures allows the Prosecution "to disclose any materials provided to the Defence in a redacted form"[1].

13. It is the Prosecution's submission that Rule 68 must not be read in a vacuum and exclusive of all other Rules of Procedure and Evidence of the Special Court for Sierra Leone. The Rule must be interpreted in accord with the ordinary meaning of the terms used.[2] The Prosecution notes that there is no language in Rule 68 that indicates that it should be interpreted or applied notwithstanding any other Rules or measures therein provided. When read together with Rule 69 and 75, there is no suggestion that Rule 68 takes precedence over the latter. Interpreting it differently would mean introducing a contradiction among the Rules which would defy the intention of the Court when constructing these rules.

14. Furthermore, the Prosecutor defers to Rule 70 (F), (G), (H) and (I) in order to interpret the relationship between protective measures and the Prosecutor's obligation to disclose evidence pursuant to Rule 66 and 68. The Rule states that protective measures related to a witness issued in one case, shall not prevent disclosure in another case. The Defence shall be however notified of the protective measures ordered in the first proceedings and any party seeking to vary the measures must apply to the Chamber. The Rule is thus clear that no obligation, be it pursuant to the rules of disclosure or pursuant to a court's order regarding witness protection, has primacy over the other. The prosecution submits, rather that the two obligations must be met in accord with each other.

15. In *Blaskic*[3], the Prosecution requested authorization from the tribunal to disclose pursuant to it's obligation under Rule 68, confidential material

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[1] Emphasis added. See order (a) of Decisions for Protective Measures.
[2] *Prosecutor v Delalic*, "Decision on the motion on presentation of evidence by the accused, Esad Landzo", 1 May 1997, para. 17; *Prosecutor v Tadic*, "Decision on the prosecutor's motion requesting protective measures for victims and witnesses", 10 August 1995, para 18.
[3] *Prosecutor v Blaskic*, "Decision on the prosecution and defence motions dated 25 January and 25 March 1999 respectively", 22 April 1999.

produced in said case by protected witnesses to Defence counsel in the *Kordic* case. The Trial Chamber held that "insofar as the protection of witnesses is maintained or increased" [emphasis added], the disclosure obligation pursuant to Rules 66 and 68 takes precedence over the confidential character of the evidence.

16. In the spirit of this decision, witness protection measures that have been ordered by this Court shall not prevent the Prosecution from performing its obligation to disclose evidence under the Rules. Such disclosure must however respect the limits imposed by the witness protection measures prescribed by the Court. In the present case, the Court ruled that protective measures such as redaction and delayed disclosure are necessary for ensuring the safety of Prosecution's witnesses and are consistent with the rights of the Accused. The Prosecutor therefore submits that in this respect it has in no way violated its obligation under Rule 68 but has rather complied with the requirements of the Rule and the Trial Chamber's Decisions on protective measures.

17. The Prosecution asserts that the Accused has been put on notice of, and provided, to the extent possible without revealing the identity of Prosecution's witnesses, the exculpatory evidence contained in the witness statements. Disclosure of un-redacted witness statements will be made to the Defence as provided in the Court's orders regarding such disclosure.

18. The Accused provides no reasons why the time provided for disclosure pursuant to the applicable Decisions for Protective Measures is insufficient and why these protective measures should be varied.

Statements from Witnesses the Prosecution Does Not Intend to Call

19. On 26 April 2004, the Prosecution filed a Witness List (the "Witness List") under cover sheet 1 of the "Materials filed pursuant to Order to the

Prosecution to file Disclosure Materials and other Materials in Preparation for the Commencement of Trial, 1 April 2004".

20. As a result of filing the Witness List, the Prosecution was in a position to review all the statements from witnesses that will not be called upon to testify. Therefore, in accordance with the Prosecution's ongoing disclosure obligations and the Witness Protection Order, the Prosecution is in the process of serving the Defence with un-redacted copies of statements containing potentially exculpatory material that were previously disclosed in redacted form.

d) Additional material containing exculpatory evidence

21. In paragraph 5 of its motion the Defence alleges that "upon information and belief" the Prosecution is in possession and is withholding additional exculpatory evidence from the Defence. The Prosecution, while it would have clearly appreciated to be informed by the Defence of the concrete source that stirs these suspicions, unequivocally states that there is no such material in the Prosecution's control and possession and that everything that the Prosecution has identified as exculpatory/mitigating evidence to the Accused has been thus far disclosed.

22. The Prosecution highlights that the initial assessment of whether evidence is exculpatory lies with the Prosecution.[4] In this exercise the prosecution counsel "ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice."[5] Prosecution counsel are therefore presumed to discharge their duty in good faith.[6] The Prosecution asserts without any reservations that it has acted in good faith in regards to its disclosure obligations.

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[4] See *Prosecutor v Blaskic*, IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997 para 47.
[5] *Prosecutor v Barayagwiza*, "Prosecutor's request for review of reconsideration-Separate opinion of Judge Shahabuddeen" March 31 2000, para. 68.
[6] *Prosecutor v Niyitegeka*, "Prosecution response to "Extremely urgent defence reply" filed on 22 September 2003", 26 September 2003, para. 12.

23. The Prosecution further stresses that should a dispute arise regarding fulfillment of Prosecution's duty under Rule 68, the Defence must, in addition of identifying the specific material requested, present to the Trial Chamber a prima facie case that the requested evidence is exculpatory and is in the custody or control of the Prosecution. In the present case, the Defence failed to satisfy this test that has generally been required at the ICTY[7] and simply contented itself with alleging in a vague and unsubstantiated way that "upon belief" the Prosecution is in possession of additional exculpatory materials that must be disclosed under Rule 68.

e) The contents of the letters accompanying disclosure materials served on the Accused

24. In paragraph 9 and 10 of Defence's Motion, it is alleged that the contents of the letters accompanying the disclosure materials served on the Accused do not in any way satisfy the requirements of Rule 68. The Prosecution finds it difficult to respond to this allegation given its very unspecific character. The Prosecution assumes that the Defence may be perhaps referring to the fact that Prosecution did not "redflag" or tag each piece of evidence that contained exculpatory material.

25. If indeed, this is what the Defence alludes to in paragraph 9 and 10, the Prosecution respectfully submits that it had no such obligation under the former Rule 68. Firstly, the Prosecution deems it important to clarify that the exculpatory evidence that the Prosecution identified in his possession was always (with the exception of 4 exhibits disclosed on 30 April 2004) part of documents/witness statements that also contained incriminating evidence that the Prosecutor equally disclosed under Rule 66. Furthermore, former Rule 68 did not specifically require the Prosecution to identify the relevant material. It only required that the Defence be put on notice of its existence. The

[7] *Prosecutor v. Delalic*, IT-96-21-T, Decision on Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996, para. 10. See also *Supra* note 1, para 29 and 50.

prosecution submits that the letters accompanying the disclosure material served on the Defence and the material itself satisfied the requirements of Rule 68.

CONCLUSION

26. The Prosecution is aware of its obligations under Rule 68.

27. Apart from the redacted witness statements from witnesses the Prosecution intends to call at trial, the Prosecution has disclosed to the Defence all exculpatory and/or mitigating evidence and is not aware of the existence of any other evidence which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

28. The Prosecution respectively submits that the Motion be dismissed in its entirety.

Done in Freetown, on this 17 day of May 2004.

For the Prosecution,

Luc Côté, Chief of Prosecution

James C. Johnson, Senior Trial Counsel

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v Delalic*, "Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo", 1 May 1997.

2. *Prosecutor v Tadic*, "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses", 10 August 1995.

3. *Prosecutor v Blaskic*, "Decision on the Prosecution and Defence Motions dated 25 January and 25 March 1999 respectively", 22 April 1999.

4. *Prosecutor v Blaskic*, IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997.

5. *Prosecutor v Barayagwiza*, "Prosecutor's Request for Review of Reconsideration-Separate opinion of Judge Shahabuddeen", March 31 2000.

6. *Prosecutor v Niyitegeka*, "Prosecution Response to "Extremely urgent Defence Reply" filed on 22 September 2003", 26 September 2003.

7. *Prosecutor v Delalic*, IT-96-21-T, Decision on Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996.

1. *Prosecutor v Delalic*, "Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo", 1 May 1997.

1997 WL 33341392 (UN ICT (Trial)(Yug))

International Criminal Tribunal for the Former Yugoslavia
IN THE TRIAL CHAMBER

Decision

Trial Chamber

Decision

PROSECUTOR
v.

ZEJNIL DELALIC

ZDRAVKO MUCIC also known as 'PAVO'

HAZIM DELIC

ESAD LANDZO also known as 'ZENGA'

Decision of: 1 May 1997

DECISION ON THE MOTION ON PRESENTATION OF EVIDENCE BY THE ACCUSED, ESAD LANDZO

DECISION ON THE MOTION ON PRESENTATION OF EVIDENCE BY THE ACCUSED, ESAD LANDZO

The Office of the Prosecutor, Mr. Eric Ostberg Mr. Guiliano Turone, Ms.Teresa McHenry Ms. Elles van Duschotten

Counsel for the Accused, Ms.Edina Residovic, Mr Ekrem Galiatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic, Mr. Branislav Tapuskovic, Mr. Micheal Greaves for Zdravko Mucic, Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic, Mr. Mustafa Brackovic, Ms. Cynthia McMurrey, for Esad Landzo

Before: Judge Adolphus G. Karibi-Whyte, Presiding, Judge Elizabeth Odio Benito, Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1997 WL 33341392 (UN ICT (Trial)(Yug))

The trial of the four accused persons, Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo commenced before this Trial 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 ('International Tribunal') on 10 March 1997.

On 17 March 1997, in open session, the Trial Chamber heard the evidence, elicited on re-examination, of the second witness called by the Office of the Prosecutor ('Prosecution'), Mr. Mirko Babic. Thereafter, Defence Counsel for the accused, Esad Landzo, expressed her intention to present further evidence to the Trial Chamber by re-cross examining Mr. Babic. The Trial Chamber ruled that the relevant provisions of the International Tribunal's Rules of Procedure and Evidence ('Rules') do not envisage re-cross-examination and refused to permit it ('Ruling').

On 24 March 1997, the Defence on behalf of Esad Landzo ('Defence') filed a Motion for Decision on Presentation of Evidence ('Motion') (Official Record at Registry Page ('RP') D3151 - D3155). The Office of the Prosecutor ('Prosecution') filed a response to the Motion ('Response') on 26 March 1997 (RP D3180 - D3183).

On 26 March 1997, both the Prosecution and the Defence (the 'Parties') argued their positions orally before the Trial Chamber. The Trial Chamber also heard Defence Counsel for the other accused persons, Zejnil Delalic, Zdravko Mucic and Hazim Delic. On the same date, the Trial Chamber delivered an oral decision, denying the Motion, reserving a written decision to a later date.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties,

HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

A. APPLICABLE PROVISIONS

1. The Defence brings this Motion for determination by the Trial Chamber pursuant to Rule 85 and Article 21(4)(e) of the Statute of the International Tribunal ('Statute'). These provisions and other provisions relevant to the matter are set out in full below.

Rule 85

Presentation of Evidence

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at

the trial shall be presented in the following sequence:

(i) evidence for the prosecution;

(ii) evidence for the defence;

(iii) prosecution evidence in rebuttal;

(iv) defence evidence in rejoinder;

(v) evidence ordered by the Trial Chamber pursuant to

Rule 98.

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him in chief, but a Judge may at any stage put any question to the witness.

(C) The accused may, if he so desires, appear as a witness in his own defence.

Article 15

Rules of Procedure and Evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 20

Commencement and Conduct of Trial Proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Article 21

Rights of the Accused

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Rule 86

Closing Arguments

After the presentation of all the evidence, the Prosecutor may present an initial argument, to which the defence may reply. The Prosecutor may, if he wishes, present a rebuttal argument, to which the defence may present a rejoinder.

Rule 89

General Provisions

A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

B. PLEADINGS

The Defence

1. 2. The Defence contends that the Ruling, following on the Trial Chamber's

interpretation of Rules 85(A) & (B), constitutes a denial to the Defence of the right to further cross-examine Prosecution witnesses after re-examination of the witnesses by the Prosecution. This is in contravention of the guarantee under Article 21(4)(e) of the Statute that the accused shall be entitled 'to examine, or have examined, the witnesses against him'.

3. The Defence construction of the Rules is that, after the Prosecution has examined its witness-in-chief, the Defence will cross-examine the witness, the Prosecution may or may not continue with re-direct-examination and subsequently, the Defence joins in re-cross-examination. When the Defence presents its case, the positions are reversed, until all questions are exhausted.

4. The Defence contends that the practice outlined in paragraph 3 is the general rule adopted in many judicial cultures, including the United States of America, Canada and Scotland. The procedure results in judicial economy, and eliminates the necessity of recalling a witness.

5. Relying on Article 21(4)(e), the Defence submits that Rule 85(A) which prescribes the procedure for the presentation of evidence, should be construed to include re-cross-examination in each case where evidence is presented as follows:

(i) evidence for the Prosecution

(ii) evidence for the Defence

(iii) Prosecution evidence in rebuttal

(iv) defence evidence in rejoinder

(v) evidence ordered by the Trial Chamber pursuant to Rule 98

This follows on the interpretation of Rule 85(B) which provides that ''examination-in-chief, cross-examination and re-examination shall be allowed in each case'. The contention is that the language of Rule 85(B) allows re-examination in each case. The Defence therefore argues that if the direct-examiner re-examines, then the cross-examiner should be allowed re-cross-examination.

6. The Defence alleges that because of the Ruling, a conflict now exists between the procedure for presentation of evidence before this Trial Chamber and the differently composed Trial Chamber II in the case of The Prosecutor v Dusko Tadic, T.Ch II. IT-94-1-T, ('Tadic Trial'). Whereas, in the Tadic Trial, re-cross-examination was permitted in the case of each witness, before this Trial Chamber the Defence has been denied re-cross-examination of the first three Prosecution witnesses.

7. The Defence asserts that the Ruling has effects far greater than just the prejudice to the accused in this trial. Because of the said conflict, the four

accused persons before this Trial Chamber have fewer privileges than Mr. Dusko Tadic was allowed during his own trial. The Defence contends that this renders the perception of justice within the International Tribunal suspect because the 'rules of the game' of the Trial Chambers are not equal.

The Prosecution

8. The Prosecution, construing the provisions of Rule 85(B) argues to the contrary. It submits that the Rule clearly contemplates a three part process. It is very clear from the Rule, other Rules of the International Tribunal and it is consistent with the practice of most, if not all national systems, as well as the rationale for examination of witnesses that there is no right to re-cross-examination. The Prosecution declares that re-direct-examination (re-examination) is only meant to clarify matters raised during cross-examination. Generally, therefore, re-cross-examination is hardly necessary. In the exceptional circumstances where important new issues have been raised during re-direct-examination (re-examination), the Trial Chamber may permit re-cross-examination.

9. The Prosecution refers to the obligation on the Trial Chamber, especially in multiple-defendant and multiple-counsel cases, to ensure that the trial proceeds in a fair, expeditious and orderly manner and to ensure that witnesses are treated fairly and humanely. The Trial Chamber has a duty to protect witnesses from unwarranted harassment or intimidation of counsel.

10. The Prosecution submits that the Trial Chamber has generally not permitted re-cross-examination, but it has done so on occasions deemed appropriate under the Rules. The circumstances in the Tadic Trial where re-cross-examination was permitted are different. The Rules are being differently applied. The Prosecution maintains that the Defence has been given wide ambit in their cross-examination. Counsel for Esad Landzo has sometimes exercised the right of cross-examination in violation of Rule 85 and the need to proceed in an expeditious manner. The Prosecution has not considered it necessary to engage in re-direct-examination of witnesses. Re-cross-examination is neither appropriate nor necessary in those situations suggested by the Defence.

11. The Prosecution urges the Trial Chamber not to vacate its Ruling and to continue its practice of not permitting re-cross-examination absent those rare and exceptional circumstances where new and important issues were raised during re-direct-examination. This is in accordance with the Rules and the need to ensure a fair and expeditious trial.

C. FINDINGS

I. General Considerations

12. Recognising the dearth, and indeed, absence of international criminal

procedure and aware of the limitations in and shortcomings of the Nrnburg Charter and Rules of Procedure, the Security Council provided in the Statute that the Judges 'shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters" (see Article 15 of the Statute and The Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704, 3 May 1993 ('Report') at paragraph 83). Thus, the Judges were entrusted with the special responsibility of formulating and elaborating the details of the rules of procedure and evidence to govern every aspect of criminal proceedings conducted by the Trial and Appeals Chambers. This invariably includes enforcement of judgements.

13. Despite this general delegation of legislative power to the Judges, by the Statute, to promulgate rules of procedure and evidence, the exercise of the power was circumscribed and subject to certain obvious limitations. The International Tribunal being a subsidiary organ of the Security Council, the rules of procedure and evidence had to be formulated in conformity with the relevant provisions of the United Nations Charter and be consistent with the principles of justice and international law, the guiding principles of the United Nations. In paragraph 106 of the Report, the Secretary-General emphasised the importance of the International Tribunal respecting internationally recognised standards regarding the rights of the accused, particularly those prescribed in Article 14 of the International Covenant on Civil and Political Rights ('ICCPR'). The rules must therefore be consistent with the provisions of the enabling statute.

14. The desire of the Security Council to ensure that all the civilised legal systems were taken into account in the formulation of the rules of procedure and evidence is implicit in the requirement of Article 13(2)(e) relating to the appointment of Judges of the International Tribunal which states that 'the Secretary-General shall forward nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation of the principal legal systems of the world.' This provision envisages inputs from all the principal legal systems of the world in the administration of justice before the International Tribunal.

15. Governments and several organisations, reflecting both the civilian and common law legal systems were generous in submitting memoranda which were of considerable assistance. Finally, the Judges adopted a largely adversarial, instead of the inquisitorial, approach in the Rules. However, in formulating the rules, elements of both the civil and the common law systems capable of promoting justice were considered and adopted. Hence, it is more appropriate in the interpretation of the provisions of a rule to rely essentially on the words of the rule as promulgated, rather than to assume an a priori position as to the origin of the rule. A Rule may have a common law or civilian origin but the final product may be an amalgam of both common law and civilian elements, so as to render it sui generis (see generally, Rule 47: Submission of Indictment; Rule 61: Procedure in Case of Failure to Execute a Warrant; and Rules 66-68 on the disclosure of evidence). Hence, it is possible to discern both adversarial and inquisitorial features in a rule.

16. Rule 85(A) without doubt belongs to the adversarial legal system. It is clearly not inquisitorial. It is, therefore, useful to rely on the practice of common law legal systems for interpretation of its scope and meaning if there is any ambiguity.

II. Interpretation of the Rules - General

17. The fundamental rule for the construction of the provision of a statute, to which all others are subordinate, is that a statute is to be expounded according to the intent of the law maker. In an effort to discover the intention of the law maker many rules to aid interpretation have been formulated. Of the many rules, one of the most familiar and commonly used is the literal or golden rule of construction. By this rule, the interpreter is expected to rely on the words used in the Statute, and to give such words their plain natural import in the order in which they are placed. The rationale is that the law maker should be taken to mean what is plainly expressed. The underlying principle which is also consistent with common sense is that the meaning and intention of a statutory provision should be discerned from the plain and unambiguous expression used therein rather than from any notions which may be entertained as just and expedient.

18. Hence, where the language of a provision is clear and plain, admitting only of one meaning there is no need for construction. The clear, unambiguous meaning so understood should be applied. When the meaning of a provision is plain, it is scarcely the province of the reader to scan its wisdom or policy. The duty is to expound the law as it stands according to the real sense of the words. Vattel, in his Law of Nations or the Principles of Natural Law (trans. Fenwick, Classics of International Law, 1916 Bk. II at s. 263) observed that it is not allowable to interpret what has no need of interpretation. It is difficult to disagree with this view. The Trial Chamber entirely agrees.

19. It is appropriate to correct an initial error of all counsel in the construction of the provisions of the Rules, particularly Rule 85(B). Even a cursory reading of Rule 85(B) shows that the expressions used therein are examination-in-chief, cross-examination, and re-examination in that order. These are the only expressions used to describe the nature of the examination of the witness. Counsel, instead of adhering to these expressions, have preferred to introduce the expressions, direct-examination for examination-in- chief, re-direct-examination for re-examination. In uniformity, they use the expression re-cross-examination for further cross-examination. These are not expressions used in Rule 85(B) which is the subject matter of construction.

20. It is an elementary but fundamental rule of interpretation of a statute that the expressions used in the provision must be adhered to. It is one of the ways of enabling the interpreter to discover the intention of the law maker. The expressions direct-examination, re-direct-examination and re-cross- examination not being words used in the Rule are exotic and aliunde, and they should not have been imported. The corollary to the literal rule of construction is that nothing should be added to or taken from a statute, unless there are adequate grounds to justify the inference that the legislator intended something which it omitted to express. In Thompson v Goold (1910) AC. 4089 at p. 420, Lord Mersey, speaking of

English Law, stated that '[i]t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity, it is a wrong thing to do.'

21. The Trial Chamber accepts and adopts this view. We have not been shown that the law maker intended something in the nature of these expressions which were omitted. Counsel are obviously not entitled, and are wrong to have read into the Rule words which are not there, and which cannot by necessary implication be read into the Rule to give it sense and meaning. The expressions may belong to some common law jurisdiction where they are appropriate. The language of Rule 85, which is clear and unambiguous, can ill afford any modification, alteration or qualification without completely changing the intention of the law maker. It is a wrong thing to do.

22. It is pertinent and useful to state precisely the meanings of the expressions used in Rule 85(B), namely, examination-in-chief, cross-examination and re-examination. Examination-in-chief is the process whereby a party who has called a witness to give evidence in support of his case elicits from such witness through questions evidence relevant to the issues favourable to his case. In other words, examination-in-chief is always conducted by the party calling a witness to testify. Cross-examination, on the other hand, is the examination of a witness by questions by the adversary against whom the witness has testified. The object of cross-examination is twofold, first to elicit information concerning facts in issue, or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted, and secondly, to cast doubt upon the accuracy of the evidence-in-chief given against such party. Re-examination is the process whereby the party who has examined a witness-in-chief is allowed to put questions to correct matters or new facts arising out of cross-examination.

23. Section 187 of the Evidence Act of Nigeria (1990), has defined the common law expressions concisely and with commendable simplicity in the following terms.

Examination-in-chief

(1) the examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination

(2) the examination of a witness by a party other than the party who calls him shall be called his cross-examination.

Re-examination

(3) Where a witness has been cross-examined, and is then examined by the party who

called him, such examination shall be called his re-examination.

III. Interpretation of Rule 85

24. The view of the Defence is that, as a general rule, the right to examine-in-chief, cross-examine, re-examine and re-cross-examine exists, in each case where evidence is presented. The Prosecution disagrees, and submits that no such right can be gathered from Rule 85 and other rules of the International Tribunal. The right to re-examine is only meant to clarify matters raised during cross-examination. There is no further need for re-cross-examination. In exceptional circumstances, where important new issues have been raised during re-examination, the Trial Chamber may allow further cross-examination on such issues.

25. Rule 85 which is entitled 'Presentation of Evidence', has three paragraphs, A, B and C. In construing the Rule, it is useful to consider all the paragraphs together. The meaning and scope of the Rule can be gathered from such a composite reading. It appears to the Trial Chamber that paragraph (A) deals with the order of presentation of evidence; (B) is concerned with the order for examining witnesses, and (C) enables the accused to give evidence in his own defence if he so wishes. By virtue of Rule 85(A), unless otherwise directed by the Trial Chamber, presentation of evidence at the trial shall begin with evidence for the Prosecution. On the close of the evidence for the Prosecution the Defence shall lead evidence. On the conclusion of the evidence for the defence, the Prosecution shall lead evidence in rebuttal. The Defence will follow by leading evidence in rejoinder. The above, in the main, is the evidence led by the Prosecution and the Defence. However, the Trial Chamber may, if it has any reasons, call upon either party to produce additional evidence, or summon witnesses and order their attendance. The words of Rule 85(A) are clear and unambiguous.

26. Rule 85(B) is also plain, clear and unambiguous as to the nature of the questioning of the witnesses. It is true that Rule 85(B) only describes the meaning of examination-in-chief, when it states, 'it shall be for the party calling a witness to examine him in chief'. Nothing is stated therein about ''cross-examination' and 're-examination'. Finally, there is the discretion vested in the Judges of the Trial Chamber by Rule 85(B) to put questions to a witness at any stage of his examination. Accordingly, a Judge, as an impartial arbiter, may put questions to a witness, during examination-in-chief, cross- examination or re-examination, to clarify issues which remain unclear after an answer by the witness.

27. The gravamen of the Defence contention is that there is re-cross- examination as of right after re-examination by the Prosecution or the Defence as the case may be. The contention is founded on the use of the expression in each case in Rule 85(B). The Defence also contends that Article 21(4)(e) of the International Tribunal's Statute which enables the accused 'to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.' is violated by the Ruling.

28. The Defence appears to the Trial Chamber to have misunderstood and misconceived the provision construed. The Trial Chamber has already pointed out that Rule 85(A) deals with the order of presentation of evidence simpliciter, and does not concern the order and scope of examinations of witnesses. Rule 85(B) is concerned with examination of witnesses and proprio vigore relates to Rule 85(A). The expression in each case in Rule 85(B) refers to the examination of witnesses during the presentation of evidence. If so construed and understood, the relationship between the order of presentation of evidence and the order of examination of witnesses becomes clear. The expression in each case, as we have observed, appropriately refers to the presentation of evidence and does not confer an additional right to examine witnesses. Thus there shall be examination-in-chief, cross-examination, and re-examination in each case of the presentation of evidence by the Prosecution or the Defence. This is without doubt the correct interpretation of the expression in each case in Rule 85(B).

29. The Defence contention that refusing further cross-examination after re-examination violates Article 21(4)(e) appears to the Trial Chamber a misconception about the operations of the practice. Rule 85(A) illustrates a clear equality of arms in the presentation of evidence. This is because the Defence is entitled to present its case in an identical manner to the Prosecution. The Defence is entitled to examine-in-chief, and re-examine its own witnesses, as the Prosecution. There is therefore no limitation in the exercise of the rights of accused persons because they were refused exercise of rights not available to them, in the rules of procedure. There is, therefore, in our considered opinion, no violation of Article 21(4)(e).

30. The Trial Chamber does not hold the view and has never stated, that a party can never be allowed to further cross-examine a witness after the re- examination of the witness. It is important to reiterate the principle that as a general rule the testimony of a witness ends with his re-examination, absent any new matter during re-examination. See Alford v United States, 282 U.S. 687, 694 (1931) and the English case of Prince v Samo (1838) 7 Ad. & E. 627. Thus, without something new, a party has the last word with his own witness. However, where during re-examination new material is introduced, the opposing party is entitled to further cross-examine the witness on such new material. Similarly, where questions put to a witness by the Trial Chamber after cross-examination raise entirely new matters, the opponent is entitled to further cross-examine the witness on such new matters. The rationale is clear in the sense that further cross-examination is to re-examination what cross-examination is to examination-in-chief. Hence, to deny further cross-examination when new material is raised in re-examination is tantamount to a denial of the right to cross-examination on such new material.

31. We have not found any conflicts between the procedure for presentation of evidence before this Trial Chamber and the procedure adopted during the Tadic Trial. The Trial Chamber has, indeed, permitted further cross-examination, in the exercise of its discretion, in those cases where new matters have been raised during re-examination or where questioning by the Trial Chamber has given rise to further cross-examination. These are accepted exceptions to the general rule.

32. The Trial Chamber has read Rule 85 according to its plain common sense

meanings which are clear and unambiguous. The Trial Chamber does not consider that the words require any qualification to disclose their meanings. It is satisfied that the drafting of Rule 85 has attained the degree of precision which a person reading in good faith can easily understand. Indeed, in this case, even a person reading in bad faith cannot misunderstand.

III. DISPOSITION

For the foregoing reasons, THE TRIAL CHAMBER, being seised of a Motion filed by the Defence, and

PURSUANT TO RULES 54 and 85,

HEREBY DENIES the Motion.

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

_____

Adolphus Godwin Karibi-Whyte

Presiding Judge

Dated this first day of May 1997

At The Hague

the Netherlands.

[Seal of the Tribunal]

END OF DOCUMENT

2. *Prosecutor v Tadic*, "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses", 10 August 1995.

Before: Judge McDonald, Presiding

Judge Stephen

Judge Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision: 10 August 1995

PROSECUTOR

v.

DUSKO TADIC A/K/A "DULE"

DECISION ON THE PROSECUTOR'S MOTION REQUESTING PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. William Fenrick
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Milan Vujin
Mr. Krstan Simic

DECISION

Pending before the Trial Chamber is the Motion Requesting Protective Measures for Victims and Witnesses filed by the Prosecutor on 18 May 1995, which contains thirteen separate prayers for relief in respect of seven alleged victims or witnesses who are referred to by the pseudonyms A, F, G, H, I, J and K and one prayer concerning all witnesses who may testify in this case. The Defence has filed a Response objecting in part and agreeing in part to the protective measures sought. Two briefs have been submitted by *amicus curiae*, one by Professor Christine Chinkin, Dean and Professor of International Law, University of Southampton, United Kingdom ("Brief of Professor Chinkin") and a joint brief filed by Rhonda Copelon, Felice Gaer, Jennifer M. Green and Sara Hossain, all of the United States of America, on behalf of the Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee, New York; the Center for Constitutional Rights, New York; the

International Women's Human Rights Law Clinic of the City University of New York, New York; and the Women Refugees Project of the Harvard Immigration and Refugee Program and Cambridge and Somerville Legal Services, both of Cambridge, Massachusetts ("the Joint U.S. Brief").

At the request of the Prosecutor, which was not opposed by the Defence, the motion was heard *in camera* on 21 June 1995. Since that date, additional confidential filings giving details of prior media contact, if any, with the pseudonymed witnesses have been made by both parties pursuant to an Order of this Trial Chamber of 23 June 1995. In that same filing, the Prosecutor has amended two of his prayers for relief. The Prosecutor has also withdrawn the request for relief in respect of the witness pseudonymed A and now seeks only delayed disclosure to the accused of the identity of the witness pseudonymed F, not non-disclosure, based on evidentiary issues surrounding the testimony of that witness.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties, and the written submissions of the *amicus curiae*,

HEREBY ISSUES ITS DECISION

DISCUSSION

I. Factual Background

1. Dus ko Tadic ("Tadic") is the first accused to appear before 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 ("the International Tribunal"). Tadic was surrendered to the jurisdiction of the International Tribunal by the Federal Republic of Germany in April 1995, pursuant to an indictment and warrants of arrest issued by the Tribunal in February 1995. Tadic made his initial appearance before this Trial Chamber on 26 April 1995 when he was formally charged and pleaded not guilty to all charges against him.

2. Tadic is charged with crimes arising out of six separate incidents which are alleged to have occurred at the Omarska camp in the Opstina of Prijedor between June and August 1992, an incident arising out of the surrender of the Kozarac area in May 1992 and a further set of charges in connection with events in the villages of Jaskici and Sivci in June 1992. The charges involve the commission of serious violations of international humanitarian law including, *inter alia*, forcible sexual intercourse or rape, wilful killing or murder, wilfully causing grave suffering or serious injury, torture, cruel treatment and the commission of inhumane acts and are alleged to constitute grave breaches of the Geneva Conventions of 12 August 1949 as recognized by Article 2 of the Statute of the International Tribunal ("the Statute"), violations of the laws or customs of war as recognized by Article 3 of the Statute and crimes against humanity as recognized by Article 5 of the Statute.

II. The Pleadings

3. The Prosecutor seeks fourteen separate protective measures for the protection of alleged victims and witnesses, as follows (after amendment of Prayers 3 and 11, and withdrawal of the request in respect of the witness pseudonymed A):

Prayer (1) : that the names, addresses, whereabouts and other identifying data concerning persons given

pseudonyms F, G, H and I, being victims and/or witnesses of the crimes alleged in Charges 4.1 to 4.4, 5.1 and 5.29 to 5.34 of the indictment against the accused shall not be disclosed to the public or to the media;

Prayer (2): that the names, addresses, whereabouts and other identifying data concerning persons given pseudonyms J and K, witnesses who will testify concerning Charge 11 of the indictment against the accused shall not be disclosed to the public or to the media;

Prayer (3): that all hearings to litigate the issue of protective measures for pseudonymed witnesses shall be in closed session;

Prayer (4): that the names, addresses, whereabouts and other identifying information concerning F, G, H, I, J and K shall be sealed and not included in any of the public records of the International Tribunal;

Prayer (5): that, to the extent the names of, or other identifying data concerning, any of these victims and witnesses are contained in existing public documents of the International Tribunal, those names and other identifying data shall be expunged from those documents;

Prayer (6): that documents of the International Tribunal identifying these witnesses shall not be disclosed to the public or the media;

Prayer (7): that testimony of these witnesses shall be given by one-way closed circuit television;

Prayer (8): that testimony of these witnesses may be given using voice and image altering devices or by not transmitting the image to the accused and the defence;

Prayer (9): that the testimony of these witnesses be heard in closed session;

Prayer (10): that the pseudonyms F, G, H, I, J and K be used whenever referring to these witnesses in proceedings before the International Tribunal and in discussions among parties to the trial;

Prayer (11): In the alternative: (a) that the prosecution may withhold from the defence and the accused the names of, and other identifying data concerning witnesses G, H, I, J and K. The prosecution shall disclose to the defence and the accused the name and complete statement of witness F in sufficient time to allow the defence to prepare for trial, but no earlier that one month in advance of the firm trial date. The Prosecution may redact from witness F's statement witness F's current address and whereabouts, and information disclosing the present address and whereabouts of the witness' relatives.

or (b) that the prosecution shall disclose to the defence and the accused the names and the complete statements of witnesses F, G, H, I, J and K in sufficient time to allow the defence to prepare for trial, but no earlier than one month in advance of the firm trial date. The prosecution may redact from the statements the witnesses' current addresses and whereabouts and information disclosing the present addresses and whereabouts of the witnesses' relatives;

Prayer (12): that the accused, the defence attorneys and their representatives who are acting pursuant to their instructions or requests shall not disclose the names of these victims and witnesses or other identifying data concerning these witnesses to the public or to the media, except to the limited extent such disclosure to members of the public is necessary to adequately investigate the witnesses. Further order that such necessary disclosure be done in such a way as to minimize the risk of the victims' and witnesses' names being divulged to the public at large or to the media;

Prayer (13): that the accused, the defence counsel and their representatives who are acting pursuant to their instructions or requests shall notify the Office of the Prosecutor of any requested contact with prosecution witnesses or the relatives of such witnesses and that the Office of the Prosecutor shall make arrangements for such contact;

Prayer (14): that the public and the media shall not photograph, video record or sketch witnesses who are victims of the conflict in the former Yugoslavia when these witnesses are entering the International Tribunal building, exiting from the International Tribunal building or while they are in the International Tribunal building.

4. The protective measures sought fall into five categories: those seeking confidentiality, whereby the victims and witnesses would not be identified to the public and the media (Prayers 1 - 6, 9, 10 and 12); those seeking protection from retraumatization by avoiding confrontation with the accused (Prayer 7); those seeking anonymity, whereby the victims and witnesses would not be identified to the accused and his counsel (Prayers 8 and 11 (a)); miscellaneous measures for certain victims and witnesses (Prayers 11 (b) and 13); and, finally, Prayer 14 seeks general measures for all victims and witnesses who may testify before the International Tribunal in the future. The Prosecutor has served the Defence with redacted statements of the pseudonymed witnesses.

5. The Prosecutor contends that the protective measures sought are necessary to allay the fears of the victims and witnesses that they or members of their family will suffer retribution, including death or physical injury, if they testify before the International Tribunal and that unless they receive the protection sought, the witnesses will not testify. The measures are also said to be necessary to protect the privacy of the victims and witnesses. The Prosecutor asserts that the measures sought are authorized by the Statute and the Rules of Procedure and Evidence adopted by the International Tribunal ("the Rules").

6. The Defence agrees to the granting of the measures requested in Prayers 1, 3 (as amended), 4, 5, 6, 9, 10, 12, 13 and 14. However, the Defence seeks dismissal of Prayers 2, 7, 8 and 11 (as amended), and contends that these measures would deny the accused his right to a public hearing and would infringe his right to a fair trial.

7. The Defence argues that the right to a fair trial, as protected by Article 20 of the Statute, evokes certain minimum standards which, as the Statute is silent on the point, can only be understood by reference to decisions in other jurisdictions, in particular, the European Court of Human Rights. One of these minimum standards is the right for the accused to examine, or have examined, the witness under the same conditions as witnesses against him. The Defence contends that this means that the accused must be in a position to understand what the witness is saying and be able to assess and challenge that evidence. It is argued that this can only be done if the accused is not limited as to the questions he puts and is able properly to prepare for the examination of the witness. Therefore the Defence asserts that the identity of the witness must be disclosed to the accused in advance of the trial.

8. In its subsequent filings, the Defence has stated that the release of the nicknames used to refer to the pseudonymed witnesses while in the Omarska camp will be sufficient in respect of witnesses F, G, H and I and that all it requires in respect of witnesses J and K is their address at the time of the alleged offence. The Defence asserts that it has no interest in knowing the present whereabouts of any of the pseudonymed witnesses.

9. The Defence further argues that there are only very limited circumstances in which the identity of the witness can be withheld from the accused and still permit the accused a fair trial, with the proper exercise of the right to examine the witnesses against him. Those circumstances arise in the situation

where the witness is not a victim of the alleged offence but a fortuitous bystander and there is no other relationship between the witness and the accused. The actual identity of the witness is then irrelevant.

10. The briefs submitted by the two *amicus curiae* generally support the position of the Prosecutor. The Brief of Professor Chinkin recognizes the right of the accused to a fair trial and addresses the question of how to balance this right with the rights of private individuals, the public interest in the proper administration of justice and the interests of the international community in seeing those accused of violations of international humanitarian law brought to trial. Professor Chinkin addresses both non-disclosure to the public (confidentiality) and to the accused (anonymity), and discusses how non-disclosure to the accused can be made compatible with the right to a fair trial and is justified by policy considerations in sexual assault cases.

11. The Joint U.S. Brief also addresses these issues and supports most of the relief sought by the Prosecutor, although in some cases the Trial Chamber is invited to extend its protection even further. The brief also urges the International Tribunal to establish a process whereby victims and witnesses can be consulted about their concerns and the dangers they face, especially in view of the ongoing conflict, and advised as to the protection available, and thus give fully-informed consent.

III. The Powers of the International Tribunal

12. The International Tribunal was established by the Security Council in the first half of 1993 as a measure to maintain or restore international peace and security pursuant to Chapter VII of the Charter of the United Nations. Resolution 827, containing the Statute of the International Tribunal, was adopted in May 1993, giving the International Tribunal jurisdiction "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991", in accordance with the provisions of the Statute.

13. The power of the Trial Chamber to grant measures for the protection of victims and witnesses arises from the provisions of the Statute and of the Rules. Article 20 of the Statute provides in paragraph (1) that the Trial Chamber shall ensure that a trial is fair and expeditious, with "due regard for the protection of victims and witnesses". Article 22 of the Statute, entitled *Protection of victims and witnesses*, reads as follows:

> The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

14. Measures for the protection of victims and witnesses are provided for in a number of places in the Rules, in particular, in Rules 69, 75, 79 and 89. The main provision is in Rule 75, as amended in June 1995. This Rule, *Measures for the Protection of Victims and Witnesses,* reads as follows:

> (A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.
>
> (B) A Chamber may hold an *in camera* proceeding to determine whether to order:
>
> (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a

victim or a witness, or of persons related to or associated with him by such means as:

(a) expunging names and identifying information from the Chamber's public records;

(b) non-disclosure to the public of any records identifying the victim;

(c) giving of testimony through image- or voice- altering devices or closed circuit television; and

(d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

15. Rule 69, *Protection of Victims and Witnesses*, as amended in June 1995, provides for protective measures at the pre-trial stage as follows:

(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Unit.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

16. Rule 79, *Closed Sessions*, provides in Sub-rule (A) that:

(A) The Trial Chamber may order that the press and public be excluded from all or part of the proceedings for reasons of:

(i) public order or morality;

(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or

(iii) the protection of the interests of justice.

Finally, Rule 89, entitled *General Provisions*, provides guidance to the Trial Chamber as to the rules of evidence it should apply, in particular, in Sub-rules (B), (C) and (D):

(A) . . .

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) . . .

IV. Sources of law that the International Tribunal should apply in interpreting its Rules and Statute

17. A fundamental issue raised by this motion is whether, in interpreting and applying the Statute and Rules of the International Tribunal, the Trial Chamber is bound by interpretations of other international judicial bodies or whether it is at liberty to adapt those rulings to its own context. The Defence argues that the case law of other international judicial bodies interpreting the right of an accused to a fair trial establishes the minimum standard which must be preserved in all judicial proceedings, including those of the International Tribunal. In contrast, the Prosecutor argues that while the case law of other international bodies is relevant for interpreting this right, its application must be tailored to the unique requirements mandated by the Statute of the International Tribunal.

18. Although the Statute of the International Tribunal is a *sui generis* legal instrument and not a treaty, in interpreting its provisions and the drafters' conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant. Article 31 of the Vienna Convention states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27.) The object and purpose of the International Tribunal is evident in the Security Council resolutions establishing the International Tribunal and has been described as threefold: to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace. (First Annual Report 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, U.N. Doc. A/49/150 (1994) at para. 11 ("Annual Report").) In the case of the International Tribunal, the context of the Statute is indicated by the Report of the Secretary-General of 3 May 1993 (U.N. DOC S/25704), which contained a draft statute adopted by the Security Council without amendment.

19. The Report of the Secretary-General gives little guidance regarding the applicable sources of law in construing and applying the Statute and Rules of the International Tribunal. Although the Report of the Secretary-General states that many of the provisions in the Statute are formulations based upon provisions found in existing international instruments, it does not indicate the relevance of the interpretation given to these provisions by other international judicial bodies. *(Id.* para. 17.) This lack of guidance is particularly troubling because of the unique character of the International Tribunal. It is the first international criminal tribunal ever to be established by the United Nations. Its only recent predecessors, the International Military Tribunals at Nuremberg and Tokyo, were created in very different circumstances and were based on moral and juridical principles of a fundamentally different nature. *(Id.* para. 3.) In addition, the Nuremberg and Tokyo Tribunals were multinational but not

international in the strict sense as only the victors were represented. (*Id.* para. 10.) By contrast, the International Tribunal is not the organ of a group of States; it is an organ of the whole international community. (*Id.* para. 10.)

20. As a body unique in international law, the International Tribunal has little precedent to guide it. The international criminal tribunals at Nuremberg and Tokyo both had only rudimentary rules of procedure. The rules of procedure at Nuremberg barely covered three and a half pages, with a total of 11 rules, and all procedural problems were resolved by individual decisions of the Tribunal. At Tokyo there were nine rules of procedure contained in its Charter and, again, all other matters were left to the case-by-case ruling of the Tribunal. *(Id.* para. 54.) Both tribunals guaranteed certain minimum rights to the accused to ensure a fair trial. These rights included: (1) the right to be furnished with the indictment in a language which the defendant understands; (2) the right to a translation of the proceedings in a language which the defendant understands; (3) the right to assistance of counsel; and (4) the right to present evidence and to cross-examine witnesses called by the prosecution[1].

[1] Art. 24(g) of the Charter of the International Military Tribunal at Nuremberg provides that "[t]he Prosecution and the Defense shall interrogate and may cross-examine any witness and any defendant who gives testimony," while art. 9(d) of the Charter of the International Military Tribunal for the Far East states that "[a]n accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine."

21. Although the Judges of the International Tribunal looked to the Nuremberg and Tokyo tribunals when drafting the Rules, these tribunals provided only limited guidance. In addition to the lack of detail, the Judges were conscious of the need to avoid some of the flaws noted in the Nuremberg and Tokyo proceedings. *(Id.* para. 71.) The Nuremberg and Tokyo trials have been characterized as "victor's justice" because only the vanquished were charged with violations of international humanitarian law and the defendants were prosecuted and punished for crimes expressly defined in an instrument adopted by the victors at the conclusion of the war. *(See* Röling and Cassese, *The Tokyo Trial and Beyond* 50-55 (1993).) Therefore, the International Tribunal is distinct from its closest precedents.

22. Another unique characteristic of the International Tribunal is its utilization of both common law and civil law aspects. Although the Statute adopts a largely common law approach to its proceedings, it deviates in several respects from the purely adversarial model. (Annual Report, *supra*, para. 71.) For example, there are no technical rules for the admission of evidence and the Judges are solely responsible for weighing the probative value of evidence. Secondly, a Chamber may order the production of additional or new evidence *proprio motu*. Thirdly, there is no plea-bargaining. (*Id.* paras. 72-74.) As such, the International Tribunal constitutes an innovative amalgam of these two systems.

23. A final indication of the uniqueness of the International Tribunal is that, as an ad hoc institution, the International Tribunal was able to mold its Rules and procedures to fit the task at hand. *(Id.* para. 75.) The International Tribunal therefore decided, when preparing its Rules, to take into account the most conspicuous aspects of the armed conflict in the former Yugoslavia. Among these is the fact that the abuses perpetuated in the region have spread terror and anguish among the civilian population. The Judges feared that many victims and witnesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences that their testimony could have for themselves or their relatives. This was particularly troubling given that, unlike Nuremberg, prosecutions would, to a considerable degree, be dependent on eyewitness testimony. (Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* at 242.)

24. In drafting the Rules, therefore, the Judges of the International Tribunal endeavored to incorporate rules that addressed issues of particular concern, such as the protection of victims and witnesses, thus discharging the mandate of Article 22 of the Statute. (Annual Report, *supra*, para. 75.) Provisions are made for the submission of evidence by way of deposition, i.e., testimony given by a witness who is unable or unwilling to testify in open court (Rule 71). Another protection is that arrangements may be made for the identity of witnesses who may be at risk not to be disclosed to the accused until such time as the witness is brought under the protection of the International Tribunal (Rule 69). Additionally, appropriate measures for the privacy and protection of victims and witnesses may be ordered including, but not limited to, protection from public identification by a variety of methods (Rule 75). Also relevant is the establishment of a Victims and Witnesses Unit within the Registry to provide counselling and recommend protective measures (Rule 34). Additionally, the Judges recognized that many victims of the conflict in the former Yugoslavia are women and have therefore placed special emphasis on crimes against women in the Rules. (Annual Report, *supra*, para. 82.) The Rules make special provisions as to the standard of evidence and matters of credibility of the witness which may be raised by the defence in cases of sexual assault (Rule 96). In particular, no corroboration of a victim's testimony is required and the victim's previous sexual conduct is inadmissible. Additionally, if the defence of consent is raised, the Trial Chamber may consider factors that vitiate consent, including physical violence and moral and psychological constraints.

25. In drafting the Statute and the Rules every attempt was made to comply with internationally recognized standards of fundamental human rights. The Report of the Secretary-General emphasizes the importance of the International Tribunal in fully respecting such standards. (Report of the Secretary-General, *supra,* para. 106.) The drafters of the Report recognized that ensuring that the proceedings before the International Tribunal were conducted in accordance with international standards of fair trial and due process was important not only to ensure respect for the individual rights of the accused, but also to ensure the legitimacy of the proceedings and to set a standard for proceedings before other ad hoc tribunals or a permanent international criminal court of the future. *(See* Morris and Scharf, *supra*, at 175.) In response to these concerns, the drafters adopted a liberal approach in procedural matters. Article 21 of the Statute provides minimum judicial guarantees to which all defendants are entitled and reflects the internationally recognized standard of due process set forth in Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"). In fact, the Statute provides greater rights than the ICCPR by extending judicial guarantees to the pre-trial stage of the investigation.

26. Although Article 14 of the ICCPR was the source for Article 21 of the Statute, the terms of that provision must be interpreted within the context of the "object and purpose" and unique characteristics of the Statute. Among those unique considerations is the affirmative obligation to protect victims and witnesses. Article 22 provides that such measures shall include the protection of the victim's identity. Article 20 (1) of the Statute requires: "full respect for the rights of the accused and due regard for the protection of victims and witnesses." Further, Article 21 states that the right of an accused to a fair and public hearing is subject to Article 22. Pursuant to those mandates, Rules were promulgated which relate to the protection of victims and witnesses, as referred to above.

27. This affirmative obligation to provide protection to victims and witnesses must be considered when interpreting the provisions of the Statute and Rules of the International Tribunal. In this regard it is also relevant that the International Tribunal is operating in the midst of a continuing conflict and is without a police force or witness protection program to provide protection for victims and witnesses. These considerations are unique: neither Article 14 of the ICCPR nor Article 6 of the European Convention of Human Rights ("ECHR"), which concerns the right to a fair trial, list the protection of victims and witnesses as one of its primary considerations. As such, the interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal, as these bodies interpret their

provisions in the context of their legal framework, which do not contain the same considerations. In interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique legal framework.

28. The fact that the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies is evident in the different circumstances in which the provisions apply. The interpretations of Article 6 of the ECHR by the European Court of Human Rights are meant to apply to ordinary criminal and, for Article 6 (1), civil adjudications. By contrast, the International Tribunal is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence. This is evident in the case law of those countries which have conducted their own war crimes trials. For example, much reliance has been placed during war crimes trials on affidavits, i.e., signed statements by a witness made before trial. Defence counsel have often objected to the use of such evidence, mainly on the ground that, unlike a witness appearing in court, affidavits cannot be cross-examined. However, it has been noted that: "there can be no doubt as to their admissibility under the laws governing at least most of the countries which have conducted trials of offences under international criminal law." *(Law Reports of Trials of War Criminals*, vol. XV, 198 (1949).) A further example of the more elastic rules of evidence permissible before those courts which have tried war criminals is found in the greater frequency with which hearsay evidence is admitted, when compared to proceedings before most courts dealing with offences purely under national law. *(Id.* at 199.)

29. In addition, the rights for the accused provided by the International Tribunal clearly exceed those contained in Article 105 of the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, which provides for the rights of a prisoner of war in criminal proceedings. Article 105 includes only the right to counsel, the right to be informed of the charges, and the rights of the accused to receive relevant documents, to have adequate time and facilities to prepare the defence, to have access to an interpreter, to confer privately with counsel, and to call witnesses.

30. As such, the Trial Chamber agrees with the Prosecutor that the International Tribunal must interpret its provisions within its own context and determine where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses within its unique legal framework. While the jurisprudence of other international judicial bodies is relevant when examining the meaning of concepts such as "fair trial", whether or not the proper balance is met depends on the context of the legal system in which the concepts are being applied.

V. Confidentiality

A. Public Hearing

31. Several of the Prosecutor's requests have direct implications for the accused's right to a public hearing. Although in this case the Defence has agreed to these requests for most witnesses, Article 20 of the Statute obligates the Trial Chamber to ensure that the trial is fair and conducted in accordance with the Rules. The Trial Chamber is cognizant that, in many respects, it is establishing legal precedents in uncharted waters. The Prosecutor has advised that he may seek protective measures for other witnesses and the Defence, if it chooses, may also apply for protection. Therefore, it is important that the Trial Chamber's interpretation and application of the Statute and Rules be explained with some specificity.

32. The benefits of a public hearing are well known. The principal advantage of press and public access is that it helps to ensure that a trial is fair. As the European Court of Human Rights noted: "By rendering the administration of justice visible, publicity contributes to the achievement of the aim of . . . a fair trial, the guarantee of which is one of the fundamental principles of any democratic society . . ." *(Sutter v. Switzerland*, decision of 22 February 1984, Series A, no. 74, para. 26.) In addition, the International Tribunal has an educational function and the publication of its activities helps to achieve this goal. As such, the Judges of this Trial Chamber are, in general, in favour of an open and public trial. This preference for public hearings is evident in Article 20 (4) of the Statute, which requires that: "The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence." Also relevant is Rule 78, which states that: "All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided."

33. Nevertheless, this preference for public hearings must be balanced with other mandated interests, such as the duty to protect victims and witnesses. This balance is expressly required in Rule 79, which provides that the press and public may be excluded from proceedings for various reasons, including the safety or non-disclosure of the identity of a victim or witness. As such, in certain circumstances, the right to a public hearing may be qualified to take into account these other interests.

34. These qualifications on the right to a public hearing are permitted under the Statute and Rules. Article 20 (4) of the Statute provides for the possibility of closed hearings and Article 20 (1) requires that due regard be given for the protection of victims and witnesses. Article 21 (2) provides that the accused is entitled to a fair and public hearing "subject to Article 22", which requires that provisions be made for the protection of victims and witnesses, including *in camera* proceedings and the protection of the identity of the victim or witness.

35. Several of the Rules relate to the balance between the protection of victims and witnesses and the accused s right to a public hearing. Rule 69 allows for the non-disclosure at the pre-trial stage of the identity of a victim or witness who may be in danger until the witness is brought under the protection of the International Tribunal. This non-disclosure applies to the press and public as well as to the accused. Rule 75 allows for the taking of appropriate measures to protect victims and witnesses, provided such measures are consistent with the rights of the accused. As already noted, Rule 79 provides that the press and public may be excluded from proceedings for reasons of public order or morality; the safety or non-disclosure of the identity of a victim or witness; or the protection of the interests of justice.

36. Measures to protect the confidentiality of victims and witnesses are also consistent with other human rights jurisprudence. Article 21 of the Statute states that the accused shall be entitled to a fair and public hearing subject to Article 22 (the protection of victims and witnesses, including *in camera* proceedings and protection of the victim's identity). The Defence argues that Article 22 should not be construed as an exception to the right of a public hearing contained in Article 21 as, in the perception of the ICCPR and the ECHR, the protection of victims and witnesses is not sufficient to set aside the right of the accused to a fair and public hearing. What is essential to recognize, however, is that the Statute of the International Tribunal, which is the legal framework for the application of the Rules, does provide that the protection of victims and witnesses is an acceptable reason to limit the accused's right to a public trial. As noted above, the Trial Chamber must interpret the provisions of the Statute and Rules within the context of its own unique framework. Therefore, just as the ICCPR and ECHR provide for the limitation of the right to a public trial to protect public morals, the Statute authorizes limits to the right to a public trial to protect victims and witnesses. This is explicit in Rule 75.

37. Even if the rulings of other international judicial bodies were binding on the Trial Chamber, they would not necessarily prohibit measures to protect the confidentiality of victims and witnesses, as these

bodies tend to balance the interests of the victims and witnesses with the rights of the accused without the affirmative duty to do so. Article 14 (1) of the ICCPR and Article 6 (1) of the ECHR state that everyone is entitled to a fair and public hearing. Nevertheless, both articles provide that the press and public may be excluded in the interest of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in special circumstances where publicity would prejudice the interests of justice.

38. In construing Article 6 (1) of the ECHR, the European Court of Human Rights has noted that the publicity requirement in Article 6 (1) applies to any phase of a proceeding which affects the determination of the matter at issue. *(Axen v. Federal Republic of Germany*, decision of 8 December 1983, Series A, no. 72.) Nevertheless, this case held that the proceedings as a whole must be examined to determine whether the absence of certain public hearings is justified. (*Id.* para. 28.) The Court has also held that the right to publicity may not necessarily be violated if both parties to a proceeding consent to it being held *in camera. (Le Compte, Van Leuven and De Meyere v. Belgium*, decision of 23 June 1981, Series A no. 43, para. 59.) In general, the Commission and the Court consider whether one of the specific conditions listed on Article 6 (1) prevails before accepting that a given *in camera* proceeding has not been conducted in violation of that article. In a similar vein, this Trial Chamber must determine if one of the specific interests it has an obligation to consider, such as the protection of victims and witnesses, mandates a limitation on public access to information.

39. Measures to prevent the disclosure of the identities of victims and witnesses to the public are also compatible with principles of criminal procedure in domestic courts. There is a growing acceptance in domestic jurisprudence of the need to protect the identity of victims and witnesses from the public when a special interest is involved. Several common law countries allow for the non-disclosure to the public of identifying information relating to certain victims and witnesses. The United Kingdom prohibits disclosure to the public of identifying information of a complainant in a sexual assault case, including any still or moving pictures, except at the discretion of the court. (The Sexual Offences (Amendment) Act 1976 s. 4.) Canadian legislation guarantees anonymity from the public upon application to the court. (Canadian Criminal Code s. 442(3).) In Queensland, Australia, the Evidence Act (Amendment) 1989 (Queensland) allows additional protection during the testimony of a "special witness" including the exclusion of the public and or the defendant or other named persons from court. (Brief of Professor Chinkin at 4 - 6.) South African law also provides for the non-disclosure for a certain period of time of the identity of a witness in a criminal proceeding if it appears likely that harm will result from the testimony (Criminal Procedure Act of South Africa 51/1977, sec. 153(2)(b)) and has provisions for closing the courtroom during the testimony of victims in cases of sexual assault.

40. Even the United States of America, with its constitutionally-protected rights to a public trial and free speech - which thus places great importance on the right of public disclosure - is more amenable than in the past to measures to protect victims and witnesses. The Supreme Court of the United States has held that state sanctions imposed on the press for disclosing the identities of sexual assault victims before trial may be constitutional, and three state statutes provide for such sanctions.[2] *Florida Star v. BJF*, 491 U.S. 524 (1989). Other United States courts have also noted that the accused's right under the Sixth Amendment to a public trial is not absolute and must, in some cases, give way to other interests essential to the fair administration of justice. *(Waller v. Georgia*, 467 U.S. 39, 46 (1984).) In this regard, courts have been willing to close certain proceedings to account for the concerns of witnesses. If a partial closure is requested, i.e., excluding only certain spectators, there must be a "substantial reason" for such closure, whereas a full closure to the public and press requires an "overriding interest." (For partial closure see *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir. 1984), *cert. denied* 469 U.S. 1208 and for total closure see *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), and *Waller*, 467 U.S. 39 (holding that tests set out in *Press-Enterprise* govern total closures).) Partial closures of the courtroom have been justified on the grounds of a witness' fear of retribution from perpetrators still at large (*Nieto*

v. Sullivan, 879 F.2d 743 (10th Cir.), *cert. denied*, 110 S. Ct 373 (1989)); to protect the dignity of an adult witness during a rape trial (*United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir.), *cert. denied* 434 U.S. 1076 (1977), *see also Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir.), *cert. granted* 468 U.S. 1206 (1983), *vacated* and *remanded*, 739 F.2d 531 (1984), in which protection of an adult prosecution witness from embarrassment was held to be sufficient for partial closure of a rape trial); and to protect a minor rape victim from fear of testifying before disruptive members of the defendant's family (*U.S. v. Sherlock*, 962 F.2d 1349 (9th Cir. 1989) *see also Geise v. United States*, 262 F.2d 151, 155 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959) in which the reluctance and fear of a child witness in a rape case to testify in the presence of a full courtroom justified closure of the courtroom to all but press, members of the bar, and close friends and relatives of the defendant). Complete closure for a limited time has been justified to protect the safety of a witness and his family (*United States v. Hernandez*, 608 F.2d 741 (9th Cir. 1979)); to preserve confidentiality of undercover agents in narcotics cases (*United States ex. rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975)); and to protect disclosure of trade secrets (*Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532 (2d Cir. 1974)). Twenty-six state statutes allow for closure of trials to protect witnesses.[3]

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[2] Florida, Georgia and South Carolina have statutory prohibitions of disclosure by the media. *See* Brief of Professor Chinkin 5.

[3] State statutes that allow for closure of trials include: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New York, North Carolina, North Dakota, South Dakota, Utah, Vermont, Virginia and Wisconsin.

41. States following the civil law model also provide for measures to prevent the disclosure of identity of certain victims and witnesses from the public and press. For example, Swiss law provides that, in cases of sex crimes, the authorities and private persons are not permitted to publicize the victim's identity if it is necessary to protect the interests of the prosecution or if the victim requests non-disclosure. The possibility also exists to close the courtroom during the victim's testimony. (Bundesgesetz Über die Hilfe an Opfer von Straftaten, art. 5, *and see* Joint U.S. Brief 29.) In Denmark, if a victim in an incest or rape case so requests, the trial must be held *in camera*, in which case no publicity of the proceedings is allowed. In certain cases the press is allowed access to the courtroom but is prohibited from reporting identifying information. (Administration of Justice Act, sec. 29 and 31.) In Germany, publicity can be restricted or even excluded in order to protect the accused and witnesses. (Gerichtsverfassungsgesetz sec. 170.) In Greece, the Constitution provides for an exception to the principle that the trial must be held in public in cases where publicity is deemed to cause prejudice to morals or to the private lives of the parties. Particularly in cases of rape, members of the public may be excluded if their presence might cause grievous suffering or defamation of the victim. (Code of Criminal Procedure art. 30. *See* Christine van den Wyngaert, *Criminal Procedure Systems in the European Community* (1993).)

42. In these jurisdictions confidentiality is justified if special considerations exist, such as in cases involving sexual assault. In the context of the conflict in the former Yugoslavia, even in cases not concerning sexual assault, sufficient considerations to justify confidentiality may be found in the fear of reprisals during an ongoing conflict, particularly given the mandated duty of the International Tribunal to protect victims and witnesses and the inability of the International Tribunal to guarantee the safety of the victim or witness due to the lack of a fully-funded and operational witness protection programme at this moment in time.

43. The Trial Chamber has also considered in this respect the confidential submissions by the Prosecutor and the Defence concerning prior media contact with the witnesses for whom this protection is sought.

Of the six witnesses, three are stated to have had no media contact, two have given interviews in which the name and identity of the witness has been withheld or disguised and one, who had previously given interviews in which the identity was disclosed, is now in a national witness protection programme.

44. The Trial Chamber therefore accepts the arguments of the Prosecutor and grants the relief sought in Prayers 1, 2, 3, 4, 5, 6, 9, 10 and 12 in respect of witnesses F, G, H, I, J and K.

B. Victims and Witnesses in Cases of Sexual Assault

45. Four of the witnesses who are sought to be protected by the confidentiality measures ordered by the Trial Chamber are allegedly victims of, or witnesses to, cases of sexual assault. The Prosecutor has requested, in Prayer 7, pursuant to Rule 75 (B)(i)(c), that all of the pseudonymed witnesses be permitted to give testimony through closed circuit television and thereby be protected from seeing the accused. This is intended to protect them from possible retraumatization. The Trial Chamber regards such measures as particularly important for victims and witnesses of sexual assault.

46. The existence of special concerns for victims and witnesses of sexual assault is evident in the Report of the Secretary-General, which states that protection for victims and witnesses should be granted, "especially in cases of rape or sexual assault." (Report of the Secretary-General, para. 108.) It has been noted that rape and sexual assault often have particularly devastating consequences which, in certain instances, may have a permanent detrimental impact on the victim. *(See* Marcus and McMahon, *Limiting Disclosure of Rape Victims' Identities* 64 S. Cal. L.Rev. 1019, 120 (1991) and sources cited therein.) It has been noted further that testifying about the event is often difficult, particularly in public, and can result in rejection by the victim s family and community. (Brief of Professor Chinkin at 4.) In addition, traditional court practice and procedures have been known to exacerbate the victim's ordeal during trial. Women who have been raped and have sought justice in the legal system commonly compare this experience to being raped a second time. (Judith Lewis Herman, M.D., *Trauma and Recovery* (1991) 72, cited in the Joint U.S. Brief.)

47. The need to show special consideration to individuals testifying about rape and sexual assault has been increasingly recognized in the domestic law of some States. *(See id.* at 22-28, *and see* Brief of Professor Chinkin at 5-6.) As noted above, several states limit the public disclosure of identifying information about victims and witnesses of sexual assault and provide for the full or partial closure of the courtroom during the victims' testimony. Several other methods are utilized to accommodate the special concerns of these victims while testifying, such as the use of one-way closed circuit television. South Africa allows the use of closed circuit television in cases of sexual offences where a child witness is involved. *(See* Joint U.S. Brief at 23.) In the United States, several of the constituent states allow closed circuit television in the courtroom, and the Supreme Court held in *Maryland v. Craig* that one-way closed circuit television can be used without violating the Sixth Amendment right to confrontation when the court finds it necessary to protect a child witness from psychological harm. (497 U.S. 836 (1990).)

48. Another such method is the use of depositions and video conferences. For example, in the United States thirty-seven constituent states permit the use of videotaped testimony of sexually abused children.[4] In Queensland, Australia, state law provides that when certain witnesses, including victims of sexual assault, testify the court may take measures to protect the witness, such as the use of videotaped evidence in lieu of direct testimony or obscuring the witness' view of the defendant. (The Evidence Act (Amendment) 1989 (Queensland).) Other mechanisms utilized to accommodate victims of sexual assault include image- and voice-altering devices, screens and one-way mirrors.

[4] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming. Cited in *Maryland v. Craig,* 497 U.S. 836, n.2 (1990).

49. In consideration of the unique concerns of victims of sexual assault, a special Rule for the admittance of evidence in cases of sexual assault was included in the Rules of the International Tribunal. Rule 96 provides that corroboration of the victim's testimony is not required and consent is not allowed as a defence if the victim has been subject to physical or psychological constraints. Finally, the victim's prior sexual conduct is inadmissible.

50. In determining where the balance lies between the right of the accused to a fair and public trial and the protection of victims and witnesses, consideration has been given to the special concerns of victims of sexual assault. These concerns have been factored into the balance on an individual basis for each witness for whom protection is sought. Witness F is an alleged victim of forcible sexual intercourse. Witnesses G, H and I are alleged victims of or witnesses to sexual mutilation. The measures sought by the Prosecutor are appropriate to protect the privacy rights of witnesses F, G, H and I. These measures in no way affect the accused's right to a fair and public trial. The protective measures sought pursuant to Rule 75 will afford these witnesses privacy and guard against their retraumatization should they choose to testify at trial. Given the individual circumstances of these four witnesses, the Trial Chamber has determined that protective measures are warranted, and are allowed by the Statute and Rules.

51. However, the Trial Chamber believes that adequate protection can be provided to certain of these witnesses without resort to closed circuit television, which involves removing the witness from the courtroom. Alternative methods such as the installation of temporary screens in the courtroom, positioned so that the witness cannot see the accused but the accused may view the witness via the courtroom monitors may also be suitable, depending upon the technical practicalities, for any witness for whom full anonymity is not ordered by the Trial Chamber and will give the Trial Chamber the benefit of observing directly the demeanour of the witness.

52. The Trial Chamber grants the relief sought in Prayer 7 or other similar protection as may be arranged by the Registry of the International Tribunal with the approval of the Trial Chamber in respect of witnesses F, G, H and I but denies the relief in respect of witnesses J and K.

VI. Anonymity

A. General principles and application

53. Two of the Prosecutor's requests relate to non-disclosure of the identities of certain witnesses to the accused. Prayer 11, as amended, and Prayer 8 are concerned with keeping the name, address, image, voice and other identifying data of witnesses G, H, I, J and K from the Defence. The Prosecutor is also seeking to keep the present address and whereabouts of witness F and relatives of witness F from the Defence. Furthermore, the Prosecutor requests that the identity of F and her complete statement, redacted only for the above stated purpose, be released to the Defence no earlier than one month in advance of the firm trial date.

54. The underlying reasons for the disclosure of the identity of witnesses are clear. As the European Court of Human Rights noted:

> If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility.
>
> *(Kostovski*, paragraph 42, ECHR series A, Vol. 166, 23 May 1989.)

Therefore the general rule must be that: "In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument." *(Id.* para. 41.)

55. However, the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the witness. The balancing of these interests is inherent in the notion of a "fair trial". A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses. In a case before the Supreme Court of Victoria, Australia, *Jarvie and Another v. The Magistrates' Court of Victoria at Brunswick and Others*, (1994) V.R. 84, 88, Judge Brooking, when pronouncing on whether anonymity of a witness is in conformity with the principle of a fair trial stated:

> The "balancing exercise" now so familiar in this and other fields of the law must be undertaken. On the one hand, there is the public interest in the preservation of anonymity . . . On the other hand, there is the public interest that . . . the defendant should be able to elicit (directly or indirectly) and to establish facts and matters, including those going to credit, as may assist in securing a favourable outcome to the proceedings. There is also the public interest in the conduct by the courts of their proceedings in public.

56. Similarly the European Court of Human Rights, when determining whether non-disclosure of the identity of a witness constitutes a violation of the principle of fair trial, looks at all the circumstances of the case. *(See Kostovski, supra* paras. 43, 45.) The Court identifies any infringement of the rights of the accused and considers whether the infringement was necessary and appropriate in the circumstances of the case. The Brief of Professor Chinkin suggests that it is in the public interest for the International Tribunal to discharge its obligation to protect victims and witnesses and the Trial Chamber so finds.

57. Under the Statute of the International Tribunal this balancing of interests is reflected in Article 20, which demands full respect for the rights of the accused and due regard for the protection of victims and witnesses to ensure a fair trial. The qualification of the rights of the accused to accommodate anonymity of witnesses is further elaborated in Article 21 (2) of the Statute, which provides that the accused is entitled to a fair and public hearing "subject to Article 22". Article 22, in turn, requires that provisions be made for the protection of victims and witnesses.

58. Within the context of the Rules, anonymity of witnesses at the trial stage is provided for in Sub-rules 75 (A) and (B)(iii). Measures granting anonymity to a witness pursuant to this provision remain subject to the requirement of Rule 75 (A) that they be "consistent with the rights of the accused."

59. In Rule 69 (C), the right of the accused to learn the identities of the witnesses against him in sufficient time prior to trial is made subject to a decision under Rule 75, thereby extending the power of the Trial Chamber to grant anonymity to a witness at the trial stage to the pre-trial stage.

60. In a leading opinion before the English Court of Appeal, *R. v. Taylor*, transcript of decision at 17

(Ct. App. Crim. Div. 22 July 1994), Lord Justice Evans stated that:

> Whether or not in a particular case the exception [to the right of a defendant to see and to know the identity of his accusers, including witnesses for the prosecution brought against him] should be made is pre-eminently a matter for the exercise of discretion by the trial judge.

Such discretion must be exercised fairly and only in exceptional circumstances can the Trial Chamber restrict the right of the accused to examine or have examined witnesses against him.

61. The situation of armed conflict that existed and endures in the area where the alleged atrocities were committed is an exceptional circumstance *par excellence*. It is for this kind of situation that most major international human rights instruments allow some derogation from recognized procedural guarantees. *(See* Article 15 of the ECHR, Article 4 of the ICCPR and Article 27 of the American Convention on Human Rights.) The fact that some derogation is allowed in cases of national emergency shows that the rights of the accused guaranteed under the principle of the right to a fair trial are not wholly without qualification. Guidance as to which other factors are relevant when balancing all interests with respect to granting anonymity to a witness can be found in domestic law.

62. First and foremost, there must be real fear for the safety of the witness or her or his family: "[T]here must be real grounds for being fearful of the consequences if the evidence is given and the identity of the witness is revealed." (*R. v. Taylor, supra* at 17, 18.) Judicial concern motivating a non-disclosure order may be based on fears expressed by persons other than the witness, e.g., the family of the witness, the Prosecutor, the Victims and Witnesses Unit, as well as by the witness himself. In this case, the Defence has expressed concern that a subjective feeling of fear be allowed to satisfy this criterion. Insofar as the Defence means that there should always be an objective basis to underscore a feeling of fear, such as the horrendous nature and ruthless character of the alleged crimes, then that is a submission with which the Trial Chamber, by majority decision, agrees.

63. Secondly, the testimony of the particular witness must be important to the Prosecutor's case: "[T]he evidence must be sufficiently relevant and important to make it unfair to the prosecution to compel the prosecutor to proceed without it." *(Id.* at 18.) In this respect it should be noted that the International Tribunal is heavily dependent on eyewitness testimony and the willingness of individuals to appear before the Trial Chamber and testify. Further, the Prosecutor has stated that this testimony is important and, for some witnesses, critical.

64. Thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy. To this end the Prosecutor must have examined the background of the witness as carefully as the situation in the former Yugoslavia and the protection sought permit. There should be no grounds for supposing that the witness is not impartial or has an axe to grind. Nor can non-disclosure of the identity of a witness with an extensive criminal background or of an accomplice be allowed. Granting anonymity in these circumstances would prejudice the case of the defence beyond a reasonable degree. The report by the Prosecutor on the reliability of the witness would need to be disclosed to the defence so far as is consistent with the anonymity sought. *(See R. v. Taylor, supra* at 19.)

65. Fourthly, the ineffectiveness or non-existence of a witness protection programme is another point that has been considered in domestic law and has a considerable bearing on any decision to grant anonymity in this case. *(See Jarvie, supra* at 84, 88.) A number of the witnesses live in the territory of the former Yugoslavia or have family members who still live there and fear that they or their family members may be harmed, either in revenge for having given evidence or in order to deter others. Family

members may still be held in prison camps. Others fear that even as refugees in other countries they may be at risk. The International Tribunal has no police force that can care for the safety of witnesses once they leave the premises of the International Tribunal. The International Tribunal has no long-term witness protection programme nor the funds to provide for one. In any event, any such programme could not be effective in protecting family members of witnesses in cases in which the family members are missing or held in camps.

66. Finally, any measures taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied. The International Tribunal must be satisfied that the accused suffers no undue avoidable prejudice, although some prejudice is inevitable. *(See R. v. Taylor, supra* at 19.)

67. The right of the accused to examine, or have examined, the witnesses against him, is laid down in Article 21(4) of the Statute of the International Tribunal. Anonymity of a witness does not necessarily violate this right, as long as the defence is given ample opportunity to question the anonymous witness. Witness anonymity will restrict this right to the extent that certain questions may not be asked or answered but, as noted above and as is evidenced in national and international jurisdictions applying a similar standard, it is permissible to restrict this right to the extent that is necessary.

68. The Defence concedes the fact that protective measures have to be balanced with the rights of the accused and that knowledge of the identity of a witness may not, in all circumstances, be essential for the concept of a fair trial. The Defence does contend, however, that there is a bottom line below which the rights of the accused may not be compromised. The Defence argues that this bottom line is best described in the *Kostovski* case before the European Court of Human Rights. The *Kostovski* case is not directly on point, as it does not relate to the testimony of unidentified witnesses who will be present in court, whose evidence will be subject to cross-examination, and whose demeanour is being observed by the Judges of the Trial Chamber. However, the *Kostovski* case does indicate that procedural safeguards can be adopted to ensure that a fair trial takes place when the identity of the witness is not disclosed to the accused.

69. In the *Kostovski* case the European Court of Human Rights, when determining whether there had been a violation of the Convention, "ascertained whether the proceedings considered as a whole . . . were fair." *(See Kostovski, supra* para. 39.) The Court concluded that "in the circumstances of the case the constraints affecting the rights of the defence were such that [the accused] cannot be said to have received a fair trial." *(Id.* para. 45.) It concluded, however, that the handicaps under which the defence has to labour when anonymity is provided can be counterbalanced by the procedures followed by the court. (*Id.* para. 43.) Thus, according to the European Court of Human Rights, certain safeguards built into the procedures followed by a court of law can redress any diminution of the right to a fair trial arising out of a restriction of the right of the accused to examine or have examined witnesses against him.

70. The majority of the Trial Chamber acknowledges the need to provide for guidelines to be followed in order to ensure a fair trial when granting anonymity. It believes that some guidance as to what standards should be employed to ensure a fair trial can be ascertained both from the case law of the European Court of Human Rights and from domestic law. It recognizes, however, that these standards must be interpreted within the context of the unique object and purpose of the International Tribunal, particularly recognizing its mandate to protect victims and witnesses. The following guidelines achieve that purpose.

71. Firstly, the Judges must be able to observe the demeanour of the witness, in order to assess the reliability of the testimony. *(Id.* para. 43.) Secondly, the Judges must be aware of the identity of the

witness, in order to test the reliability of the witness. *(Id.* para. 43.) Thirdly, the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name traceable. The release of nicknames used in the camps clearly falls into this latter category and the majority of the Trial Chamber will therefore not allow the release of this information concerning witnesses who have been granted anonymity without the express consent of these witnesses. Finally, the identity of the witness must be released when there are no longer reasons to fear for the security of the witness. *(See* Article 68 of the German Criminal Code of Procedure (StPO).)

72. Questions relating to the reliability and the relationship of the witness to the accused or the victim by the defence must be permitted. If this information is released, knowledge of the identities of the witnesses would not add considerably to the information which the defence needs to cross-examine them about the events to which they testify. It may prevent questioning them about their past history, which could go to their credibility, but such restriction of the right of the accused would seem to be permissible in the light of the circumstances. As Judge Brooking observed in the *Jarvie* case:

> The balancing process accepts that justice, even criminal justice, is not perfect, or even as perfect as human rules can make it . . . A fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused.
>
> *(See Jarvie, supra* at 90.)

73. According to the Defence, the bottom line formulated in the *Kostovski* case is that the accused should be given a proper opportunity to question and challenge a witness and to be informed about particulars which may enable the accused to demonstrate that the witness is prejudiced. These rights are sufficiently safeguarded by the procedural guidelines ensuring a fair trial as outlined above. As long as the Trial Chamber adheres to these guidelines, the Trial Chamber should order appropriate measures for anonymity of vulnerable witnesses, bound as it is by its mandated obligation to offer protection to them in the process of conducting a fair trial.

74. The Rules, especially Rule 89, give the Trial Chamber wide latitude with respect to the receipt of evidence. In this Rule, perhaps more than anywhere else in the Rules, there is a departure from some common law systems where technical rules of evidence predominate. Sub-rules 89 (C) and (D) provide that the only limit on the receipt of relevant evidence is that it has probative value, and it may be excluded only if it is substantially outweighed by the need to ensure a fair trial. Anonymous testimony may be both relevant and probative.

75. The limitation on the accused's right to examine, or have examined, the witnesses against him, which is implicit in allowing anonymous testimony, does not, standing alone, violate his right to a fair trial. Indeed, the Defence recognizes that, under certain circumstances, anonymous testimony is consistent with a fair trial. If the party offering anonymous testimony is able to meet the guidelines set out herein, the testimony should be allowed.

76. Now that the framework in which anonymity may function has been set out, the Trial Chamber has to look at the specific circumstances of this case to determine whether to grant anonymity would be an appropriate measure for witness protection. In this regard, the Trial Chamber has paid particular attention to the confidential filings by the parties concerning prior media contact.

77. Initially, the Trial Chamber must consider the factors that apply to all witnesses. First, with respect to the objective aspect of the criterion that there must be real fear for the safety of the witness, it is generally sufficient for a court to find that the ruthless character of an alleged crime justifies such fear of the accused and his accomplices. The alleged crimes are, without doubt, of a nature that warrants such a finding. Secondly, the Prosecutor has sufficiently demonstrated the importance of the witnesses to prove the counts of the indictment to which they intend to testify. Thirdly, no evidence has been produced to indicate that any of the witnesses is untrustworthy. Fourthly, the International Tribunal is in no position to protect the witnesses and or members of their family after they have testified. When applying these principles to the specific circumstances that can justify anonymity in an individual case, the evidence with regard to each of the five witnesses pseudonymed G, H, I, J and K must be examined separately.

78. Witness G was allegedly forced to participate in the sexual mutilation of Fikret Harambas ic in charge 5 of the indictment. According to a Declaration filed by one of the investigators from the Office of the Prosecutor, witness G originally ruled out the prospect of testifying before the International Tribunal. However, witness G did indicate that he would consider the possibility if "stringent procedures to ensure his confidentiality and security" were implemented. The Defence is aware of the true name of this witness as witness G has, in the past, appeared in the media without disguising his identity. The Defence is not aware, however, of a new identity under a national witness protection programme. The Trial Chamber, by majority, orders that the present identity and whereabouts of witness G be withheld from the Defence. His former identity need not be withheld from the Defence because that identity is already known to them.

79. Witness H was also allegedly forced to participate in the sexual mutilation of Fikret Harambas ic in charge 5 of the indictment. The Defence asserts that it believes that it knows the identity of witness H, who has refused to testify unless: "[the] identity and that of [the] family is completely protected". Because of the reasonable fear of retaliation felt by the witness and because the Prosecutor has met the guidelines for anonymity set out above, the majority decision of the Trial Chamber is to order that the identity of witness H and other identifying information be withheld from the Defence.

80. Witness I is a witness to the alleged sexual mutilation in charge 5 of the indictment. According to the Prosecutor, this witness has had no media contact. On behalf of witness I, the Prosecutor has submitted a Declaration from one of his investigators stating that:

> [B]ased on my observations, it is my opinion that the emotional impact of public disclosure of his victimization would be profound and irreparable. There is a strong likelihood that [witness] I would decline to participate in the proceedings if public disclosure was a condition of his testimony.

This statement fails to satisfy the threshold requirement that the witness requests anonymity from the accused. The Trial Chamber has granted the request of the Prosecutor for confidentiality for witness I from the public and the media, measures which are designed to give witness I the protection from "public disclosure" that he seeks. The obligation of the International Tribunal to protect witnesses should not go beyond the level of protection they are actually seeking.

81. It is alleged that witnesses G, H and I together support charge 5 of the indictment. Witness G has been denied anonymity by the Trial Chamber insofar as it relates to his former identity of which the Defence is already aware. Witness I is also alleged to be a witness to this mutilation. As noted above, it has been asserted that there is "a strong likelihood" that witness I would decline to give evidence if public disclosure was a condition of his testimony. The Trial Chamber has declined to allow witness I to testify anonymously but has granted full confidentiality to protect against public disclosure. The

Prosecutor has not disclosed whether he will have other evidence regarding this charge and, of course, the Trial Chamber does not mean to suggest that additional evidence is required. At this stage of the proceeding, however, the accused is not denied a fair trial by the decision to permit witness H to testify anonymously.

82. According to the Prosecutor, witnesses J and K have had no media contact. Both fear reprisals against themselves and members of their families. Again it is asserted by the Prosecutor that witness J will not testify unless the identity is protected. Witness K has also requested that the identity and the identity of family members be protected. The Defence requests the release of the addresses of these witnesses at the time of the alleged offence in order to examine neighbours about the events of charge 11. Neither their identity nor their image is needed for an effective cross-examination, for the Defence asserts that its need is to "examine neighbours". Because of the reasonable fear of retaliation felt by these witnesses and because the Prosecutor has met the guidelines for anonymity set out above, the Trial Chamber, by majority decision, orders the non-disclosure of the identities and other identifying information relating to witnesses J and K.

83. It is alleged that witnesses J and K are "critical witnesses" to charge 11, for they are said to have observed armed forces beat and shoot persons in their neighbourhood. The Defence asserts that:

> [D]isclosure of names and/or images will not be necessary for an effective examination of their statements if their addresses at the time of the events as described in the indictment will be disclosed to the defence.
>
> The defence has no interest in data concerning present whereabouts of any witness for the prosecution.

As the Defence has indicated that it does not need to observe the images of these witnesses while testifying, the accused is not denied his right of cross-examination if the images of witnesses J and K are distorted or otherwise withheld from the accused. However, the Trial Chamber is not persuaded that it is necessary to release the addresses of the witnesses at the time that the alleged crimes took place in order to examine the circumstances of that charge. Revealing the former addresses of witnesses J and K is tantamount to revealing their identity. A less precise description will be sufficient to place the witnesses in their proper setting without giving actual addresses. The majority of the Trial Chamber believes that these witnesses are bystanders. Therefore, their contextual identity is sufficient to assure the accused a fair trial. Providing the Defence with their general locality meets the requirement of contextual identification, for this information will be sufficiently precise to allow the Defence to make enquiries of others in the vicinity as to what they saw of the incidents of which J and K speak. The Trial Chamber finds that withholding their addresses will not deny the accused his right to a fair trial. Judge Stephen concurs with such decision subject to confirmation by the Prosecutor that witnesses J and K were, indeed, mere bystanders. The Prosecutor is directed to provide the Defence with the above general locality for witnesses J and K not less than thirty (30) days in advance of the firm trial date.

84. The Trial Chamber, by majority, finds that the Prosecutor has met the necessary standard to warrant anonymous testimony in respect of witnesses H, J and K. If, after considering the proceedings as a whole, as suggested in *Kostovski*, the Trial Chamber considers that the need to assure a fair trial substantively outweighs this testimony, it may strike that testimony from the record and not consider it in reaching its finding as to the guilt of the accused. It would be premature for the Trial Chamber to determine now that such testimony must be excluded.

85. This balancing of interests shows that, on the one hand, there is some constraint to cross-examination, which can be substantially obviated by the procedural safeguards. On the other hand, the Trial Chamber has to protect witnesses who are genuinely frightened. In this situation the Trial Chamber, by majority, grants anonymity to witnesses G (of present identity only), H, J and K as requested by the Prosecutor in his Prayer 11 (a). The Prosecutor's Prayer in the alternative is denied.

86. As Lord Justice Beldam in the judgement given by the Queen's Bench Divisional Court in the British case of *R. v. Watford Magistrates' Court* [1992] T.L.R. 285 stated:

> [I]t would be pointless to withhold the identity of the witnesses or the means by which they could be identified if at the same time the circumstances in which they gave evidence were such that they could by other means, either because of their appearance, or because of the sound of their voices, easily be identified.
>
> (Cited in *R.v. Taylor*, *supra* at 15.)

Therefore the Trial Chamber, by majority, orders that the voices and images of witnesses H, J and K be altered to the extent that this will be necessary to prevent their identities from becoming known to the accused. The Prosecutor's Prayer 8 is granted in respect of these three witnesses H, J and K but denied in respect of witnesses F, G and I.

B. Release of edited recorded eyewitness testimony to the media.

87. In view of the right of the public to learn about the administration of justice in the International Tribunal, and especially because the International Tribunal has been established to prosecute serious violations of international humanitarian law in which the world community has a special interest, the Trial Chamber has decided that, after review by the Victims and Witnesses Unit, edited recordings and transcripts of the proceedings shall be released to the media. Editing will take place at the discretion of the Coordinator of the Victims and Witnesses Unit for the necessary protection of the witnesses, subject to the overall control of the Trial Chamber.

VII. Miscellaneous and general measures sought

88. The Prosecutor's request for measures to protect the identity of witness A has been withdrawn. The Prosecutor intends to release details of the identity of witness A as early as reasonably practicable and, in any event, prior to the commencement of the trial. The Defence asks for the identity to be released right away, asserting that, as the request for protection has been withdrawn, any further denial of information constitutes an inequality of examination. The Trial Chamber agrees with the Defence and orders the identity of witness A to be released immediately.

89. Furthermore, in his alternative Prayer 11 (a), the Prosecutor asks for delayed disclosure of the identity of witness F and the Defence consents to this. The Defence requests that the nickname as used in the camp also be released. The Trial Chamber orders in accordance with both requests. The release of the nickname is necessary to enable the Defence to place this witness in context. Rule 67 (A) requires that the identity of each witness shall be notified to the defence "as early as reasonably practicable and in any event prior to the commencement of the trial". In exceptional circumstances where disclosure of identity is ordered under Rule 69, Sub-rule (C) requires that the identity be disclosed "in sufficient time prior to the trial to allow adequate time for preparation of the defence". The Trial Chamber therefore orders that the identity and nickname of witness F be released not less than thirty days in advance of the firm trial date in order to allow the Defence sufficient time to prepare its case.

90. The Prosecutor has also sought non-disclosure of the current address of witness F and of the relatives of witness F. The Defence has confirmed that it has no interest in the present whereabouts of any witness. The Trial Chamber therefore grants this request.

91. The Prosecutor has already delivered to the Defence the redacted statements of witnesses G, H, I, J and K. The Trial Chamber has determined that witnesses H, J and K are entitled to full anonymity and therefore no further information needs to be disclosed to the Defence concerning the statements of these witnesses. The Trial Chamber, by majority, orders that the full statements of witnesses G and I, redacted only so far as may be necessary to preserve the anonymity of witnesses H, J and K and the current identity of witness G, be released to the Defence not later than thirty days in advance of the firm trial date.

92. The Trial Chamber has thus disposed of all of the requests for protection made by the Prosecutor with the exception of those contained in Prayers 13 and 14. In view of the measures for the protection of witnesses ordered by the Trial Chamber, the relief sought in Prayer 13 flows as a logical consequence and is granted accordingly.

93. Prayer 14 raises a number of practical difficulties for the Trial Chamber in that the enforcement of the powers of the International Tribunal in respect of contempt of its Orders and Decisions depends, as with many of its other powers, on the cooperation of States. However, the Trial Chamber grants the relief requested in Prayer 14 in so far as it relates to the six protected witnesses in the matter now before it.

DISPOSITION

For the foregoing reasons **THE TRIAL CHAMBER**, being seized of the Motion filed by the Prosecutor, and

PURSUANT TO RULE 75,

HEREBY GRANTS the Prosecutor's requests contained in Prayers 1, 2, 3, 4, 5 and 6, Prayer 7 (in respect of witnesses F, G, H and I only), Prayer 8 (in respect of witnesses H, J and K only), Prayers 9 and 10, Prayer 11 (a) (as to witnesses G, H, J and K only) and Prayers 12, 13 and 14 and **ORDERS AS FOLLOWS**:

(1) the identity of witness A shall be released to the Defence immediately;

(2) the names, addresses, whereabouts and other identifying data concerning persons given pseudonyms F, G, H, I, J and K shall not be disclosed to the public or to the media;

(3) all hearings to litigate the issue of protective measures for pseudonymed witnesses shall be in closed session;

(4) the names, addresses, whereabouts and other identifying information concerning F, G, H, I, J and K shall be sealed and not included in any of the public records of the International Tribunal;

(5) to the extent the names of, or other identifying data concerning, any of these victims and witnesses are contained in existing public documents of the International Tribunal, those names and other identifying data shall be expunged from those documents;

(6) documents of the International Tribunal identifying these witnesses shall not be disclosed to the public or the media;

(7) the testimony of witnesses F, G, H and I may be given by one-way closed circuit television or such other method as will avoid the retraumatization of these witnesses;

(8) the testimony of witnesses F, G, H, I, J and K shall be heard in closed session: however, edited recordings and transcripts of these sessions shall be released to the public and the media after review by the Victims and Witnesses Unit of the International Tribunal;

(9) the pseudonyms F, G, H, I, J and K shall be used whenever referring to these witnesses in proceedings before the International Tribunal and in discussions among parties to the trial;

(10) the Prosecutor shall disclose to the Defence and the accused the name and complete statement of witness F not less than thirty days in advance of the firm trial date. The Prosecution may redact from witness F's statement witness F's current address and whereabouts, and information disclosing the present address and whereabouts of the witness' relatives;

(11) the Prosecutor may withhold from the Defence and the accused the current identity of, and other identifying data concerning, witness G and the names of, and other identifying data concerning, witnesses H, J and K;

(12) the Prosecutor shall disclose to the Defence and the accused the complete statements of witnesses G and I, redacted only so far as may be necessary to preserve the anonymity of witnesses H, J and K and the current identity of witness G, not later than thirty days in advance of the firm trial date;

(13) the Prosecutor shall provide the Defence with details of the general locality for witnesses J and K not less than thirty days in advance of the firm trial date;

(14) the testimony of witnesses H, J and K may be given using voice and image altering devices to the extent necessary to prevent their identities from becoming known to the accused;

(15) the accused, the defence counsel and their representatives who are acting pursuant to their instructions or requests shall not disclose the names of these victims and witnesses or other identifying data concerning these witnesses to the public or to the media, except to the limited extent such disclosure to members of the public is necessary to investigate the witnesses adequately;

(16) any such disclosure shall be done in such a way as to minimize the risk of the victims' and witnesses' names being divulged to the public at large or to the media;

(17) the accused, the defence counsel and their representatives who are acting pursuant to their instructions or requests shall notify the Office of the Prosecutor of any requested contact with prosecution witnesses or the relatives of such witnesses and the Office of the Prosecutor shall make arrangements for such contact;

(18) the public and the media shall not photograph, video record or sketch the six protected witnesses appearing in this matter while they are in the precincts of the International Tribunal.

THE TRIAL CHAMBER DENIES the request in Prayer 7 in respect of witnesses J and K, the request in Prayer 8 in respect of witnesses F, G and I and the alternative request in Prayer 11 (b).

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Gabrielle
Kirk
McDonald

Presiding
Judge

Dated this tenth day of August 1995
At The Hague
The Netherlands

3. *Prosecutor v Blaskic*, "Decision on the Prosecution and Defence Motions dated 25 January and 25 March 1999 respectively", 22 April 1999.

UNITED NATIONS

IT-95-14-T
D5-1 /10 485 BIS
28 APRIL 1999

5/10 485 BIS
HG

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-95-14-T
Date : 22 April 1999
English
Original: French

IN THE TRIAL CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Mohamed Shahabuddeen
Judge Almiro Simões Rodrigues

Registrar: **Mr. Jean-Jacques Heintz, Deputy Registrar**

Decision of: **22 April 1999**

THE PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

DECISION ON THE PROSECUTION AND DEFENCE MOTIONS DATED 25 JANUARY 1999 AND 25 MARCH 1999 RESPECTIVELY

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Defence Counsel:

Mr. Anto Nobilo
Mr. Russell Hayman

TRIAL CHAMBER I hearing the case *The Prosecutor v. Tihomir Blaškić* (hereinafter the Blaškić Trial 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 (hereinafter "the Tribunal");

NOTING the *ex parte* Motion of the Prosecutor filed confidentially on 25 January 1999 requesting that she be permitted to disclose to Defence counsel for Dario Kordić and Mario Čerkez non-public documents produced in the *Blaškić* case (hereinafter "the Motion of 25 January 1999");

NOTING the Defence Motion to limit disclosure by the Prosecutor of confidential exculpatory documents filed under seal on 25 March 1999 (hereinafter "the Motion of 25 March 1999");

NOTING the confidential Response of the Prosecutor dated 9 April 1999 to the Motion of 25 March 1999 (hereinafter "the Response of 9 April 1999");

NOTING the Opinion of the Blaškić Trial Chamber rendered on 16 December 1998 (hereinafter "the Opinion of 16 December 1998") further to the Decision of the Trial Chamber hearing the case *The Prosecutor v. Dario Kordić and Mario Čerkez* (hereinafter the Kordić-Čerkez Trial Chamber") dated 12 November 1998;

NOTING the further Order in respect of the request for access to non-public materials in the Lašva Valley and related cases issued on 16 February 1999 by the Kordić-Čerkez Trial Chamber (hereinafter "the further Order);

PURSUANT to Rules 54, 66, 68 and 70 of the Rules of Procedure and Evidence (hereinafter "the Rules");

CONSIDERING that, in her Motion of 25 January 1999, the Prosecutor requests that the Trial Chamber authorise her to disclose to counsel for the accused Dario Kordić and Mario Čerkez, in accordance with her obligations under Rules 66 and 68 of the Rules, the transcripts of four confidential depositions tendered in evidence in the proceedings against Tihomir Blaškić, including the deposition of a Defence witness; that this request for authorisation also

guarantees compliance with all the protective measures already ordered by the Blaškić Trial Chamber as well as any additional future protective measure which the Kordić-Čerkez Trial Chamber might order; that, finally, the Prosecutor refers to the Orders issued in other related cases to ask that the disclosure of documents be authorised only further to the express consent of the witnesses concerned or, in any event, to a further Order of the Tribunal to that end;

CONSIDERING that, in its Motion of 25 March 1999, Defence counsel for Tihomir Blaškić requests that the Trial Chamber order the Prosecutor to disclose no confidential documents tendered by the Defence to a third party, in particular, to counsel for the accused Dario Kordić and Mario Čerkez if no express notification and consent have been given; that the Defence bases its request on the Opinion of 16 December 1998 and reasserts its concern that the safety of the protected witnesses not be jeopardised and that the guarantees of confidentiality offered to the said witnesses be honoured so that it may continue its investigations;

CONSIDERING that the Prosecutor objects to the Defence Motion on the ground that the Defence does not have the capacity to consent to an Order of a Trial Chamber and also that the Motion is of no practical interest insofar as the Prosecutor has already disclosed confidential materials to counsel for the accused Dario Kordić and Mario Čerkez, and, lastly, that the protective measures ordered by the Kordić-Čerkez Trial Chamber in its further Order address the concern for witness protection expressed by the Defence; that the Prosecutor does not object to the practice of notifying the Defence of confidential exculpatory documents which have been disclosed;

CONSIDERING that the Trial Chamber deems that the connection between the Motion of 25 January 1999 and the Motion of 25 March 1999 justifies their being considered simultaneously and that a single Decision cover both;

CONSIDERING that the Motion of 25 January 1999 concerns three transcripts of confidential testimony of Prosecution witnesses who have appeared in this case; that the Defence, in effect, objects only to the disclosure of the testimony transcript of the fourth Defence witness mentioned by the Prosecutor;

CONSIDERING that, in its Opinion of 16 December 1998, the Trial Chamber considered "that the Trial Chamber could [...] not order that Defence counsel for one accused provide any materials to the Defence counsel for another accused"; that it thus stated that the Defence was not subject to the same disclosure obligations as the Prosecutor;

CONSIDERING, however, that it considered that the Prosecutor did remain subject to her obligations pursuant to Rules 66 and 68 of the Rules, without any distinction based on the public or confidential character of the documents concerned, except for those materials tendered pursuant to Rule 70 of the Rules;

CONSIDERING that the Trial Chamber is of the opinion that the exculpatory character of the confidential documents tendered by the Defence in support of its case and the Prosecutor's resulting disclosure obligation take precedence over their confidential nature insofar as the protection of the witnesses concerned is maintained, or even increased;

CONSIDERING that the Kordić-Čerkez Trial Chamber thus ordered the Prosecution to disclose to Defence counsel of the accused Dario Kordić and Mario Čerkez "copies of all transcripts of the testimony of, identifying material, and all exhibits introduced through protected witnesses in the case of *Prosecutor v. Tihomir Blaškić*, insofar as such material relates to witnesses to be called in the case of *Dario Kordić and Mario Čerkez* or constitutes exculpatory material relating to either of these two accused and subject to the protective measures set out herein"; that the further Order also included increased witness protective measures;

CONSIDERING that, in the case in point, this Trial Chamber is intervening only alternatively should the Prosecutor, to date, not have discharged her obligations under Rules 66 and 68 of the Rules;

FOR THE FOREGOING REASONS,

AUTHORISES the Prosecution to disclose, if necessary, to Defence counsel for the accused Dario Kordić and Mario Čerkez the transcripts of the confidential testimony of the four witnesses listed in paragraph 3 of the Motion of 25 January 1999 within the limits stated in the said Motion.

REJECTS the Motion of 25 March 1999.

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

Done this twenty-second day of April 1999
At The Hague
The Netherlands

(signed)

Claude Jorda
Presiding Judge, Trial Chamber I

(Seal of the Tribunal)

4. *Prosecutor v Blaskic*, IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997.

6622

victims and witnesses[4] and also ensuring that the pragmatic needs of the trial process are met in that hearings proceed in an expeditious manner. The Trial Chamber mentions the need for avoiding time consuming and repetitious testimony a number of times during the course of these Decisions. In general the value of these Decisions which on first sight relate to apparently minor procedural issues should not be underestimated. At a time when procedure is still being formulated for the International Criminal Court, confirmation of contentious points of international criminal law and the very manner in which the Tribunal addresses problems not expressly provided for in the Statute and the Rules of Procedure and Evidence are instructive.

Mark Mackarel

[4] See for example ICTY, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Wi... *Prosecutor v. Tadić*, Case No. IT-94-1-T, T.Ch II, 10 August 1995, Klip/ Shiter ALC-I 155, (Tadić (1995) I ICTY JR[illegible]

...International Tribunal for the ...Prosecution of Persons ...Responsible for Serious Violations of ...International Humanitarian Law ...Committed in the Territory of ...Former Yugoslavia since 1991

Case No. IT-95-14-PT

Date: 27 January 1997
English

Original: French

IN THE TRIAL CHAMBER

...Hore: Judge Claude Jorda, Presiding
Judge Jules Deschênes
Judge Fouad Riad

...Registrar: Mr. Dominique Marro, Deputy Registrar

...tion of: 27 January 1997

THE PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

DECISION ON THE PRODUCTION OF DISCOVERY MATERIALS

...Office of the Prosecutor:
...Mr. Mark Harmon
...Mr. Gregory Kehoe
...Mr. Andrew Caley

Counsel for the accused
Mr. Anto Nobilo
Mr. Russel Hayman
Mrs. Nela Pedišić

[page 2] 1. In its motion entitled "Motion to Compel the Production of Discovery Materials", dated 26 November 1996 (hereinafter "the Motion"), Defence counsel for General Blaškić (hereinafter "the accused") requested that Trial Chamber I (hereinafter "the Trial Chamber"), issue a decision compelling the Prosecution to produce information, documents and other items of potential evidentiary value. The Office of the Prosecutor (hereinafter "the Prosecutor"), in opposition to the Defence, responded to the Motion on 11 December 1996 (hereinafter "the Response"). The Defence replied to the opposition in a brief filed on 16 December 1996 (hereinafter "the Reply"). The Trial Chamber heard the parties at a hearing held on 19 December 1996.

The Trial Chamber would first analyse the claims of the parties and then all the disputed points in fact and law.

I) Analysis of the claims and arguments of the parties

2. The requests to compel discovery, generally within seven days as stated by the Defence, are presented in the Motion as follows:

1. "B. Statements of the Accused";
2. "C. Witness Statements";
3. "D. List of Prosecution Witnesses";
4. "E. Evidence Submitted to the Tribunal in Support of the Indictment Pursuant to Rule 47 of the Rules of Procedure and Evidence (hereinafter "the Rules")";
5. "F. Exculpatory Evidence";
6. "G. Lack of Evidence";
7. "H. Evidence Gathered and Provided to the Prosecution by BiH";
8. "I. Evidence In the Prosecutor's Possession Including Evidence Submitted to the Tribunal in Connection with the Indictment of Ivica Rajić";
9. "J. Evidence in the Prosecutor's Possession, including Evidence Submitted to the Tribunal in Connection with the Indictments of Marinić Zoran and of Kupreškić Zoran and others";
10. "K. Rule 61 Materials"; [page 3]
11. "L. Databases";
12. Discovery of materials covered in Sub-rule 66(B) of the Rules

The arguments of the parties in respect of each of the points included in the request should now be reviewed.

1. "B. Statements of the Accused":

3. In its Motion, the Defence bases its request that the Prosecution procedure all the prior statements of the accused (both written and oral, in letter or computer form) which have been collected since the accused has been in the custody of the Tribunal on Sub-rule 66(A) of the Rules. Furthermore, in its Reply, it includes the statements taken not only by the Prosecution but also those from other sources.

In her Response, the Prosecutor claims that the term "statement" must be interpreted narrowly as the official statements given under oath or, at least, signed and recognised by the accused as an exact and precise interpretation. The Prosecutor asserts that she does not have such statements and, in addition, considers that all the written letters, notes, books, orders or other documents written by the accused which he produced are not statements of the accused obtained by the Prosecutor. She therefore contends that they are not covered by Sub-rule 66(A) and need not be disclosed to the Defence.

2. "C. Witness Statements":

4. Basing its argument on the same grounds, the Defence also requests the production of all the witness statements as well as the memoranda of interviews of those witnesses, whether or not collected by the Office of the Prosecutor. Should the Prosecutor fail to satisfy this obligation, the Defence submits that the witnesses in question not be permitted to testify before the Trial Chamber. In her Response, the Prosecutor considers that the Defence request goes further than the scope of application of Rule 66 but states, however, that, pursuant to the requirements of Rule 68, she is prepared to disclose to the Defence any information which might raise questions as to the credibility of a witness. [page 4]

5. The Defence replies that if the Trial Chamber does not order the Prosecution to produce "as soon as possible" the items covered in Rule 68, it should, in the alternative, require discovery of the witness statements in the possession of the Prosecutor within ten days. It should further bar from appearing those witnesses, whose statements, which the Prosecution also has in its possession, will have not been disclosed or about which the Prosecution will have learned subsequently.

3. "D. List of Prosecution Witnesses":

6. The Defence requests that the Prosecution produce the list of the witnesses which it intends to call [illegible].

7. In her Response, the Prosecutor claims that she has produced the list as quickly as possible.

8. The Defence replies that the Prosecutor has not complied with her obligation as stipulated in Rule 67 of the Rules and requests that the Trial Chamber require that this list be produced within ten days and that, should a prosecution witness whose name does not appear on the list appear before the Trial Chamber, his testimony should not be admitted.

4. "E. Evidence Submitted in Support of the Indictment":

9. The Defence has requested production of all material submitted in support of both the initial and amended indictments. In its Reply, it states that material has been provided and that it will attempt to resolve any issues which might remain directly with the Prosecution.

[illegible]

5. "Exculpatory Evidence":

10. Pursuant to the provisions of Rule 68 of the Rules, the Defence requests disclosure of the exculpatory evidence in the possession of the Prosecutor and discovery of the nature and location of all exculpatory evidence known to the Prosecutor but not in her possession.

11. The Prosecutor recalls that on 14 and 18 November and 5 December 1996, she turned over voluntarily exculpatory evidence. In accordance with the *Delalić* decision, [page 5] she also asserts that, in addition presenting mere speculation, the accused must demonstrate a *prima facie* showing that the evidence is in the custody or control of the Prosecutor. The Prosecutor, however, states that she has complied and that she is prepared to comply in the future with the positive obligation stipulated in Rule 68.

12. Basing its arguments also on the *Delalić* decision[1], in its Reply, the Defence expands on the interpretation to be given to the obligation. In its opinion, the Prosecutor must turn over the required evidence, deny that she has it in her possession or admit that she does have it but refuses to disclose it on the grounds of its not being material to the Defence, a condition required in Sub-rule 66(B). In the case at hand, the Defence considers that the Prosecutor has the obligation to review her files to search for such evidence and that, should she not disclose it, appropriate sanctions should be imposed on her.

[illegible]

[1] Decision on the application of the accused Zejnil Delalić for disclosure of evidence. *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, 26 September 1996, Case no. IT-96-21-T.

6. "G. Lack of Evidence":

8. The Defence requests the Prosecutor to acknowledge that she lacks evidence in respect of certain points of the indictment. Such a lack of inculpatory evidence constitutes exculpatory evidence.

The Prosecutor objects to the request and considers that the issue must be resolved on the merits.

7. "H. Evidence Gathered and Provided to the Prosecution by Bosnia and Herzegovina":

9. The Defence, pursuant to Rule 8 of the Rules, requests the right to review the evidence provided to the Prosecutor by Bosnia and Herzegovina in order to ensure that it has not been improperly obtained.

The Prosecutor considers that the purpose of this request is to circumvent the Defence's reciprocal discovery obligation, as set forth in Sub-rule 67(C), while providing it with access to information which she has collected. She asserts that this issue must be reviewed on the merits. **[page 6]**

8. "I. Evidence in Connection with the Indictment of Ivica Rajić":

10. The Defence requests production of all materials submitted to the Tribunal in support of the indictment against Ivica Rajić. Whereas Ivica Rajić is accused of crimes allegedly committed in General Blaškić's zone of command, the indictment against him contains no counts relating to those crimes.

The Prosecutor states that this request conflicts with her power to assess the appropriateness of prosecution and the confidentiality of the evidence.

9. "J. Evidence in Connection with the Indictment of Zoran Marinić and Zoran Kupreškić".

11. The Defence requests production of all the materials in support of the indictments against Zoran Martinićand Zoran Kupreškić insofar as the materials might prove exculpatory as to be accused.

The Prosecutor objects to this request for the reasons already presented under Item 8.

10. "K. Rule 61 Materials":

12. The Defence requested the discovery of all the documents submitted or presented to the Trial Chamber in connection with the Rule 61 proceedings in this matter. It amended its request during the hearing of 19 December 1996 by relating it to the Rajić case which was also heard pursuant to Rule 61.

11. "L. Databases":

13. Basing its request on the provisions of Article 21 of the Statute, the Defence requests access to the Prosecutor's databases.

The Prosecutor objects to this request and *inter alia* refers to the risk of the Defence's having access to sensitive matters pertaining to other investigations.

In its Reply, the Defence proposes recourse to an ombudsman who would review the exculpatory material contained in the Prosecutor's databases. **[page 7]**

12. Nullity of the provisions restricting the right of the accused to review the evidence against him and the disclusre of the materials indicated in Sub-rule 66(B).

14. The Defence requests that the Prosecutor be ordered to provide forthwith all the materials described in Sub-rule 66(B) of the Rules without a reciprocal discovery obligation being imposed. In respect of this, it states that the provisions of the Rules which provide for this obligation run contrary to customary international law and are hence void.

In her Response, the Prosecutor considers that the provisions are consistent with the proper administration of justice and the right to a fair trial. **[page 8]**

ANALYSIS

The Trial Chamber will first deal with points 1 to 11, that is, points B to L, above.

In this connection, during the hearings, the Trial Chamber noted the points of agreement on some questions and ruled at the bench on several contested points relating to other requests.

The Trial Chamber will first indicate the points of agreement and those on which it ruled.

It will then consider the points still pending.

Lastly, it will deal with point 12 of the Motion.

The motions which in the current case no longer present difficulties

The requests on which an agreement was noted by the Trial Chamber:

These are points E and K.

a) Evidence submitted to the Tribunal in support of the indictment (Point E):

The Trial Chamber notes that the Defence has stated that the discovery obligation has, to date, been satisfied although the Defence still reserves the right to review in detail the materials it has received[2]. It notes the intention demonstrated by the Prosecutor to meet her obligation in the future.

b) Rule 61 Materials (Point K): **[page 9]**

The Prosecutor, with the agreement of the Defence, recalls that no Rule 61 hearing was held in this

Motions on which the Trial Chamber ruled at the bench:

These concern points D, G, I and J.

a) List of Prosecution Witnesses (Point D):

Disclosure of the names of the prosecution witnesses is provided for in Sub rule 67(A) which on this matter:

Rule 67
Reciprocal Disclosure

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) the Prosecutor shall notify the defence of the names of the witnesses that he intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-rule (ii) below;

[2] French version of the provisional transcript of the hearing of 19 December 1996, p. 19, Case no. IT-95-14-T, *The Prosecutor v. Tihomir Blaškić*.

21. The Defence recognises that, to date, the identify of over one hundred prosecution witnesses has been transmitted to it but that he has not actuelly received a list in support of the initial indictment and thus of the amended indictment of 22 November 1996.

The Prosecution intends to disclose to the accused as soon as possible a list of the witnesses it plans to call.

22. The Trial Chamber would note that the dispute concerns both the notion of a list and the moment when such a list must be disclosed.

The Trial Chamber notes that Sub-rule 67(A) does not refer to an official list. However, by stipulating that the Prosecution has the obligation to inform the Defence of the names of the prosecution witnesses "as early as reasonably practicable and in any event prior to the commencement of the trial", the Rules support the idea that all the names of the prosecution **[page 10]** witnesses must be disclosed at the same time in a comprehensive document which thus permits the Defence to have a clear and cohesive view of the Prosecution's strategy and to make the appropriate preparations.

The Trial Chamber therefore orders that all the names of the prosecution witnesses shall be disclosed by 1 February 1997 at the latest, unless there are additions or supplements which, in any case, shall be limited to any possible new developments in the investigation and which must never result in the rights of the Defence being circumvented.

b) Lack of Evidence (Point G):

23. The Defence contends that the lack of evidence may be considered as exculpatory and therefore covered by the provisions of Rule 68 of the Rules which states:

Rule 68
Disclosure of Exculpatory Evidence

> The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

In point F, the Defence raised the issue of disclosure of the exculpatory evidence as stipulated in Rule 68 of the Rules. This point will be considered below in view of the arguments developed by the parties at the hearing.

24. As relates more specifically to the question of knowing whether the lack of inculpatory evidence may be considered as part of the administration of exculpatory evidence as presented in Rule 68 of the Rules, the Defence requests that the Prosecution authorise it to raise this argument at trial, in particular as regards the following points:

– the absence of any proof that the accused was physically present at the locations where attacks were carried out against civilians or property protected by the Geneva Conventions; **[page 11]**
– the absence of any written or verbal orders or directives from the accused to commit acts which violate the Geneva Conventions;
– the absence of any electronic interception of messages demonstrating that the accused exercised command and control powers or that he issued any orders or directives to attack persons or property protected by the Geneva Conventions.

25. The Trial Chamber need only note that the Prosecutor has no intention of agreeing with the Defence on this point. The Trial Chamber, in fact, concurs with the Prosecution's argument that the time and place to raise the possible question of the lack of evidence can only be at the trial on the merits. Possible evaluation of the exculpatory nature of this lack of evidence can take place at that time only. The Defence motion on this point therefore is, as such, denied.

c) Evidence in the Prosecutor's possession submitted to the Tribunal in connection with the indictment of Ivica Rajić (Point I):

26. The Defence requests the production of all evidence transmitted to the Tribunal in support of the indictment of Ivica Rajić who has been charged with crimes allegdly committed within the accused's geographic zone of command. The Defence considers that the indictment of General Blaškić contains none of the crimes that Rajić is alleged to have committed and therefore draws the conclusion, which forms the basis of its request, that if the accused who is being prosecuted on the grounds of command responsibility is not charged with some of the crimes allegedly committed by Rajić in his geographic zone of command, it is entitled to demand the production of exculpatory evidence culled from that indictment. This would allow the Defence to demonstrate that the responsibility for other crimes alleged to have been committed in that same zone of command was mistakenly ascribed to the accused.

27. The Prosecution points out that the Prosecutor derives her sovereign and independent decision-making power in respect of prosecution and charges by the Tribunal from the Statute and the Rules. This power was exercised appropriately in the *Rajić case* and in the case at hand. The Prosecutor considers that the mere fact of not having ascribed to the accused crimes supposedly committed by Rajić does not **[page 12]** give the Defence the right to inspect the case file on the accused or "to go fishing" through all the files in a search for potentially exculpatory evidence.

Furthermore, the Prosecution commits itself to disclosing to the Defence either at present or at trial all the exculpatory materials relative to the accused which might be found in the *Rajić* case-file.

28. The Trial Chamber concurs with the position of the Prosecutor and would point out her sovereign power of evaluation as to the appropriateness of initiating prosecution and issuing indictments which devolves on her by virtue of the Statute of the Tribunal. From this derives the principle of the independence of prosecution cases in respect of one another, conditional on the possibility, which always exists, of a joinder of crimes as provided for in Rule 48 of the Rules.

It is all the more impossible to grant to the Defence the right of inspection which it requests in the *Rajić case* – a right of inspection which, moreover, it interprets very broadly – because so doing would risk disclosing confidential information, not strictly required for General Blaškić's defence, which concerns another accused who is a fugitive from international justice and for whom the prosecutorial proceedings have not reached the same stage of development.

The Trial Chamber finds many provisions in the Rules which protect the confidentiality of certain information. In respect of protection of evidence, one need merely refer to the provisions of Sub-Rule 66(C) and Rules 69 and 70. In such cases, the power to order disclosure always rests with the Trial Chamber.

Finally, it should be emphasised that the objective which the Defence is seeking in its motion – not the ultimate in and of itself – may be reached by other means:

– by reminding the Prosecutor of her obligations in respect of disclosure of exculpatory evidence (Rule 68) obligations which must be satisfied under the authority and control of the Trial Chamber. **[page 13]**

– by indicating that, at any stage of the proceedings, and, more specifically, at trial, the Defence may request that the Trial Chamber produce evidence taken from the *Rajić* proceedings which, in the Defence's view, might serve as exculpatory for the accused. This right however is subject to the two fold condition that the production of the materials not be protected by confidentiality at the time of the request and that the Defence present *a prima facie* case which would allow the Trial Chamber to evaluate the exculpatory nature of the materials whose production is being requested.

d) Evidence in connection with the Indictments of Zoran Marinić and of Zoran Kupreškić (Point J):

30. As regards a request analogous to the previous one, the Trial Chamber opts for the same solution; it reminds the Prosecutor of her obligations under Rule 68 and reserves for itself the right to raise the question at trial under the same conditions as those specified above.

B. Points still pending:

31. The hearings have brought out remaining points on which agreement has not been reached. These were identified in the initial Motion of the Defence as follows:

B. Statements of the Accused,
C. Witness Statements;
F. Exculpatory Evidence;
H. Evidence Gathered by Bosnia and Herzegovina;
L. Databases.

The legal character of the arguments between the parties permits the Trial Chamber to group together, first, points B and C and, second, points F and L.

The Trial Chamber will deal separately with point H and then review the request seeking the nullification of the provisions limiting the right of the accused to examine the inculpatory evidence and the disclosure of the documents referred to in Sub-rule 66(A). [page 14]

I. Statements of the Accused and the Witnesses

32. The disagreement revolves around the interpretation which should be given to Sub-rule 66(A) of the Rules:

Rule 66
Disclosure by the Prosecutor

(A) The Prosecutor shall make available to the defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses. The final version of the statement of the accused or from prosecution witnesses. The final version of the statement of the accused or a witness audiorecorded at the time of the interview, as well as a translation into one of the working languages of the Tribunal, shall be provided to the defence.

The question is two-fold: it concerns both the source of the statements and their form.

– Must the statements (of the accused or the witnesses) come only from the Office of the Prosecutor and have been collected only by her?

– Must the statements be "official", that is, given under oath or at least "signed and recognised by the accused" (or the witnesses)?

33. In order to answer each of the questions, both parties referred to previous decisions rendered by the Tribunal in the *Tadić*[3] and *Delalić*[4] *cases*.

[3] English version of the provisional transcript of the hearing of 24 October 1996, morning, p. 5673, Case no. IT-96-[illegible]

[4] See Decision of 26 September 1996, Case no. IT-96-21-T, note 1.

34. In this instance, the reference to the *Tadić case* is not relevant. The disagreement, in fact, concerned only one letter which, is it true, was not admitted as a statement of the accused, but by not admitting it, the Trial Chamber has merely endorsed the agreement of the parties.

35. The precedent set by the *Delalić case* however must be considered. Asked to render an opinion on an analogous disagreement concerning the interpretation of Sub-Rule 66(A), Trial Chamber II stated on this specific point which is of interest to us that [page 15]"this part of the Rule [66] requires the Prosecution to disclose all statements of the accused that it has in its possession. This is a continuing obligation[5]."

36. A literal reading of the Rules does not permit a different interpretation because such would restrict the rights of the accused as expressly indicated in Article 21 of the Statute.

37. The reference to the legal standards in effect in developed legal systems – such as those of the United States or France – leads to the same conclusion, namely, that the accused must have access to his own statements no matter how the Prosecution has obtained them.

38. In this respect, it should be noted that Article 16 (a) (1) (A) of the United States Criminal Code whose wording is very similar to that of Rule 66, states:

"Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government."

39. Although in French criminal proceedings the issue does not arise in the same terms because an investigation (*instruction*) is conducted by a specialised judge seeking exculpatory or inculpatory material, the principle posited by the French Code of Criminal Procedure still remains full disclosure of information at all times (See *inter alia* Article 114, paragraph 3 of that Code)[6].

40. The case-law of both those countries has not restricted the scope of the provisions which are mainly protective of the rights of the accused.

41. The principles identified in support of the interpretation of Sub-rule 66(A) lead the Trial Chamber to the decision that all the previous statements of the accused [page 16] which appear in the Prosecutor's file, whether collected by the Prosecution or originating from any other source, must be disclosed to the Defence immediately.

42. The same interpretation of Sub-rule 66(A) leads the Trial Chamber to draw no distinction between the form or forms which these statements may have. Moreover, nothing in the text permits the introduction of the distinctions suggested by the Prosecution between "the official statements taken under oath or signed and recognised by the accused" and the others.

43. Furthermore, the Trial Chamber considers that the same criteria as those identified in respect of the accused's previous statements must apply *mutatis mutandis* to the previous statements of the witnesses mentioned indicated in Sub-rule 66(A).

44. Nonetheless, the Trial Chamber subjects its decision to two conditions:

45. The first derives from Sub-rule 66(C) which permits the Prosecutor to apply to the Trial Chamber to [illegible] the obligation to disclose evidence which may prejudice further or ongoing investigations or be contrary to the public interest or affect the security interests of any State;

[illegible] p. 15.

[6] Article 114, para. 3 of the CCP: "The information shall be made available to the attorneys four working days at the latest [illegible] each time the person being held in custody is questioned or after each time the *partie civile* (plaintiff) is questioned. After the first appearance of the person being detained or the first time the *partie civile* (plaintiff) is questioned, the information is also made available to the attorneys during working days, subject to the requirements of the proper operation of the investigating [illegible]" (unofficial translation).

– the second is based on Sub-rule 70(A) which provides an exception from the disclosure obligation for reports,memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case.

40. The Trial Chamber considers that this provision is applicable to the decision at hand.

It therefore finds that the notes of the investigations (stipulated in C1 of the Defence Motion of 26 November 1996) as well as the internal reports at the Office of the Prosecutor from any expert witness (stipulated in C4 of that same Motion) must fall within the scope of Sub-rule 70(A) and not be the subject of any disclosure or exchange. The books, articles, biographies or prior testimony of those same expert [page 17] witnesses (stipulated in C4 of the Motion) must be considered as public property and need not be disclosed.

41. Lastly, in respect of the request specified in C5 which covers "all reports, affidavits, or written statements prepared by any Tribunal investigator who will testify at trial...", the Trial Chamber considers that the time is not ripe to rule on this point and reserves its decision for the trial on the merits.

2. Exculpatory Evidence (Points F and L):

Rule 68 of the Rules states:

Rule 68
Disclosure of Exculpatory Evidence

The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

As indicated above, on the basis of this Rule, the Defence asked for:

1) disclosure of all exculpatory evidence in the possession of the Prosecution;

2) disclosure of the nature and location of all exculpatory materials of which it has knowledge but which are not in its possession.

In its Motion, the Defence produces a detailed exhaustive list of 12 points, no. 1 sub-divided into 12 sub points and no. 2 into 26 sub-points, that is, a total of 50 types of materials it considers potentially exculpatory for the accused.

In its Motion, the Defence asserts that it knows of the existence of, or has reasons to believe that the Prosecutor possesses, exculpatory evidence which she has not disclosed.

44. It should be first noted that, in respect of the facts, the Defence claims that several of its specific motions were either ignored or specifically rejected by the [page 18] Prosecution; the Prosecution, however, refers to several instances of disclosure which it made, specifically, in November and December 1996.

45. The general problem stemming from this disagreement gives rise to several questions:

– Does the Prosecution have in its possession all or some of the materials listed by the Defence? Does it have the obligation to respond to the Defence? Must it specify that the materials it would admit to possessing might be considered exculpatory for the accused? What would be the sanction imposed should it fail to honour its obligation?

– Does the Defence which does not base its Motion on Sub-rule 66(B) – which would entail the obligation of mutual disclosure as required by Sub-rule 67(C) – have a general and unilateral right to inspect the Prosecutor's file by demanding and obtaining extensive and unrestricted disclosure? If the Defence is not accorded such a right, can one determine which criteria permit the accused to gain

knowledge of the materials which might wholly or partially exonerate him without prejudicing the rights which are inherent to prosecution?

46. These two questions and their corollaries cause the Trial Chamber to question the scope of Rule 68 of the Rules and the procedures for implementing its provisions.

47. There is no doubt that the obligation to disclose evidence which might exculpate the accused is the responsibility of the Prosecutor alone, if for no other reason than the fact that she is the one in possession of the materials.

Seen from this perspective, in respect of all the materials mentioned by the Defence, the Prosecutor must state:

– whether the materials are in fact in her possession;

– whether the materials contain exculpatory evidence;

– whether she believes that although she does possess exculpatory materials, Sub rule 66(C) or any other relevant provision require that their confidentiality be protected. [page 19]

The Trial Chamber does not consider it sufficient that the Prosecutor declares that she "recognises her obligations under the Rule and has complied with them."[7]

Taking into account not only the fact that the trial will soon commence but also the material constraints with which the Prosecutor will be confronted, the Trial Chamber orders her to respond to the Defence as quickly as possible, by 14 February 1997 at the latest. If necessary, the Trial Chamber will exert its control over the proper application of this decision.

48. Does the mean, however, that a general right of access to the Prosecutor's files should be granted to the Defence? If the Trial Chamber ordered disclosure of all the requested documents and exhibits to the Defence without setting into place procedures for implementing the order, that general right would be the indirect result.

It is true that although Rule 68 places the burden of unrestricted obligation on the Prosecutor through the general nature of its wording – "disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused" –, as a corollary, it grants a right to the Defence which is itself unrestricted.

49. The Trial Chamber, however, chooses not to go down this path.

First, this is because the Statute and the Rules define the respective rights of the parties – the Prosecution and the accused – *inter alia* in respect of disclosure of the evidence for which the Tribunal must ensure balanced respect.

Next, because the Defence has confronted it with so broad a request and such a general "right of inspection," the Trial Chamber must only draw the parallel between Rule 68 and Sub-rule 66(B) of the Rules.

Rule 66
Disclosure by the Prosecutor [page 20]

(B) The Prosecutor shall on request, subject to Sub-rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

[7] Response of the Prosecutor, p. 15.

To be sure, the Defence has clearly stated that its request does not fall within the ambit of this rule and thus evades its discovery obligation to the Prosecutor which would derive through the application of Sub-rule 67(C).

Nevertheless, the border between the evidence referred to in Sub-rule 66(B), identified as "material to the preparation of the defence," and the evidence identified as that which "in any way tends to suggest the innocence or mitigate the guilt of the accused" is tenuous. There can be no doubt that the first necessarily includes the second.

The Trial Chamber would point out however that it has the responsibility of ensuring that the balance of the respective rights of the parties in this matter be honoured.

Thus, if the Trial Chamber notes that the Defence does not wish to honour the need for balanced reciprocal disclosure provided for in Sub-rules 66(B) and 67(C), it must then be particularly vigilant as to limiting the nature and extent of the request for exculpatory evidence from the Prosecutor's file because the accused has made such a scrutinising request compelling her to produce evidence.

As regards Sub-rule 66(B), like Trial Chamber II in the *Delalić* decision – to which, moreover, both parties have referred – which demanded that the Defence demonstrate the existence of the presumption of the Defence's need to obtain the various pieces of evidence, this Trial Chamber also considers that, after having previously shown that they were in the possession of the Prosecutor, the Defence must present a *prima facie* case which would make probably the exculpatory nature of the materials sought.

50. In conclusion, it is the decision of the Trial Chamber that: **[page 21]**

1. The Prosecution alone is responsible for disclosing to the Defence the evidence which might exculpate the accused fully or partially. It is responsible for doing so under the control of the Trial Chamber which will duly respond to an established failure to comply, particularly at the trial.

2. If the Prosecution fulfils its above indicated obligations but the Defence considers that evidence other than that disclosed might prove exculpatory for the accused and is in the possession of the Office of the Prosecutor, it must submit to the Trial Chamber all *prima facie* proofs tending to make it likely that the evidence is exculpatory and is in the Prosecutor's possession. Should it not present this *prima facie* proof to the Trial Chamber, the Defence will not be granted its request to have the evidence disclosed. In addition, depending on the breadth of the request, the Defence risks having its request interpreted as being subject to Sub-rule 66(B) and thus being subject to the burden of its obligation under Sub-rule 67(C).

51. As regards the Defence motion in respect of the disclosure of the databases (Point L), the Trial Chamber notes a certain evolution in the arguments of the Defence. In its latest arguments, the Defence continues to request that the Office of the Prosecutor open access to the databases but concedes that the disclosure may be made under the authority of an ombudsman designated by the Trial Chamber.

In support of its argument, the Defence states that exculpatory evidence most likely appears on electronic media and that if it did not receive that material, a dangerous imbalance contrary to Article 21 of the Statute of the Tribunal would be created to its detriment.

The Prosecution responds that this is a request for the right "to rummage through (her) electronic database" and that the accused is thus seeking to obtain the benefit of Sub-rule 66(B) while at the same time attempting to avoid her concomitant obligation under Sub-rule 67(C).

52. The Trial Chamber would note that the disagreement is formulated in the same terms as those on the question which has just been dealt with regarding the exculpatory evidence: the legitimate concern of the Defence to have disclosed to it all **[page 22]** the potentially exculpatory evidence and the protection of the right to proceed with the prosecution.

It would note that the Defence is conscious that its request is extraordinary by the fact that it is also requesting the designation of an ombudsman.

53. The position of the Trial Chamber is the same as the one it adopted regarding the exculpatory evidence, and it considers that there is no need for such a designation.

3. Evidence Gathered and Provided to the Prosecution by BiH

54. The dispute between the parties centres on how reliable the evidence gathered and provided to the Prosecution by Bosnia and Herzegovina should be considered. Referring to what happened in the *Tadić case* during the testimony of Witness "L", the Defence expresses its concern that the evidence which that country submitted was wholly or partly obtained by completely fabricated or coercive means or are the result of some other abuse.

55. The Trial Chamber considers that at this stage of the proceedings the Defence is not in a position to ascribe such intrigues to Bosnia and Herzegovina.

It agrees with the Prosecutor that the review of the questions regarding coercion, invention or misconduct in respect of evidence submitted to the Prosecutor by the Government of Bosnia and Herzegovina must take place during the trial on the merits.

4. Nullification of the provisions restricting the right of the accused to review the evidence against him and the disclosure of the materials indicated in Sub-rule 66(B)

As regards the request seeking nullification of the provisions restricting the right of the accused to review the evidence against him and the disclosure of the materials indicated in Sub-rule 66(B), the three Judges of the Trial Chamber consider that in this case they are neither qualified not competent to rule on whether the **[page 23]** provisions of the Rules of Procedure and Evidence conform to international customary law. **[page 24]**

III. DISPOSITION

FOR THE FOREGOING REASONS,

The Trial Chamber I

Ruling in Public and *inter partes*,

PURSUANT to Rules 66 and following of the Rules,

NOTES the agreement of the parties on Points E and K indicated in the Motion of the Defence,

ORDERS the Prosecutor to disclose to the Defence the list of the names of the witness which she intends to call at trial (Point D) by 1 February 1997 at the latest;

REJECTS, as the case stands, the requests in respect of the lack of evidence (Point G) and of the evidence in the Prosecutor's possession relating to the indictment of Rajić (Point I) as well as to the evidence relating to the other indictments of Marinić and Kuprešić (Point J);

ORDERS the Prosecutor to disclose to the Defence all the previous statements of the accused and the witnesses (Points B and C) except, however, for the notes of interviews of the investigators, internal reports in the Office of the Prosecutor and previous statements from any expert witness, as well as books, articles and biographies of those same witnesses;

REJECTS, as the case stands, the request for disclosure of all reports, affidavits or written statements from any investigator of the Tribunal who will testify at trial;

REMINDS the Prosecutor of her obligation pursuant Rule 68 of the Rules in respect of exculpatory evidence, whether in document or written from or included in the databases, and orders that for all evidence mentioned by the Defence the Prosecutor shall state whether or not she in fact has that evidence

5. *Prosecutor v Barayagwiza*, "Prosecutor's Request for Review of Reconsideration-Separate opinion of Judge Shahabuddeen", March 31 2000.

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International Criminal Tribunal for Rwanda
In the Appeals Chamber

JEAN BOSCO BARAYAGWIZA
v.

THE PROSECUTOR

ICTR-97-19-AR72

Decision of: 31 March 2000

DECISION (PROSECUTOR'S REQUEST FOR REVIEW OR RECONSIDERATION)

Counsel for Jean Bosco Barayagwiza: Ms Carmelle Marchessault, Mr David Danielson

Counsel for the Prosecutor: Ms Carla Del Ponte, Mr Bernard Muna, Mr Mohamed Othman, Mr Upawansa Yapa, Mr Sankara Menon, Mr Norman Farrell, Mr Mathias Marcussen

Before: Presiding Judge Claude Jorda, Judge Lal Chand Vohrah, Judge Mohamed Shahabuddeen, Judge Rafael Nieto-Navia, Judge Fausto Pocar

Registrar: Mr Agwu U Okali

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seised of the """"Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber's Decision Rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. the Prosecutor and Request for Stay of Execution" filed by the Prosecutor on 1 December 1999 ("the Motion for Review").

2. The decision sought to be reviewed was issued by the Appeals Chamber on 3 November 1999 ("the Decision"). In the Decision, the Appeals Chamber allowed the appeal of Jean-Bosco Barayagwiza ("the Appellant") against the decision of Trial Chamber II which had rejected his preliminary motion challenging the legality of his arrest and detention. In allowing the appeal, the Appeals Chamber dismissed

the indictment against the Appellant with prejudice to the Prosecutor and directed the Appellant's immediate release. Furthermore, a majority of the Appeals Chamber (Judge Shahabuddeen dissenting) directed the Registrar to make the necessary arrangements for the delivery of the Appellant to the authorities of Cameroon, from whence he had been originally transferred to the Tribunal's Detention Centre.

3. The Decision was stayed by Order of the Appeals Chamber [FN1] in light of the Motion for Review. The Appellant is therefore still in the custody of the Tribunal.

FN1 The Decision was first stayed for 7 days pending the filing of the Prosecutor's Motion by the Order of 25 November 1999. By Order of 8 December 1999 the stay was continued pending further order.

II. PROCEDURAL HISTORY

4. The Appellant himself was the first to file an application for review of the Decision. On 5 November 1999 he requested the Appeals Chamber to review item 4 of the disposition in the Decision, which directed the Registrar to make the necessary arrangements for his delivery to the Cameroonian authorities. [FN2] The Prosecutor responded to the application, asking to be heard on the same point [FN3], and in response to this the Appellant withdrew his request. [FN4]

FN2 Notice of Review and Stay of Dispositive Order No. 4 of the Decision of the Appeals Chamber dated 3rd November 1999

FN3 Prosecutor's Response to Appellant's Notice of Review and Stay of Dispositive Order No. 4 of the Appeals Chamber Decision rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. the Prosecutor, filed on 13 November 1999.

FN4 Withdrawal of the Defence's "Notice of Review and Stay of Dispositive Order No. 4 of the Decision of the Appeals Chamber dated 3rd November 1999", dated on 5th November 1999, filed on 18 November 1999.

5. Following this series of pleadings, the Government of Rwanda filed a request for leave to appear as amicus curiae before the Chamber in order to be heard on the issue of the Appellant's delivery to the authorities of Cameroon. [FN5] This request was made pursuant to Rule 74 of the Rules of Procedure and Evidence of the Tribunal ("the Rules").

FN5 Request by the Government of the Republic of Rwanda for Leave to Appear as Amicus Curiae pursuant to Rule 74, filed on 19 November 1999.

6. On 19 November 1999 the Prosecutor filed a "Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999" ("the

Prosecutor's Notice of Intention") [FN6], informing the Chamber of her intention to file her own request for review of the Decision pursuant to Article 25 of the Statute of the Tribunal, and in the alternative, a "motion for reconsideration". On 25 November, the Appeals Chamber issued an Order staying execution of the Decision for 7 days pending the filing of the Prosecutor's Motion for Review. The Appeals Chamber also ordered that that the direction in the Decision that the Appellant be immediately released was to be read subject to the direction to the Registrar to arrange his delivery to the authorities of Cameroon. On the same day, the Chamber received the Appellant's objections to the Prosecutor's Notice of Intention. [FN7]

FN6 Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999 (Rule 120 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda)

FN7 Extremely Urgent Appellant's Response to the Prosecutor "Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999", filed on 24 November 1999.

7. The Prosecutor's Motion for Review was filed within the 7 day time limit, on 1 December 1999. Annexes to that Motion were filed the following day. [FN8] On 8 December 1999 the Appeals Chamber issued an Order continuing the stay ordered on 25 November 1999 and setting a schedule for the filing of further submissions by the parties. The Prosecutor was given 7 days to file copies of any statements relating to new facts which she had not yet filed. This deadline was not complied with, but additional statements were filed on 16 February 2000, along with an application for the extension of the time-limit. [FN9] The Appellant objected to this application. [FN10]

FN8 A corrigendum to the motion was filed on 20 December 1999. Corrigenda to the annexes were filed on 13 January and 7 February 2000.

FN9 Prosecutor's Motion for Extension of Time to File New Facts, corrected on 17 February 2000. The Registrar submitted a Memorandum to the Appeals Chamber from the Registrar, pursuant to rule 33(B), with regard to the Prosecutor's motion for extension of time limit to file new facts on 21 February 2000, and the Prosecutor filed a Supplement to "Prosecutor's motion for extension of time to file new facts" in response to memorandum to the Appeals Chamber from the Registrar pursuant to rule 33(B) on 22 February 2000.

FN10 Extremely urgent appellant's argument in response to the Prosecutor's 16 February 2000 motion to submit new facts in support of motion for review or reconsideration of 3 November 1999 decision, filed on 28 February 2000. The Prosecutor's reply to the "extremely urgent appellant's argument in response to the Prosecutor's 16 February 2000 motion to submit new facts in support of motion for review or reconsideration of 3 November decision was then filed on 7 March 2000.

8. The Order of 8 December 1999 further provided that that the Chamber would hear oral argument on the Prosecutor's Motion for Review, and that the Government of Rwanda might appear at the hearing as amicus curiae with respect to the modalities of the release of the Appellant, if that question were reached. The Government of Rwanda filed a memorial on this point on 15 February 2000. [FN11]

FN11 Memorial amicus curiae of the Government of the Republic of Rwanda pursuant to Rule 74 of the Rules of Procedure and Evidence.

9. On 10 December 1999 the Appellant filed four motions: challenging the jurisdiction of the Appeals Chamber to entertain the review proceedings; opposing the request of the Government of Rwanda to appear as amicus curiae; asking for clarification of the Order of 8 December and requesting leave to make oral submissions during the hearing on the Prosecutor's Motion for Review. [FN12] The Prosecutor filed her response to these motions on 3 February 2000. [FN13]

FN12 Extremely Urgent Motion of the Defence Challenging the Jurisdiction of the Appeals Chamber to Entertain the Review Proceedings; Extremely Urgent Motion of the Defence in Opposition to the Request by the Government of the Republic of Rwanda for Leave to Appear as Amicus Curiae Pursuant to Rule 74; Extremely Urgent Motion of the Defence for the Clarification and Interpretation of the Appeals Chamber Order of 8 December 1999; Extremely Urgent Motion of the Defence for the Appellant to Give Oral Testimony During the Hearing of the Review on Facts of his Illegal Detention as Proved in the Decision of 3rd November 1999.

FN13 The Prosecutor's Consolidated Response to Four Defence Motins Filed on 10 December 1999, Following the Order of the Appeals Chamber dated 8 December 1999.

10. On 17 December 1999, the Appeals Chamber issued a Scheduling Order [FN14] clarifying the time-limits set in its previous Order of 8 December 1999 and on 6 January 2000 the Appellant filed his response to the Prosecutor's Motion for Review.

FN14 Filed on 21 December 1999

11. Meanwhile, the Appellant had requested the withdrawal of his assigned counsel, Mr. J.P.L. Nyaberi, by letter of 16 December 1999. The Registrar denied his request on 5 January 2000, and this decision was confirmed by the President of the Tribunal on 19 January 2000. [FN15] The Appellant then filed a motion before the Appeals Chamber insisting on the withdrawal of assigned counsel, and the assignment of new counsel and co-counsel to represent him with regard to the Prosecutor's Motion for Review. [FN16] The Appeals Chamber granted his request by Order of 31 January 2000. In view of the change of counsel, the Appellant was given until 17 February 2000 to file a new response to the Prosecutor's Motion for Review, such response to replace the earlier response of 6 January 2000. The Prosecutor was given four further days to reply to any new response submitted. Both these documents were duly filed. [FN17]

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FN15 Decision on Review in Terms of Article 19(E) of the Directive on Assignment of Defence Counsel

FN16 Requête en extreme urgence en vue du retrait du conseil J.P. Lumumba Nyaberi de la défense de Jean-Bosco Bnarayagwiza (art.20.4,d du Statut; art.45, 45bis, 73, 107 du Règlement), filed on 26 January 2000.

FN17 Appellants' response to Prosecutor's motion for review or reconsideration of the Appeals Chamber decision rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. the Prosecutor and request for stay of execution, and Prosecutor's reply to the appellant's response to the Prosecutor's motion for review or reconsideration of the Appeals Chamber decision rendered on 3 November 2999 in Jean-Bosco Barayagwiza v. the Prosecutor and request for stay of execution, respectively.

12. The oral hearing on the Prosecutor's Motion for Review took place in Arusha on 22 February 2000.

III. APPLICABLE PROVISIONS

A. The Statute

Article 25: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

B. The Rules

Rule 120: Request for Review

Where a new fact has been discovered which was not known to the moving party at the tine of the proceedings before a Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber, if it can be reconstituted or, failing that, to the appropriate Chamber of the Tribunal for review of the judgement.

Rule 121: Preliminary Examination

If the Chamber which ruled on the matter decides that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber

shall review the judgement, and pronounce a further judgement after hearing the parties.

IV. SUBMISSIONS OF THE PARTIES

A. The Prosecution Case

13. The Prosecutor relies on Article 25 of the Statute and Rules 120 and 121 of the Rules as the legal basis for the Motion for Review [FN18]. The Prosecutor bases the Motion for Review primarily on its claimed discovery of new facts [FN19] . She states that by virtue of Article 25, there are two basic conditions for an Appeals Chamber to reopen and review its decision, namely the discovery of new facts which were unknown at the time of the original proceedings and which could have been a decisive factor in reaching the original decision [FN20] . The Prosecutor states that the new facts she relies upon affect the totality of the Decision and open it up for review and reconsideration in its entirety. [FN21]

FN18 Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution, filed on 1 December 1999 at § 1.

FN19 Brief in Support of the Prosecutor's Motion for Review of the Appeals Chamber Decision rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor Following the Orders of the Appeals Chamber dated 25 November 1999, at §§ 45 and 46.

FN20 Ibid., at § 48.

FN21 Ibid., at § 46.

14. The Prosecutor opposes the submission by the Defence (paragraph 27 below), that Article 25 can only be invoked following a conviction. The Prosecutor submits that the wording "persons convicted... or from the Prosecutor" provides that both parties can bring a request for review under Article 25, and not that such a right only arises on conviction. The Prosecutor submits that there is no requirement that a motion for review can only be brought after final judgement. [FN22]

FN22 Transcript of Hearing in Arusha on 22 February 2000 ("Transcript") at pages 248 et seq. See also, Prosecutor's Reply to the Appellant's Response to the Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution ("Reply"), filed on 21 February 2000, at §§ 5-15

15. The "new facts" which the Prosecutor seeks to introduce and rely on in the

Motion for Review fall, according to her, into two categories: new facts which were not known or could not have been known to the Prosecutor at the time of the argument before the Appeals Chamber; and facts which although they "may have possibly been discovered by the Prosecutor" at the time, are, she submits, new, as they could not have been known to be part of the factual dispute or relevant to the issues subsequently determined by the Appeals Chamber. [FN23] The Prosecutor in this submission relies on Rules 121, 107, 115, 117, and 5 of the Rules and Article 14 of the Statute. The Prosecutor submits that the determination of whether something is a new fact, is a mixed question of both fact and law that requires the Appeals Chamber to apply the law as it exists to the facts to determine whether the standard has been met. It does not mean that a fact which occurred prior to the trial cannot be a new fact, or a "fact not discoverable through due diligence." [FN24]

FN23 Supra note 19 at § 49.

FN24 Transcript at page 253-256.

16. The Prosecutor alleges that numerous factual issues were raised for the first time on appeal by the Appeals Chamber, proprio motu, without a full hearing or adjudication of the facts by the Trial Chamber, [FN25] and contends that the Prosecutor cannot be faulted for failing to comprehend the full nature of the facts required by the Appeals Chamber. Indeed, the Prosecutor alleges that the questions raised did not correspond in full to the subsequent factual determinations by the Appeals Chamber and that at no time was the Prosecutor asked to address the factual basis of the application of the abuse of process doctrine relied upon by the Appeals Chamber in the Decision [FN26]. The Prosecutor further submits that application of this doctrine involved consideration of the public interest in proceeding to trial and therefore facts relevant to the interests of international justice are new facts on the review. [FN27] The Prosecutor alleges that she was not provided with the opportunity to present such facts before the Appeals Chamber. [FN28]

FN25 The Prosecutor alleges that these new facts arose as a result of questions asked by the Appeals Chamber in its Scheduling Order of 3 June 1999. See supra note 19 at §§ 29, 50-54, 147 and 158.

FN26 Ibid., §§ 54-55.

FN27 Ibid., § 56.

FN28 Ibid., at § 62.

17. In application of the doctrine of abuse of process, the Prosecutor submits that the remedy of dismissal with prejudice was unjustified, as the delay alleged was, contrary to the findings in the Decision, not fully attributable to the

Prosecutor. [FN29] New facts relate to the application of this doctrine and the remedy, which was granted in the Decision.

FN29 Ibid., §§ 57-62. In making this submission, the Prosecutor refers to §§ 75, 76, 86, 98-100 and 106 of the Decision.

18. The Prosecutor submits that the Appeals Chamber can also reconsider the Decision, pursuant to its inherent power as a judicial body, to vary or rescind its previous orders, maintaining that such a power is vital to the ability of a court to function properly. [FN30] She asserts that this inherent power has been acknowledged by both Tribunals and cites several decisions in support. The Prosecutor maintains that a judicial body can vary or rescind a previous order because of a change in circumstances and also because a reconsideration of the matter has led it to conclude that a different order would be appropriate. [FN31] In the view of the Prosecutor, although the jurisprudence of the Tribunal indicates that a Chamber will not reconsider its decision if there are no new facts or if the facts adduced could have been relied on previously, where there are facts or arguments of which the Chamber was not aware at the time of the original decision and which the moving party was not in a position to inform the Chamber of at the time of the original decision, a Chamber has the inherent authority to entertain a motion for reconsideration. [FN32] The Prosecutor asks the Appeals Chamber to exercise its inherent power where an extremely important judicial decision is made without the full benefit of legal argument on the relevant issues and on the basis of incomplete facts. [FN33]

FN30 Ibid., §§ 63-65.

FN31 Ibid., § 66.

FN32 Ibid., §§ 70-73.

FN33 Ibid., § 85.

19. The Prosecutor submits that although a final judgement becomes res judicata and subject to the principle of non bis in idem, the Decision was not a final judgement on the merits of the case. [FN34]

FN34 Ibid., §§ 74-80.

20. The Prosecutor submits that she could not have been reasonably expected to anticipate all the facts and arguments which turned out to be relevant and decisive to the Appeals Chamber's Decision. [FN35]

FN35 Ibid., § 84.

21. The Prosecutor submits that the new facts offered could have been decisive factors in reaching the Decision, in that had they been available in the record on appeal, they may have altered the findings of the Appeals Chamber that: (a) the period of provisional detention was impermissibly lengthy; (b) there was a violation of Rule 40bis through failure to charge promptly; (c) there was a violation of Rule 62 and the right to an initial appearance without delay; and (d) there was failure by the Prosecutor in her obligations to prosecute the case with due diligence. In addition, they could have altered the findings in the Conclusion and could have been decisive factors in determination of the Appeals Chamber's remedies. [FN36]

FN36 Ibid., §§ 86, 87.

22. The Prosecutor submits that the extreme measure of dismissal of the indictment with prejudice to the Prosecutor is not proportionate to the alleged violations of the Appellant's rights and is contrary to the mandate of the Tribunal to promote national reconciliation in Rwanda by conducting public trial on the merits. [FN37] She states that the Tribunal must take into account rules of law, the rights of the accused and particularly the interests of justice required by the victims and the international community as a whole. [FN38]

FN37 Ibid., § 146.

FN38 Ibd.i, § 181.

23. The Prosecutor alleges a violation of Rule 5, in that the Appeals Chamber exceeded its role and obtained facts which the Prosecutor alleges were outside the original trial record. The Prosecutor submits that in so doing the Appeals Chamber acted ultra vires the provisions of Rules 98, 115 and 117(A) with the result that the Prosecutor suffered material prejudice, the remedy for which is an order of the Appeals Chamber for review of the Decision, together with the accompanying Dispositive Orders. [FN39]

FN39 Ibid., §§ 147-171.

24. The Prosecutor submits that her ability to continue with prosecutions and investigations depends on the government of Rwanda and that, unless the Appellant is tried, the Rwandan government will no longer be "involved in any manner". [FN40]

FN40 Transcript at pages 27 and 28.

25. Finally, the Prosecutor submits that review is justified on the basis of the new facts, which establish that the Prosecutor made significant efforts to transfer the Appellant, that the Prosecutor acted with due diligence and that any delays did not fundamentally compromise the rights of the Appellant and would not

justify the dismissal of the indictment with prejudice to the Prosecutor. [FN41]

FN41 Ibid., at page 122 and supra note 19 at § 184.

26. In terms of substantive relief, the Prosecutor requests that the Appeals Chamber either review the Decision or reconsider it in the exercise of its inherent powers, that it vacate the Decision and that it reinstate the Indictment. In the alternative, if these requests are not granted, the Prosecutor requests that the Decision dismissing the indictment is ordered to be without prejudice to the Prosecutor [FN42].

FN42 Supra note 18 at § 7.

B. The Defence Case

27. The Appellant submits that Article 25 is only available to the parties after an accused has become a "convicted person". The Appeals Chamber does not have jurisdiction to consider the Prosecutor's Motion as the Appellant has not become a "convicted person" The Appellant submits that Rules 120 and 121 should be interpreted in accordance with this principle and maintains that both rules apply to review after trial and are therefore consistent with Article 25 which also applies to the right of review of a "convicted person" [FN43].

FN43 Appellant's Response to Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution ("Appellant's Response") filed on 17th February 2000, at §§ 1-12. Transcript at page 129 et seq. and pages 227-230.

28. The Appellant submits that the Appeals Chamber does not have "inherent power" to revise a final decision. He submits that the Prosecutor is effectively asking the Appeals Chamber to amend the Statute by asking it to use its inherent power only if it concludes that Article 25 and Rule 120 do not apply. The Appellant states that the Appeals Chamber cannot on its own create law. [FN44]

FN44 Appellant's Response at §§ 13 - 16. Transcript at page 139 et seq.

29. The Appellant submits that the Decision was final and unappealable and that he should be released as there is no statutory authority to revise the Decision. [FN45]

FN45 Appellant's Response at.§§ 17-24.

30. The Appellant maintains that the Prosecutor has ignored the legal requirements for the introduction of new facts and has adduced no new facts to justify a review of the Decision. Despite the attachments provided by the Prosecutor and held out to be new facts, the Appellant submits that the Prosecutor has failed to produce any evidence to support the two-fold requirement in the Rules that the new fact should not have been known to the moving party and could not have been discovered through the exercise of due diligence. [FN46]

FN46 Ibid., § 28.

31. The Appellant submits that the Appeals Chamber should reject the request of the Prosecutor to classify the "old facts" as "new facts" as an attempt to invent a new definition limited to the facts of this case. The Appellant maintains that the Decision was correct in its findings and is fully supported by the Record.

32. The Appellant maintains that the Prosecutor's contention that the applicability of the abuse of process doctrine was not communicated to it before the Decision is groundless. The Appellant alleges that this issue was fully set out in his motion filed on 24 February 1998 and that when an issue has been properly raised by a party in criminal proceedings, the party who chooses to ignore the points raised by the other does so at its own peril. [FN47]

FN47 Ibid., §§ 45-49.

33. In relation to the submissions by the Prosecutor that the Decision of the Appeals Chamber was wrong in light of UN Resolution 955's goal of achieving national reconciliation for Rwanda, the Appellant urges the Appeals Chamber "to forcefully reject the notion that the human rights of a person accused of a serious crime, under the rubric of achieving national reconciliation, should be less than those available to an accused charged with a less serious one". [FN48]

FN48 Ibid., §§ 51-53.

V. THE MOTION BEFORE THE CHAMBER

34. Before proceeding to consider the Motion for Review, the Chamber notes that during the hearing on 22 February 2000 in Arusha, Prosecutor Ms Carla Del Ponte, made a statement regarding the reaction of the government of Rwanda to the Decision. She stated that: "The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999." [FN49] Later, the Attorney General of Rwanda appearing as representative of the Rwandan Government, in his submissions as "amicus curiae' to the Appeals Chamber, openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review. [FN50] The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If its decision in any case should

be followed by non-cooperation, that consequence would be a matter for the Security Council. [FN51]

FN49 Transcript, pages 26-28.

FN50 Ibid., pages 290 and 291: The Attorney General representing the government of Rwanda referred to the "terrible consequences which a decision to release the appellant without a prospect of prosecution by this Tribunal or some other jurisdiction will give rise to. Such a decision will encourage impunity and hamper the efforts of Rwanda to maintain peace and stability and promote unity and reconciliation. A decision of this nature will cost the Tribunal heavily in terms of the support and goodwill of the people of Rwanda."

FN51 Rule 7bis of the Rules. See also: Prosecutor v. Tihomir Blaskic, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case no. IT-95-14-AR108 bis, 29 October 1997 at §§ 26 and 33; Prosecutor v. Dusko Tadic, Judgement, Case no. IT-94-1-A, 15 July 1999 at §51.

35. The Chamber notes also that, during the hearing on her Motion for Review, the Prosecutor based her arguments on the alleged guilt of the Appellant, and stated she was prepared to demonstrate this before the Chamber. The forcefulness with which she expressed her position compels us to reaffirm that it is for the Trial Chamber to adjudicate on the guilt of an accused, in accordance with the fundamental principle of the presumption of innocence, as incorporated in Article 3 of the Statute of the Tribunal.

36. The Motion for Review provides the Chamber with two alternative courses. First, it seeks a review of the Decision pursuant to Article 25 of said Statute. Further, failing this, it seeks that the Chamber reconsider the Decision by virtue of the power vested in it as a judicial body. We shall begin with the sought review.

A. REVIEW

1. General considerations

37. The mechanism provided in the Statute and Rules for application to a Chamber for review of a previous decision is not a novel concept invented specifically for the purposes of this Tribunal. In fact, it is a facility available both on an international level and indeed in many national jurisdictions, although often with differences in the criteria for a review to take place.

38. Article 61 of the Statute of the International Court of Justice is such a provision and provides the Court with the power to revise judgements on the discovery of a fact, of a decisive nature which was unknown to the court and party

claiming revision when the judgement was given, provided this was not due to negligence [FN52]. Similarly Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides for the reopening of cases if there is inter alia, "evidence of new or newly discovered facts" [FN53]. Finally, on this subject, the International Law Commission has stated that such a provision was a "necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal." [FN54]

FN52 Statute of the International Court of Justice as annexed to the Charter of the United Nations, 26th June 1945, I.C.J. Acts and Documents No. 5 ("ICJ Statute"). See Application for Revision and Interpretation of the Judgement of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/LibyanArab Jamahiriya) 1985 (ICJ) Rep 192.

FN53 22 November 1984, 24 ILM 435 at 436.

FN54 Report of the International Law Commission on the work of its 46th session. Official Records, 49th Session. Supplement number No.10 (A/49/10) at page 128. It should also be noted that the International Covenant on Civil and Political Rights (ICCPR) (1966) also refers to the discovery of "new or newly discovered facts" in Article 14. However it relates primarily to the right to compensation in the event that these new facts (together with other criteria) mean that a conviction is reversed or an accused pardoned.

39. In national jurisdictions, the facility for review exists in different forms, either specifically as a right to review a decision of a court, or by virtue of an alternative route which achieves the same result. Legislation providing a specific right to review is most prevalent in civil law jurisdictions, although again, the exact criteria to be fulfilled before a court will undertake a review can differ from that provided in the legislation for this Tribunal [FN55].

FN55 E.g. in Belgium Article 443 et seq. of the Code d'Instruction Criminelle provides for "Demandes en Revision"; iN sWeden, cHapter 58 of pArt 7 of the Swedish Code of Judicial Procedure (which came into force on 1 January 1948, provision cited as per amendments of the Code as of 1 January 1999) provides for the right of review; In France, Article 622 et seq. of the Code de Procédure Pénale (as amended by the law of 23 June 1989) provides for """"Démandes en Revision"; iN gErmany, sEction 359 et seq. of the gErman Code of Criminal Procedure 1987 (as amended) provides for "re-opening"; In Italy, Articles 629-647 of the Codice de Procedura Penale provides for review; and in Spain Article 954 of La Ley de Enjuiciamiento Criminal provides for "Revision".

40. These provisions are pointed out simply as being illustrative of the fact that, although the precise terms may differ, review of decisions is not a unique idea and the mechanism which has brought this matter once more before the Appeals Chamber is, in its origins, drawn from a variety of sources.

41. Returning to the procedure in hand, it is clear from the Statute and the Rules [FN56] that, in order for a Chamber to carry out a review, it must be satisfied that four criteria have been met. There must be a new fact; this new fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and it must be shown that the new fact could have been a decisive factor in reaching the original decision.

FN56 Article 25, Rules 120 and 121.

42. The Appeals Chamber of the International Tribunal for the former Yugoslavia has highlighted the distinction, which should be made between genuinely new facts which may justify review and additional evidence of a fact [FN57]. In considering the application of Rule 119 of the Rules of the International Tribunal for the former Yugoslavia (which mirrors Rule 120 of the Rules), the Appeals Chamber held that:

FN57 Prosecutor v. Dusko Tadic, Decision on Appellant's Motion for the extension of the time-limit and admission of additional evidence, Case no, IT- 94-1-A, 15th October 1998.

Where an applicant seeks to present a new fact which becomes known only after trial, despite the exercise of due diligence during the trial in discovering it, Rule 119 is the governing provision. In such a case, the Appellant is not seeking to admit additional evidence of a fact that was considered at trial but rather a new fact...It is for the Trial Chamber to review the Judgement and determine whether the new fact, if proved, could have been a decisive factor in reaching a decision". [FN58]

FN58 Ibid., at 30.

Further, the Appeals Chamber stated that-

a distinction exists between a fact and evidence of that fact. The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules. [FN59]

FN59 Ibid., at 32.

43. The Appeals Chamber would also point out at this stage, that although the substantive issue differed, in Prosecutor v. Drazen Erdemovic, [FN60] the Appeals Chamber undertook to warn both parties that "[t]he appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing". The Appeals Chamber confirms that it notes and adopts both this observation and the test established in Prosecutor v. Dusko Tadic in consideration of the matter before it now.

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FN60 Judgement, Case no IT-96-22-A, 7 October 1997 at § 15.

44. The Appeals Chamber notes the submissions made by both parties on the criteria, and the differences which emerge. In particular it notes the fact that the Prosecutor places the new facts she submits into two categories (paragraph 15 above), the Appellant in turn asking the Appeals Chamber to reject this submission as an attempt by the Prosecutor to classify "old facts" as "new facts" (paragraph 31 above). In considering the "new facts" submitted by the Prosecutor, the Appeals Chamber applies the test outlined above and confirms that it considers, as was submitted by the Prosecutor, that a "new fact" cannot be considered as failing to satisfy the criteria simply because it occurred before the trial. What is crucial is satisfaction of the criteria which the Appeals Chamber has established will apply. If a "new" fact satisfies these criteria, and could have been a decisive factor in reaching the decision, the Appeals Chamber can review the Decision.

2. Admissibility

45. The Appellant pleads that the Prosecutor's Motion for Review is inadmissible, because by virtue of Article 25 of the Statute only the Prosecutor or a convicted person may seise the Tribunal with a motion for review of the sentence. In the Appellant's view, the reference to a convicted person means that this article applies only after a conviction has been delivered. According to the counsel of the Appellant:

Rule 120 of the Rules of Procedure and Evidence is not intended for revision or review before conviction, but after ... a proper trial. [FN61]

FN61 Transcript of the hearing of 22 February 2000 ("transcript"), p.134.

As there was no trial in this case, there is no basis for seeking a review.

46. The Prosecutor responds that the reference to "the convicted person or the Prosecutor" in the said article serves solely to spell out that either of the two parties may seek review, not that there must have been a conviction before the article could apply. If a decision could be reviewed only following a conviction, no injustice stemming from an unwarranted acquittal could ever be redressed. In support of her interpretation, the Prosecutor compares Article 25 with Article 24, which also refers to persons convicted and to the Prosecutor being entitled to lodge appeals. She argued that it was common ground that the Prosecutor could appeal against a decision of acquittal, which would not be the case if the interpretation submitted by the Appellant was accepted.

47. Both Article 24 (which relates to appellate proceedings) and Article 25 of the Statute, expressly refer to a convicted person. However, Rule 72D and consistent decisions of both Tribunals [FN62] demonstrate that a right of appeal is also available in inter alia the case of dismissal of preliminary motions brought before a Trial Chamber, which raised an objection based on lack of jurisdiction. [FN63] Such appeals are on interlocutory matters and therefore by definition do

not involve a remedy available only following conviction. Accordingly, it is the Appeals Chamber's view that the intention was not to interpret the Rules restrictively in the sense suggested by the Appellant, such that availability of the right to apply for review is only triggered on conviction of the accused; the Appeals Chamber will not accept the narrow interpretation of the Rules submitted by the Appellant. If the Appellant were correct that there could be no review unless there has been a conviction, it would follow that there could be no appeal from acquittal for the same reason. Appeals from acquittals have been allowed before the Appeals Chamber of the ICTY. The Appellant's logic is not therefore correct. Furthermore, in this case, the Appellant himself had recourse to the mechanism of interlocutory appeals which would not have been successful had the Chamber accepted the arguments he is now putting forward.

FN62 i.e. the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

FN63 Rule 72(D) of the Rules. See also the additional provisions for appeal provided in Rules 65(D), 77D and 91(C) of the Rules, and in Rules 72, 73, 77(J), 65(D), 91(C) of the Rules of Procedure and Evidence of the ICTY, as pointed out in the Reply at §§ 11.

48. The Appeals Chamber accordingly subscribes to the Prosecutor's reasoning. Inclusion of the reference to the "Prosecutor" and the "convicted person" in the wording of the article indicates that each of the parties may seek review of a decision, not that the provision is to apply only after a conviction has been delivered.

49. The Chamber considers it important to note that only a final judgement may be reviewed pursuant to Article 25 of the Statute and to Rule 120 [FN64]. The parties submitted pleadings on the final or non-final nature of the Decision in connection with the request for reconsideration. The Chamber would point out that a final judgement in the sense of the above-mentioned articles is one which terminates the proceedings; only such a decision may be subject to review. Clearly, the Decision of 3 November 1999 belongs to that category, since it dismissed the indictment against the Appellant and terminated the proceedings.

FN64 In this respect, the Appeals Chamber does not agree with the Decision on the Alternative Request for Renewed Consideration of Delalic's Motion for an Adjournment until 22 June or Request for Issue of Subpoenas to Individuals and Requests for Assistance to the Government of Bosnia and Herzegovina (IT-96-21- T, 22 June 1998), which suggests that interlocutory decisions can be subject to review. The Appeals Chamber confirms that the law is as stated above.

50. The Appeals Chamber therefore has jurisdiction to review its Decision pursuant to Article 25 of the Statute and to Rule 120.

3. Merits

51. With respect to this Motion for Review, the Appeals Chamber begins by confirming its Decision of 3 November 1999 on the basis of the facts it was founded on. As a judgement by the Appeals Chamber, the Decision may be altered only if new facts are discovered which were not known at the time of the trial or appeal proceedings and which could have been a decisive factor in the decision. Pursuant to Article 25 of the Statute, in such an event the parties may submit to the Tribunal an application for review of the judgement, as in the instant case before the Chamber.

52. The Appeals Chamber confirms that in considering the facts submitted to it by the Prosecutor as "new facts", it applies the criteria drawn from the relevant provisions of the Statute and Rules as laid down above. The Chamber considers first whether the Prosecutor submitted new facts which were not known at the time of the proceedings before the Chamber, and which could have been a decisive factor in the decision, pursuant to Article 25 of the Statute. It then considers the condition introduced by Rule 120, that the new facts not be known to the party concerned or not be discoverable due diligence notwithstanding. If the Chamber is satisfied, it accordingly reviews its decision in the light of such new facts.

53. In considering these issues, the Appellant's detention may be divided into three periods. The first, namely the period where the Appellant was subject to the extradition procedure, starts with his arrest by the Cameroonian authorities on 15 April 1996 and ends on 21 February 1997 with the decision of the Court of Appeal of the Centre of Cameroon rejecting the request for extradition from the Rwandan government. The second, the period relating to the transfer decision, runs from the Rule 40 request for the Appellant's provisional detention, through his transfer to the Tribunal's detention unit on 19 November 1997. The third period begins with the arrival of the Appellant at the detention unit on 19 November 1997 and ends with his initial appearance on 23 February 1998.

(a) First period (15.4.1996 - 21.2.1997)

54. The Appeals Chamber considers that several elements submitted by the Prosecutor in support of her Motion for Review are evidence rather than facts. The elements presented in relation to the first period consist of transcripts of proceedings before the Cameroonian courts: on 28 March 1996; 29 March 1996; 17 April 1996 and 3 May 1996. [FN65] It is manifest from the transcript of 3 May 1996 that the Tribunal's request was discussed [FN66] at that hearing. The Appellant addressed the court and opposed Rwanda's request for extradition, stating that, « c'est le tribunal international qui est compétent » [FN67]. The Appeals Chamber considers that it may accordingly be presumed that the Appellant was informed of the nature of the crimes he was wanted for by the Prosecutor. This was a new fact for the Appeals Chamber. The Decision is based on the fact that:

FN65 Annexes 8, 9 and 11 to the Motion for Review.

FN66 On page 3 of the transcript of 3 May, the Public Prosecutor explains that he is waiting for "the Tribunal to send us the relevant documentation (« que le

Tribunal International nous procure les documents »).

FN67 Page 4 of the transcript.

l'Appelant a été détenu pendant une durée totale de 11 mois avant d'etre informé de la nature générale des chefs d'accusation que le Procureur avait retenus contre lui. [FN68]

FN68 Decision, §85.

The information now before the Chamber demonstrates that, on the contrary, the Appellant knew the general nature of the charges against him by 3 May 1996 at the latest. He thus spent at most 18 days in detention without being informed of the reasons therefor.

55. The Appeals Chamber considers that such a time period violates the Appellant's right to be informed without delay of the charges against him. However, this violation is patently of a different order than the one identified in the Decision whereby the Appellant was without any information for 11 months.

(b) Second period (21.2.1997 - 19.11.1997)

56. With respect to the second period, the one relative to the transfer decision, several elements are submitted to the Chamber's scrutiny as new facts. They consist of Annexes 1 to 7, 10 and 12 to the Motion for Review. The Chamber considers the following to be material:

> 1. The report by Judge Mballe of the Supreme Court of Cameroon. [FN69] In his report, Justice Mballe explains that the request by the Prosecutor pursuant to Article 40 bis was transmitted immediately to the President of the Republic for him to sign a legislative decree authorising the accused's transfer. As he sees it, if the legislative decree could be signed only on 21 October 1997 that was due to the pressure exerted by the Rwandan authorities on Cameroon for the extradition of detainees to Kigali. He adds that in any event this semi- political semi-judicial extradition procedure was not the one that should have been followed.

FN69 Annexe No 1 de la Demande en révision.

2. A statement by David Scheffer, ambassador-at-large for war crimes issues, of the United States. [FN70] Mr. Scheffer described his involvement in the Appellant's case between September and November 1997. In his statement, Mr. Scheffer explains that the signing of the Presidential legislative decree was delayed owing to the elections scheduled for October 1997, and that Mr. Bernard Muna of the Prosecutor's Office asked Mr. Scheffer to intervene to speed up the transfer. He went on to say that, subsequent to that request, the United States Embassy made several representations to the Government of Cameroon in this regard between September and November 1997. Mr. Scheffer says he also wrote to the

Government on 13 September 1997 and that around 24 October 1997 the Cameroonian authorities notified the United States Embassy of their willingness to effect the transfer.

FN70 Filed on 10 December 1999.

57. In the Appeals Chamber's view a relevant new fact emerges from this information. In its Decision, the Chamber determined on the basis of the evidence adduced at the time that "Cameroon was willing to transfer the Appellant" [FN71], as there was no proof to the contrary. The above information however goes to show that Cameroon had not been prepared to effect its transfer before 24 October 1997. This fact is new. The request pursuant to Article 40 bis had been wrongly subject to an extradition process, when under Article 28 of the Statute all States had an obligation to co-operate with the Tribunal. The President of Cameroon had elections forthcoming, which could not prompt him to accede to such a request. And it was the involvement of the United States, in the person of Mr. Scheffer, which in the end led to the transfer.

FN71 Decision, §59.

58. The new fact, that Cameroon was not prepared to transfer the Appellant prior to the date on which he was actually delivered to the Tribunal's detention unit, would have had a significant impact on the Decision had it been known at the time, given that, in the Decision, the Appeals Chamber drew its conclusions with regard to the Prosecutor's negligence in part from the fact that nothing prevented the transfer of the Appellant save the Prosecutor's failure to act:

It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the writ of habeas corpus. Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant. Rather it appears that the Appellant was simply forgotten about. [FN72]

FN72 Decision, §96 (emphasis added).

The Appeals Chamber considered that the human rights of the Appellant were violated by the Prosecutor during his detention in Cameroon. However, the new facts show that, during this second period, the violations were not attributable to the Prosecutor.

(c) Third period (19.11.1997 - 23.2.1998)

59. In her Motion for Review, the Prosecutor submitted few elements relating to the third period, that is the detention in Arusha. However, on 16 February 2000 she lodged additional material in this regard, along with a motion for deferring the time-limits imposed for her to submit new facts. Having examined the

Prosecutor's request and the Registrar's memorandum relative thereto as well as the Appellant's written response lodged on 28 February 2000 [FN73], the Appeals Chamber decides to accept this additional information.

FN73 The President of the Appeals Chamber authorised the filing of this document during the hearing of 22 February, see page 57 of the transcript.

60. The material submitted by the Prosecutor consists of a letter to the Registrar dated 11 February 2000, and annexes thereto. A relevant fact emerges from it. The letter and its annexes indicate that Mr. Nyaberi, counsel for the defence, entered into talks with the Registrar in order to set a date for the initial appearance. Several provisional dates were discussed. Problems arose with regard to the availability of judges and of defence counsel. Annex C to the Registrar's letter indicates that Mr. Nyaberi assented to the initial appearance taking place on 3 February 1997. This was not challenged by the defence at the hearing.

61. The assent of the defence counsel to deferring the initial appearance until 3 February 1997 is a new fact for the Appeals Chamber. During the proceedings before the Chamber, only the judicial recess was offered by way of explanation for the 96-day period which elapsed between the Appellant's transfer and his initial appearance, and this was rejected by the Chamber. There was no suggestion whatsoever that the Appellant had assented to any part of that schedule.

There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge during the period of the provisional detention and the Appellant contends that he was denied this opportunity. [FN74]

FN74 Decision, §69.

62. The decision by the Appeals Chamber in respect of the period of detention in Arusha is based on a 96-day lapse between the Appellant's transfer and his initial appearance. The new fact relative hereto, the defence counsel's agreeing to a hearing being held on 3 February 1997, reduces that lapse to 20 days - from 3 to 23 February. The Chamber considers that this is still a substantial delay and that the Appellant's rights have still been violated. However, the Appeals Chamber finds that the period during which these violations took place is less extensive than it appeared at the time of the Decision.

(d) Were the new facts known to the Prosecutor?

63. Rule 120 introduces a condition which is not stated in Article 25 of the Statute which addresses motions for review. According to Rule 120 a party may submit a motion for review to the Chamber only if the new fact "was not known to the moving party at the time of the proceedings before a Chamber, and could not have been discovered through the exercise of due diligence" (emphasis added).

64. The new facts identified in the first two periods were not known to the Chamber at the time of its Decision but they may have been known to the Prosecutor or at least they could have been discovered. With respect to the second period, the Prosecutor was not unaware that Cameroon was unwilling to transfer the Appellant, especially as it was her deputy, Mr. Muna, who sought Mr. Scheffer's intervention to facilitate the process. But evidently it was not known to the Chamber at the time of the Appeal proceedings. On the contrary, the elements before the Chamber led it to the opposite finding, which was an important factor in its conclusion that "the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence." [FN75]

FN75 Decision, §101.

65. In the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice, the Chamber construes the condition laid down in Rule 120, that the fact be unknown to the moving party at the time of the proceedings before a Chamber, and not discoverable through the exercise of due diligence, as directory in nature. In adopting such a position, the Chamber has regard to the circumstance that the Statute itself does not speak to this issue.

66. There is precedent for taking such an approach. Other reviewing courts, presented with facts which would clearly have altered an earlier decision, have felt bound by the interests of justice to take these into account, even when the usual requirements of due diligence and unavailability were not strictly satisfied. While it is not in the interests of justice that parties be encouraged to proceed in a less than diligent manner, "courts cannot close their eyes to injustice on account of the facility of abuse" [FN76].

FN76 Berggren v Mutual Life Insurance Co., 231 Mass. at 177. The full passage reads:

"The mischief naturally flowing from retrials based upon the discovery of alleged new evidence leads to the establishment of a somewhat stringent practice against granting such motions unless upon a survey of the whole case a miscarriage of justice is likely to result if a new trial is denied. This is the fundamental test, in aid of which most if not all the rules upon the matter from time to time alluded to have been formulated. Ease in obtaining new trials would offer temptations to the securing of fresh evidence to supply former deficiencies. But courts cannot close their eyes to injustice on account of facility of abuse'.'DDDD'

67. The Court of Appeal of England and Wales had to consider a situation not unlike that currently before the Appeals Chamber in the matter of Hunt and Another v Atkin. [FN77] In that case, a punitive order was made against a firm of solicitors for having taken a certain course of action. It emerged that the solicitors were in possession of information that justified their actions to a certain extent, and which they had failed to produce on an earlier occasion, despite enquiries from the court. As in the current matter, the moving party (the solicitors) claimed that the court's enquiries had been unclear, and that they had not fully understood the nature of the evidence to be presented. The Judge approached the question as follows:

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FN77 Court of Appeal (Civil Division) 6 May 1964.

I hope I can be forgiven for taking a very simplistic view of this situation. What I think I have to ask myself is this: if these solicitors ... had produced a proper affidavit on the last occasion containing the information which is now given to me ... would I have made the order in relation to costs that I did make? It is a very simplistic approach, but I think it is probably necessary in this situation.

He concluded that he would not have made the same order, and so allowed the fresh evidence and ordered a retrial. The Court of Appeal upheld his decision.

68. Faced with a similar problem, the Supreme Court of Canada has held that the requirements of due diligence and unavailability are to be applied less strictly in criminal than in civil cases. In the leading case of McMartin v The Queen, the court held, per Ritchie J, that:

In all the circumstance, if the evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury, I do not think it should be excluded on the ground that reasonable diligence was not exercised to obtain it at or before the trial. [FN78]

FN78 (1964) 1 CCC 142, 46 DLR (2d) 372.

69. The Appeals Chamber does not cite these examples as authority for its actions in the strict sense. The International Tribunal is a unique institution, governed by its own Statute and by the provisions of customary international law, where these can be discerned. However, the Chamber notes that the problems posed by the Request for Review have been considered by other jurisdictions, and that the approach adopted by the Appeals Chamber here is not unfamiliar to those separate and independent systems. To reject the facts presented by the Prosecutor, in the light of their impact on the Decision, would indeed be to close ones eyes to reality.

70. With regard to the third period, the Appeals Chamber remarks that, although a set of the elements submitted by the Prosecutor on 16 February 2000 were available to her prior to that date, according to the Registrar's memorandum, Annex C was not one of them. It must be deduced that the fact that the defence counsel had given his consent was known to the Prosecutor at the time of the proceedings before the Appeals Chamber.

4. Conclusion

71. The Chamber notes that the remedy it ordered for the violations the Appellant was subject to is based on a cumulation of elements:

... the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was

tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him. [FN79]

FN79 Decision, §106.

The new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant. The cumulative effect of these elements being thus reduced, the reparation ordered by the Appeals Chamber now appears disproportionate in relation to the events. The new facts being therefore facts which could have been decisive in the Decision, in particular as regards the remedy it orders, that remedy must be modified.

72. The Prosecutor has submitted that it has suffered "material prejudice" from the non compliance by the Appeals Chamber with the Rules and that consequently it is entitled to relief as provided in Rule 5. As the Appeals Chamber believes that this issue is not relevant to the Motion for Review and as the Appeals Chamber has in any event decided to review its Decision, it will not consider this issue further.

B. RECONSIDERATION

73. The essential basis on which the Prosecutor sought a reconsideration of the previous Decision, as distinguished from a review, was that she was not given a proper hearing on the issues passed on in that Decision. The Appeals Chamber finds no merit in the contention and accordingly rejects the request for reconsideration.

VI. CONCLUSION

74. The Appeals Chamber reviews its Decision in the light of the new facts presented by the Prosecutor. It confirms that the Appellant's rights were violated, and that all violations demand a remedy. However, the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the Decision is founded. Accordingly, the remedy ordered by the Chamber in the Decision, which consisted in the dismissal of the indictment and the release of the Appellant, must be altered.

VII. DISPOSITION

75. For these reasons, the APPEALS CHAMBER reviews its Decision of 3 November 1999 and replaces its Disposition with the following:

1) ALLOWS the Appeal having regard to the violation of the rights of the Appellant to the extent indicated above;

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2) REJECTS the application by the Appellant to be released;

3) DECIDES that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows:

a) If the Appellant is found not guilty, he shall receive financial compensation;

b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights.

Judge Vohrah and Judge Nieto-Navia append Declarations to this Decision.

Judge Shahabuddeen appends a Separate Opinion to this Decision.

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

Claude Jorda, Presiding

Lal Chand Vohrah

Mohamed Shahabuddeen

Rafael Nieto-Navia

Fausto Pocar

Dated this thirty-first day of March 2000

At The Hague, The Netherlands

Seal of the Tribunal

DECLARATION OF JUDGE LAL CHAND VOHRAH

1. I would like to reiterate that I fully agree with the conclusions of the Appeals Chamber in the present decision and with the disposition that follows this Review. This agreement, however, calls for a few observations on my part. In the original decision the Appeals Chamber invoked the abuse of process doctrine. In the light of the facts which where then before it, the Chamber found that to proceed with the trial of the Appellant in the face of the egregious violations of his rights would be unjust to him and injurious to the integrity of the judicial

process of the Tribunal. Consequently, the Appeals Chamber decided that the proceedings against the Appellant should be discontinued.

2. In its previous decision, the Appeals Chamber proceeded on the basis of, inter alia, its finding that the Prosecutor was responsible for the delays of which the Appellant complained. In this Review a different picture has been shown by the disclosure of new facts which now diminish substantially the blameworthiness attributed to the Prosecutor on the ground of lack of diligence, and the seriousness of the violations suffered by the Appellant. Had the Appeals Chamber been apprised of these facts on appeal, the original decision would have been different and the abuse of process doctrine would not have been called in aid and applied with all the vigour that was implicit in the "with prejudice" order that was made.

3. I must say that I have had the benefit of reading the Declaration in draft of my brother Judge Nieto-Navia and would like to state that I subscribe fully to the views he has expressed therein on the overriding principle relating to the independence of the judiciary (in the light of the considerations which the Prosecutor and the Representative of the Government of Rwanda as amicus curiae have, perhaps unwittingly, asked the Appeals Chamber to take into account), and on the principles of human rights.

4. In conclusion, I am satisfied that there are new facts which now require that the previous decision be modified in the way stated in the disposition of the present decision.

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

Lal Chand Vohrah

Dated this 31st day of March 2000

At The Hague, The Netherlands.

Seal of the Tribunal

DECLARATION OF JUDGE RAFAEL NIETO-NAVIA

1. It is necessary to consider the role of the Tribunal in the context of its mandate in Rwanda as dispenser of justice and the effect, if any, of politics on its work in prosecuting those responsible for genocide and other serious violations of international humanitarian law.

2. This issue was raised specifically during the oral hearing on this matter, in Arusha, on 22 February 2000 by the Chief Prosecutor. It is expedient to set out the relevant section:

"Let me just say a few words with respect to the government of Rwanda. The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999. It was a politically motivated decision, which is understandable. It can only be understood if one is cognisant with the situation, if one is aware of what happened in Rwanda in 1994. I also notice that, well, it was the Prosecutor that had no visa to travel to Rwanda. It was the Prosecutor who was unable to go to her office in Kigali. It was the Prosecutor who could not be received by the Rwandan authorities. In November, after your decision, there was no co- operation, no collaboration with the office of the Prosecutor. In other words, justice, as dispensed by this Tribunal was paralysed. It was the trial of Baglishima which had to be adjourned because the Rwandan government did not allow 16 witnesses to appear before this Court. In other words, they were not allowed to leave the territory of Rwanda. Fortunately, things have improved currently, and we again enjoy the support of the government. Why? Because we were able to show our good will, our willingness to continue with our work based on the mandate entrusted to us. However, your Honours, due account has to be taken of that fact. Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend on the government of Rwanda. That is the reality that we face. What is the reality? Either Barayagwiza can be tried by this Tribunal, in the alternative; or the only other solution that you have is for Barayagwiza to be handed over to the state of Rwanda to his natural judge, judex naturalis. Otherwise I am afraid, as we say in Italian, possiamo chiudere la baracca. In other words we can as well put the key to that door, close the door and then open that of the prison. And in that case the Rwandan government will not be involved in any manner" [FN1]

FN1 Transcript of the hearing on 22 February 2000, (the 'Transcript'), pp. 26- 28.

3. The Prosecutor maintained that after the Decision in the instant case was rendered by the Appeals Chamber on 3 November 1999 (hereinafter "the Decision"), justice before the International Criminal Tribunal for Rwanda was effectively suspended as a result of action taken by the Rwandan government, who reacted essentially to what they viewed as an adverse decision of the Appeals Chamber.

4. It would be naïve to assert that the Tribunal does not depend on the co-operation of States for it to fulfil its duties. Indeed the Appeals Chamber itself has held that

"The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal." [FN2]

FN2 Prosecutor v. Tihomir Blaskic, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case no. IT-95-14-AR108bis, 29 October 1997, §26.

Without State co-operation, the work of the Tribunal would be rendered impossible.

5. In order to cater for this, and aware of the need to ensure effective and ongoing co-operation, Article 28 of the Statute compels States to co-operate with the Tribunal "in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law" [FN3]. This is a general obligation incumbent on all States but the Rwandan government is specially obliged, because the Tribunal was established "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda" [FN4]. In addition, being the territory in which most of the crimes alleged took place, the co-operation of the Rwandan government with the Tribunal in fulfilment of their obligations as prescribed by Article 28, is paramount.

FN3 Article 28.1. Security Council Resolution 955 (1994) (S/RES/955) (1994) § 2, also states that "all states shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chaber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures."

FN4 Security Council Resolution 955 (1994) (S/RES/955)(1994) § 1.

6. This obligation of the Rwandan government is absolute. It is an obligation which cannot be overridden in particular circumstances by considerations of convenience or politics.

7. In my view, the Appeals Chamber, although mindful of this essential need for co-operation by the Rwandan government, is also mindful of the role the Tribunal plays in this process and therefore I refute most strenuously the suggestion that in reaching decisions, political considerations should play a persuasive or governing role, in order to assuage States and ensure co- operation to achieve the long-term goals of the Tribunal. On the contrary, in no circumstances would such considerations cause the Tribunal to compromise its judicial independence and integrity. This is a Tribunal whose decisions must be taken, solely with the intention of both implementing the law and guaranteeing justice to the case before it, not as a result of political pressure and threats to withhold co-operation being exerted by an angry government.

8. Faced with non co-operation by a State and having exhausted the facilities available to it to ensure co-operation, a clear mechanism has been provided in the Statute and Rules [FN5] whereby the Tribunal may make a finding concerning the particular State's failure to observe the provisions of the Statute or the Rules and thereafter may report this finding to the Security Council. [FN6] It then falls to the Security Council to determine appropriate action to take against the

State in question. [FN7] The involvement of the Tribunal will cease at the point of referral to the Security Council and indeed its position is safeguarded further by the stipulation, as has been held, that "the finding by the International Tribunal must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding." [FN8]. This mechanism ensures that clear separation in roles is maintained and more importantly that the independence of the Tribunal cannot be called into question. Its mandate is the prosecution of those responsible for serious violations of international humanitarian law [FN9] and it must do so in an impartial and unbiased fashion. It must not qualify this independence under any circumstances.

FN5 E.g., Rule 54 includes the power to issue orders, summonses, subpoenas, warrants and transfer orders. See Prosecutor v. Dusko Tadic, Judgement, Case no. IT-94-1-A, 15 July 1999, § 52.

FN6 Rule 7bis of the Rules. Supra note 2 at 26 and 33. Also, Prosecutor v. Dusko Tadic, Judgement, Case no. IT-94-1-A, 15 July 1999 § 51.

FN7 Such failure by States to comply with their obligations under the Statute, have been referred to the Security Council on several occasions to date (Supra. note 2, § 34).

FN8 Supra. note 2 § 36.

FN9 Article 1 of the Statute.

9. The concept of "the separation of powers" plays a central role in national jurisdictions. This concept ensures that a clear division is maintained between the functions of the legislature, judiciary and executive and provides that """""one branch is not permitted to encroach on the domain or exercise the powers of another branch." [FN10] It ensures that the judiciary maintains a role apart from political considerations and safeguards its independence.

FN10 Blacks Law Dictionary, 6th edition, West Publishing Co, 1990, p. 1365.

10. As a result, the judiciary holds a privileged position in national jurisdictions and is subjected to unceasing public scrutiny of its activities. This however is accepted as being a necessary component of its existence so that public confidence in the system can be maintained.

11. In consideration of this issue, I note the importance accorded to the principle by the United Nations, in appointing a Special Rapporteur on the Independence of Judges and Lawyers and by the General Assembly, in the promulgation of the 1985 UN Basic Principles on the Independence of the Judiciary.

[FN11] The Principles as a whole are of the utmost importance, but it serves now to highlight the following provisions:

FN11 Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August - 6 September 1985: Report prepared by the Secretariat Chap.IV, sect. B, as referred to in GA Resolution A/RES/40/146 of 13 December 1985 "Human Rights in the Administration of Justice''. The Resolution was also pointed out by the Appellant in the Oral Hearing on 22 February 2000 and recorded at page 213 of the Transcript.

"1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary;

2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. [FN12]''

FN12 Ibid., § 1, 2. Note also, the UN 1990 Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Havana, Cuba from 27 August to 7 September 1990. The General Assembly has welcomed these principles and invites governments to respect them and to take them into account within the framework of their national legislation and practice (A/RES/45/166 of 18 December 1990).

The principle of the independence of the judiciary is overriding and should at all times take precedence faced with any conflict, political pressures or interference. The proposition put forward by the Prosecutor that political considerations can play a role in the Appeals Chamber's decision making and actions is not acceptable.

12. Indeed it is important to note the remark made by Robert H. Jackson, Chief of Counsel for the United States at the International Military Tribunal, sitting at Nuremberg, in his opening speech before the Tribunal on 21 November 1945:

"The United States believed that the law has long afforded standards by which a juridical hearing could be conducted to make sure that we punish only the right men and for the right reasons" [FN13]

FN13 The Trial of German Major War Criminals by the International Military Tribunal sitting at Nuremberg Germany (commencing 20 November 1945) Opening Speeches of the Chief Prosecutors. Published under the Authority of H.M. Attorney-General By His Majesty's Stationery Office, London: 1946. pp. 36 and 37.

13. Political reasons are not the right reasons. The Tribunal is endowed with a Statute, which ensures that trials take place by means of a transparent process, wherein widely accepted international standards of criminal law are applied.

Central to this process is the maintenance of human rights standards of the highest level, to ensure that the basic Rule of Law is upheld.

14. The basic human right of an accused to be tried before an independent and impartial tribunal is recognised also in the major human rights treaties and is one to which the Tribunal accords the utmost importance. [FN14] Indeed the Appeals Chamber in a case before the ICTY, held in consideration of its function that:

FN14 Article 14 (1) of the International Covenant of Civil and Political Rights, 1966 ("ICCPR") provides, inter alia, that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". Similarly, Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ("ECHR"), protects the right to a fair trial and requires, inter alia, that cases be heard by an """"independent and impartial tribunal established by law," and Article 8(1) of the American Convention on Human Rights (1969) ("ACHR") provides that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law."

"For a Tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments" [FN15]

FN15 Prosecutor v. Dusko, Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case no. IT-94-1-AR72, 2 October 1995, § 45.

15. It must not be forgotten that the Rwandan government itself has recognised the importance of impartial justice. In requesting the establishment of a Tribunal by the international community, the Rwandan government stated that it supported an international tribunal because of its desire to avoid "any suspicion of its wanting to organise speedy vengeful justice". [FN16] Accordingly, this Tribunal's fundamental aim is to vindicate the highest standards of international criminal justice, in providing an impartial and equitable system of justice.

FN16 UN Doc. S/PV.3453 (1994) at 14.

16. But now the government of Rwanda has suggested that the Tribunal should convict all the indictees who come before it. It is wrong. The accused can be acquitted if the Trial Chamber is not satisfied that guilt has been proven beyond a reasonable doubt. [FN17] Alternatively, the accused can be released on procedural grounds, as was the case in the Decision. In the application of impartial justice the role of the Tribunal is not simply to convict all those who appear before it, but to consider a case upholding the fundamental principles of human rights.

FN17 Rule 87(A) of the Rules of Procedure and Evidence.

17. By virtue of Resolution 955 of 1994, the Security Council stated:

"Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace", [FN18]

FN18 Supra note 4.

This was subsequently reiterated by Resolution 1165 of 1998, when the Security Council stated that it "remain[ed] convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law will contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda and in the region" [FN19]. This aim can only be achieved by an independent Tribunal, mindful of the task entrusted to it by the international community.

FN19 Security Council Resolution 1165 (1998) (S/RES/1165) (1998).

18. Both Tribunals, ICTY and ICTR, find themselves in the midst of very emotive atmospheres and are charged with the duty to maintain their independence and transparency, as expected by the international community, preserving the norms of international human rights. The international community needs to be sure that justice is being served but that it is being served through the application of their Rules and Statutes, which are applied in a consistent and unbiased manner. I recall the words of the Zimbabwean Court in the Mlambo case, as cited in the Decision:

"The charges against the applicant are far from trivial and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are charged with the commission of serious crimes. Yet that trial can only be undertaken if the guarantee under.... the Constitution has not been infringed." [FN20]

FN20 Jean-Bosco Barayagwiza v. The Prosecutor, Decision, Case no. ICTR-97-19-AR72, 3 November 1999 (the 'Decision'), § 111.

Difficult as this may be for some to understand, these are the principles which govern proceedings before this Tribunal at all times, even if application of these principles on occasion renders results which for some, are hard to swallow.

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19. I wish to draw attention to the matter of res judicata, which was referred to by both the Appellant and the Prosecutor in their written briefs [FN21]. I wish to briefly discuss the applicability of this principle to the case in hand, noting that the Appeals Chamber has now reviewed its Decision.

FN21 Brief in Support of the Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor following the Orders of the Appeals Chamber Dated 25 November 1999, § 74. Appellant's Response to Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution, § 17. Prosecutor's Reply to the Appellant's Response to the Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution, § 21.

20. The principle of res judicata is well settled in international law as being one of those "general principles of law recognized by civilised nations", referred to in Article 38 of the Statutes of the Permanent Court of International Justice ("PCIJ") and the International Court of Justice ("ICJ"). [FN22] As such, it is a principle which should be applied by the Tribunal. The principle can be enunciated as meaning that, once a case has been decided by a final and valid judgement rendered by a competent tribunal, the same issue may not be disputed again between the same parties before a court of law [FN23].

FN22 See Judge Anzilotti's dissenting opinion in the Chorzow Factory Case (Interpretation), PCIJ Series A (1927), 13 at 27. See also PCIJ, Advisory Committee of Jurists: Procès-verbaux of the Proceedings of the Committee, June 16-July 24, 1920, with Annexes, The Hague, 1920, pp. 315-316.

FN23 Effect of Awards of Compensation made by the United Nations Administrative Tribunal, ICJ Reports 1954, p. 47.

21. The rationale behind the principle is that security is required in juridical relations. The determinative and obligatory character of a judgement prevents the parties from contemplating the possibility of not complying with the decision or alternatively from seeking the same or another court to decide in a different manner. At the same time it is understood that only final judgements are considered res judicata, as judgements of lower courts can generally take advantage of appellate proceedings.

22. The impact of the Appeals Chamber Decision is twofold. On the one hand the Appeals Chamber decided to allow an appeal [FN24] against a decision of Trial Chamber II [FN25] which dismissed a preliminary objection by the accused based on lack of personal jurisdiction, on the grounds inter alia, that the fundamental human rights of the accused to a fair and expeditious trial were violated as a result of his arrest and long detention in Cameroon before being transferred to the U.N. Detention Facilities in Arusha. On the other hand, the Decision "DISMISSE[D] THE INDICTMENT with prejudice to the Prosecutor." [FN26] This rendered the Decision final and definitive, as stated by the Appeals Chamber in its decision today. [FN27]

FN24 Supra note 20, § 113(1).

FN25 Prosecutor v. Barayagwiza, Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect, Case No. ICTR-97-19-1, 17 November 1998, and Prosecutor v. Barayagwiza, Corrigendum, Case No. ICTR-97-19-1, 24 November 1998.

FN26 Supra note 20, § 113(2).

FN27 § 49.

23. The International Court of Justice has held:

"It is contended that the question of the Applicants' legal right or interest was settled by the [1962] [FN28] Judgement and cannot now be reopened. As regards the issue of preclusion, the Court finds it unnecessary to pronounce on various issues which have been raised in this connection, such as whether a decision on a preliminary objection constitutes a res judicata in the proper sense of that term, --whether it ranks as a "decision" for the purposes of Article 59 of the Court's Statute, or as "final" within the meaning of Article 60. The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to its merits, whether or not it has in fact been dealt with in connection with the preliminary objection". [FN29]

FN28 South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) Preliminary Objections, ICJ Reports, 1962, p. 319.

FN29 South West Africa, Second phase, Judgement, ICJ Reports, 1966, p. 6 at § 59.

24. In domestic jurisdictions a preliminary objection on lack of competence, raised by a party before a court does not prevent the matter being brought before the competent court. However, some decisions on preliminary points which are primarily within the competence of the court acquire the force of res judicata on the question decided and the court is bound by its own decisions. [FN30]

FN30 The distinction in the civil law systems between peremptory (which put an end to the procedure) and dilatory (which simply delay the procedure) preliminary objections is very useful.

25. In this Tribunal, Article 25 of the Statute opens up the possibility for review of "final" decisions, if certain criteria are satisfied. The Appeals Chamber has clearly explained this in its decision today. It is clear to me that if the Statute provides for a "final" decision to be reviewed, when a Chamber acts pursuant to this provision, the principle of res judicata does not apply.

26. Some common law systems consider that dismissal of an indictment with prejudice bars the right to bring an action again on the same issue and is,

therefore, res judicata. [FN31] The instant case has not been litigated on the merits. What seems to be "final" is the issue of the prejudice to the Prosecutor, because the Prosecutor was barred from bringing the case before the Tribunal again. As I understood it, the Decision considered the finding of """"prejudice to the Prosecutor" as a form of punishment due to the violations of fundamental human rights committed by the Prosecutor against the Appellant. [FN32]

FN31 This concept is unknown to civil law systems.

FN32 Supra note 20, § 76.

27. If the new facts brought before the Appeals Chamber under Article 25 mean that the Prosecutor is responsible for less extensive violations (as accepted by the Appeals Chamber today), [FN33] she cannot be punished because of them, the dismissal cannot be with prejudice to her and hence the Decision must be amended. That is what we are deciding today.

FN33 § 72.

28. Human rights treaties provide that when a state [FN34]violates fundamental human rights, it is obliged to ensure that appropriate domestic remedies are in place to put an end to such violations and in certain circumstances to provide for fair compensation to the injured party. [FN35]

FN34 In these treaties, the "subject-parties" are always States. See Article 2.1 ICCPR; Article 1 ECHR; Article 1.1 ACHR. The Inter-American Court of Human Rights held that "as far as concerns the human rights protected by the Convention, the jurisdiction of the organs established thereunder refer exclusively to the international responsibility of States and not to that of individuals" (International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of December 9, 1994, Series A No. 14, § 56.

FN35 Article ?? ECHR; Article 63.1, ACHR. International jurisprudence has considered a "general concept of law" that violations of international obligations which cause harm deserve adequate reparation (Factory at Chorzów, jurisdiction, Judgement No. 8, 1927, P.C.I.J., Series A, No. 9, p.21; Factory at Chorzów, Merits, Judgement No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29.

29. Although the Tribunal is not a State, it is following such a precedent to compensate the Appellant for the violation of his human rights. As it is impossible to turn back the clock, I think that the remedy decided by the Appeals Chamber fulfills the international requirements.

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30. Finally, I wish to emphasise that the Appeals Chamber made its Decision, based on certain facts which were presented before it at that time. The new facts which are before the Appeals Chamber now, change its position. If these facts which the Appeals Chamber has concluded to be new facts and which are discussed in today's decision, had been before the Appeals Chamber when considering the Decision, it is my opinion that the Appeals Chamber would have reached a different decision at that time.

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

Rafael Nieto-Navia

Dated this 31st day of March 2000

At The Hague, The Netherlands.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. This is an important case: it is not every day that a court overturns its previous decision to liberate an indicted person. This is what happens now. New facts justify and require that result. But possible implications for the working of the infant criminal justice system of the international community need to be borne in mind. Because of this, and also because I agreed with the previous decision, I believe that I should explain why I support the present decision to cancel out the principal effect of the former.

(i) The limits of the present hearing

2. Except on one point, I was not able to agree with the grounds on which the previous decision rested. However, the points on which I differed are not now open for discussion. This is because the present motion of the Prosecutor has to be dealt with by way of review and not by way of reconsideration. Under review, the motion has to be approached on the footing that the earlier findings of the Appeals Chamber stand, save to the extent to which it can be seen that those findings would themselves have been different had certain new facts been available to the Appeals Chamber when the original decision was made; under that procedure, it is not therefore possible to challenge the previous holdings of the Appeals Chamber as incorrect on the basis on which they were made. By contrast, under reconsideration, the appeal would have been reopened, with the result that that kind of challenge would have been possible, as I apprehend is desired by the prosecution. To cover all the requests made by the prosecution, it is thus necessary to say a word on its motion for reconsideration. I agree that the motion should not be granted. These are my reasons:

3. Decisions rendered within the International Criminal Tribunal for the former

Yugoslavia ("ICTY") on the competence of a Chamber to reconsider a decided point vary from the exercise of a relatively free power of reconsideration to a denial of any such power based on the statement, made in Kordic, "that motions to reconsider are not provided for in the Rules and do not form part of the procedures of the International Tribunal". [FN1] Where the decisions suggest a relatively free power of reconsideration, they concern something in the nature of an operationally passing position taken in the course of continuing proceedings; in such situations the Chamber remains seised of the matter and competent, not acting capriciously but observing due caution, to revise its position on the way to rendering the ultimate decision. In situations of more lasting consequence, it appears to me that the absence of rules does not conclude the issue as to how a judicial body should behave where complaint is made that its previous decision was fundamentally flawed, and more particularly where that body is a court of last resort, as is the Appeals Chamber. Not surprisingly, in ^elebici the Appeals Chamber of the ICTY introduced a qualification in stating that "in the absence of particular circumstances justifying a Trial Chamber or the Appeals Chamber to reconsider one of its decisions, motions for reconsideration do not form part of the procedure of the International Tribunal". [FN2] The first branch of that statement is important, including its non-reproduction of the Kordic words "that motions to reconsider are not provided for in the Rules": the implication of the omission seems to be that the fact that the Rules do not so provide is not by itself determinative of the issue whether or not the power of reconsideration exists in "particular circumstances". Alternatively, the omitted words were not intended to deny the inherent jurisdiction of a judicial body to reconsider its decision in """""particular circumstances".

FN1 Kordic, IT-95-14/2-PT, 15 February 1999. And see similarly Kovacevic, IT-97-24-PT, 30 June 1998.

FN2 Order of the Appeals Chamber on Hazim Delic's Emergency Motion to Reconsider Denial of Request for Provisional Release, IT-96-21-A, 1 June 1999.

4. Circumscribed as they evidently are, it is hard, and perhaps not in the interest of the policy of the law, to attempt exhaustively to define """""particular circumstances" which might justify reconsideration. It is clear, however, that such circumstances include a case in which the decision, though apparently res judicata, is void, and therefore non-existent in law, for the reason that a procedural irregularity has caused a failure of natural justice. [FN3] An aspect of that position was put this way by the presiding member of the Appellate Committee of the British House of Lords:

FN3 See, in English law, Halsbury's Laws of England, 4th edn., vol. 26, pp 279-280, para. 556, where mention is made of other situations in which a decision may be set aside and the proceedings reopened.

In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In Cassell & Co Ltd v. Broome (No. 2) [1972] 2 All ER 849, [1972] AC 1136 your Lordships varied an order

for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.

However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong. [FN4]

FN4 R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2), [1999] 1 All ER 577, HL, at pp. 585-586, per Lord Browne-Wilkinson.

5. I understand this to mean that, certainly in the case of a court of last resort, there is inherent jurisdiction to reopen an appeal if a party had been """"subjected to an unfair procedure". I see no reason why the principle involved does not apply to criminal matters if a useful purpose can be served, particularly where, as here, the decision in question has not been acted upon.

6. I have referred to unfairness in procedure because it appears to me that this is the criterion which is attracted by the posture of the Prosecutor's case. Was there such unfairness?

7. Whether a party was or was not "subjected to an unfair procedure" is a matter of substance, not technicality. If the party did not understand that an issue would be considered (which is the Prosecutor's contention), that could found a claim that it was disadvantaged. But, provided that that was understood and that there was opportunity to respond, I do not see that the procedure was unfair merely because a Chamber considered an issue not raised by the parties. The interests involved are not merely those of the parties; certainly, they are not interests submitted by them to adjudication on a consensual jurisdictional basis; they include the interests of the international community and are intended to be considered by a court exercising compulsory jurisdiction. In Erdemovic [FN5] the Appeals Chamber raised, considered and decided issues not presented by the parties, observing that there was "nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties". [FN6]

FN5 IT-96-22-A, 7 October 1997, para. 16.

FN6 With respect, this can benefit from qualification in the case of the International Court of Justice. That court would be acting ultra petita if it decided issues (as distinguished from arguments concerning an issue) not presented by the parties, since the jurisdiction is consensual. See Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, Vol. II (Cambridge, 1986), p. 531.

8. Further, a Chamber need not echo arguments addressed to it; its reasoning may be its own. [FN7] When the present matter is examined, all that appears is that the Appeals Chamber in some cases used arguments other than those presented to it. The basic issue was one on which the parties had an opportunity to present their positions, namely, whether the rights of the appellant had been violated by undue delay so as to lead to lack of jurisdiction. For the reasons given below, I am satisfied that there is not any substance in the contention of the prosecution that it had no notice that certain questions would be determined. It is more to the point to say that the prosecution did not avail itself of opportunities to present its position on certain matters; in particular, it did not assist either the Trial Chamber or the Appeals Chamber with relevant material at the time when that assistance should have been given.

FN7 See the "Lotus", (1927), PCIJ, Series A, No. 10, p. 31; Fisheries, ICJ Reports 1951, p. 116, at p. 126; Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, ICJ Reports 1974, p. 3, at pp. 9-10, para. 17. As to a distinction between issues and arguments, see Fitzmaurice, supra.

9. In short, there was no unfairness in procedure in this case. Accordingly, the previous decision of the Appeals Chamber cannot be set aside and the appeal reopened. It is thus not possible to accede to the Prosecutor's proposition, among others, that that decision was wrong when made and should for that reason be now changed. [FN8]

FN8 Transcript, Appeals Chamber, 22 February 2000, p. 13.

10. For the reasons given in today's judgment, the procedure of review is nevertheless available. [FN9] As mentioned above, the possibility of revision which this opens up is however limited to consideration of the question whether the same decision would have been rendered if certain new facts had been at the disposal of the Appeals Chamber, and, if not, what is the decision which would then have been given.

FN9 See also Zejnil Delalic, IT-96-21-T, 22 June 1998, paras. 38-40, which would seem, however, to apply the idea of review to an ordinary interlocutory decision even if it does not put an end to the case.

(ii) The Prosecutor's complaint that she had no notice of the intention of the Appeals Chamber to deal with the question of the legality of the detention between transfer and initial appearance

11. Before moving on, I shall pause over the question, alluded to above, as to whether the prosecution availed itself of opportunities to present its position on certain points. The question may be considered illustratively in relation to the issue of detention between the appellant's transfer from Cameroon to the Tribunal's detention unit in Arusha and his initial appearance before a Trial Chamber, extending from 19 November 1997 to 23 February 1998. The prosecution

takes the position, which it stresses, that it had no opportunity to address this issue because it did not know that the Appeals Chamber would be dealing with it. That, if correct, is a sufficiently weighty matter to justify reconsideration, as it would show that the prosecution was subjected to an unfair procedure in the Appeals Chamber. So it should be examined.

12. The prosecution submitted that the issue of delay between transfer and initial appearance was not argued by the appellant in the course of the oral proceedings in the Trial Chamber and was not included in his grounds of appeal. Although, as will be seen, the appellant did include a claim on the point in his motion, I had earlier made a similar observation, noting that, in the Trial Chamber, "no issue was presented as to delay between transfer and initial appearance", [FN10] that the "Trial Chamber was not given any reason to believe that there was such an issue", and, in respect of the appeal proceedings, that it "does not appear that the Prosecutor thought that she was being called upon to meet an argument about delay between transfer and initial appearance". [FN11] But it seems to me that, apart from the action of the appellant, account has to be taken of the action of the Appeals Chamber and that the position changed with the issuing by the latter of its scheduling order of 3 June 1999; that order, referred to below, clearly raised the matter. After the order was made, the appellant went back to the claim which he had originally raised; equally, the prosecution gave its reaction. Thus, in the event, the Appeals Chamber did not pass on the matter without affording an opportunity to the Prosecutor to address the point.

FN10 Possibly, there was a misunderstanding as to the need for specific argument in the Trial Chamber, for the Presiding Judge said, as he properly could, "We have read the motion and the documents that have been attached to it so we have a general idea of what it is, so, counsel, if you may introduce your motion to highlight what you consider to be important issues that should get the Trial Chamber's attention". (See transcript, Trial Chamber, 11 September 1998, p. 4, Presiding Judge Sekule). Thus defence counsel was not expected to deal with each and every aspect of his written motion. He contended himself with speaking merely of "continued provisional detention" (ibid., pp. 12 and 14), and with referring to the "summary on the detention times" as set out in annexure DM2 to his motion and as explained below (ibid., p. 39).

FN11 Separate opinion, 3 November 1999, p. 3, cited in part in the Brief in Support of the Prosecutor's Motion for Review, 1 December 1999, p. 8, para. 51.

13. To fill out this brief picture, it is right to consider the factual basis of the proposition that the appellant did include a claim on the point in his motion. As I noted at page 1 of a separate opinion appended to the decision of the Appeals Chamber of 3 November 1999, in paragraphs 2 and 9 of the motion the appellant complained of "continued provisional detention". Viewing the time when that complaint was made (three months after the transfer), he was thus also complaining of the detention following on his transfer, inclusive of delay between transfer and initial appearance. In fact, as I also pointed out, annexure DM2 to his motion spoke of "98 days of detention after transfer and before initial appearance" (original emphasis, but actually 96 days). Further, in paragraph 11 of his brief in support of that motion he referred to Articles 7, 8, 9 and 10 of the Universal

Declaration of Human Rights, relating inter alia to protection of the law and to freedom from arbitrary arrest and detention. More particularly, he also referred to Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), stating that this required that "the accused should be brought before the court without delay". That was obviously a reference to paragraph 3 of Article 9 of the ICCPR which stipulates that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". It follows that, in his motion, the appellant did make a complaint on the matter to the Trial Chamber.

14. Now, how did the prosecution react to the appellant's complaint? The complaint having been made in the motion, and the motion being heard seven months after it was brought, it seems to me that, by the time when the motion was heard, the prosecution should have been in possession of all material relevant to the issue whether there was undue delay between transfer and initial appearance; it also had an opportunity at that stage to present all of that material together with supporting arguments. The record shows that it did not do so.

15. In the Trial Chamber, the prosecution did not file a response to the appellant's motion in which the appellant complained of delay between transfer and initial appearance. Indeed, some part of the oral hearing before the Trial Chamber on 11 September 1998 was taken up with this very fact - that the prosecution had not submitted a reply, with the consequential difficulty, about which the appellant remonstrated, that he did not know exactly what issues the prosecution intended to challenge at the hearing before the Trial Chamber. In the words then used by his counsel, "... in an adversarial system we should not leave leeway for ambush". [FN12] In his reply, counsel for the prosecution simply said, "We didn't do it in this case and I have no explanation for that.... we don't have an explanation for why we haven't followed our usual practice''. [FN13] In turn, the Presiding Judge, though not sanctioning the prosecution, noted that what was done was contrary to the established procedure. [FN14] At the oral hearing before the Appeals Chamber on 22 February 2000, counsel for the prosecution took the position that there was no rule requiring the prosecution to file a response. [FN15] Counsel for the prosecution before the Trial Chamber had earlier made the same point. [FN16] They were both right. But that circumstance was not determinative. As the Presiding Judge of the Trial Chamber had made clear, it was the practice to file a response; and, as counsel for the prosecution later conceded at the oral hearing before the Appeals Chamber on 22 February 2000, the Presiding Judge """"did draw the conclusion that [what was done] was contrary ... to the practice of the Tribunal". [FN17] Indeed, at the hearing before the Trial Chamber on 11 September 1998, counsel for the prosecution accepted, as has been seen, that the failure of the prosecution to submit a written reply was contrary to the """usual practice" of the prosecution itself.

FN12 Transcript, Trial Chamber, 11 September 1998, p. 5.

FN13 Ibid., p. 8, emphasis added.

FN14 Ibid., p. 9.

FN15 Transcript, Appeals Chamber, 22 February 2000, p. 105.

FN16 Transcript, Trial Chamber, 11 September 1998, p. 8.

FN17 Transcript, Appeals Chamber, 22 February 2000, p. 107.

16. The failure of the prosecution to respond to the appellant's complaint of undue delay between transfer and initial appearance did not of course remove the complaint. The dismissal of the appellant's motion included dismissal of that complaint. The complaint and its dismissal formed part of the record before the Appeals Chamber. This being so, it appears to me that at this stage the question of substance is whether the Prosecutor knew that the Appeals Chamber intended to deal with the complaint, and, if so, whether the Prosecutor had an opportunity to address it. The answer to both questions is in the affirmative. This results from the Appeals Chamber's scheduling order of 3 June 1999, referred to above.

17. That order required the parties "to address the following questions and provide the Appeals Chamber with all relevant documentation: .... 4). The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance". The requisition was made on the stated basis that the Appeals Chamber needed "additional information to decide the appeal". At the oral hearing in the Appeals Chamber on 22 February 2000, a question from the bench to counsel for the Prosecutor was this: "Did the prosecution understand from that, that the Appeals Chamber was proposing to consider reasons for any delay between transfer of the Appellant and his initial appearance?". [FN18] Counsel for the Prosecutor correctly answered in the affirmative. He also agreed that the prosecution did not object to the competence of the Appeals Chamber to consider the matter and did not ask for more time to respond to the request by the Appeals Chamber for additional information. [FN19] In fact, in paragraphs 17-20 of its response of 21 June 1999, the prosecution sought to explain the delay in so far as it then said that it could, stating that it had no influence over the scheduling of the initial appearance of accused persons, that these matters lay with the Trial Chambers and the Registrar, that assignment of defence counsel was made only on 5 December 1997, and that there was a judicial holiday from 15 December 1997 to 15 January 1998. In stating these things (how adequate they were being a different matter), the prosecution fell to be understood as having accepted that the Appeals Chamber would be dealing one way or another with the question to which those things were a response.

FN18 Ibid., p. 108.

FN19 Ibid.

18. Focusing on the issues as she saw them, the Prosecutor, as I understood her,

submitted that the Appeals Chamber was confined to the issues presented by the parties. As indicated above, that is not entirely correct. The cases show that the leading principle is that the overriding task of the Tribunal is to discover the truth. Since this has to be done judicially, limits obviously exist as to permissible methods of search; and those limits have to be respected, for the Appeals Chamber is not an overseer. It cannot gratuitously intervene whenever it feels that something wrong was done: beyond the proper appellate boundaries, the decisions of the Trial Chamber are unquestionable. However, as is shown by Erdemovic, [FN20] the Appeals Chamber can raise issues whether or not presented by a party, provided, I consider, that they lie within the prescribed grounds of appeal, that they arise from the record, and that the parties are afforded an opportunity to respond. I think that this was the position in this case.

FN20 IT-96-22-A, 7 October 1997.

19. As has been demonstrated above, the record before the Appeals Chamber included both a claim by the appellant that there was impermissible delay between transfer and initial appearance [FN21] and dismissal by the Trial Chamber of the motion which included that claim. Where an issue lying within the prescribed grounds of appeal is raised on the record, the Appeals Chamber can properly require the parties to submit additional information on the point; there is not any basis for suggesting, as the Prosecutor has done, that in this case the Appeals Chamber went outside of the appropriate limits in search of evidence.

FN21 By contrast, the appellant's motion did not, in my opinion, include a claim that there was impermissible delay in the hearing of his habeas corpus motion.

20. In conclusion, it appears to me that the substance of the matter is that the Prosecutor had notice of the intention of the Appeals Chamber to deal with the point, had an opportunity to address the point both before the Trial Chamber and the Appeals Chamber, and did address the point in her written response to the Appeals Chamber. In particular, the Prosecutor knew that the Appeals Chamber would be passing on the point and did not object to the competence of the Appeals Chamber to do so. Her approach fell to be understood as acquiescence in such competence. I accordingly return to my previous position that it is not possible to set aside the previous decision and to reopen the appeal, and that the only way of revisiting the matter is through the more limited method of review on the basis of discovery of new facts.

(iii) The Prosecutor's argument that the Appeals Chamber did not apply the proper test for determining whether there was a breach of the appellant's rights

21. In dealing with this argument by the Prosecutor, it would be useful to distinguish between the breach of a right and the remedy for a breach. The former will be dealt with in this section; the latter in the next.

22. An opinion which I appended to the decision given on 2 July 1998 by the

Appeals Chamber of the ICTY in Prosecutor v. Kovacevic included an observation to the effect that, because of the preparatory problems involved, the jurisprudence recognises that there is "need for judicial flexibility" in applying to the prosecution of war crimes the principle that criminal proceedings should be completed within a reasonable time. The prosecution correctly submits that, in determining whether there has been a breach of that principle, a court must weigh competing interests. As it was said in one case, the court "must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in" the territory concerned. [FN22] To do this, the court "should assess such factors as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant". [FN23] The reason for the delay could of course include the complexity of the case and the conduct of the prosecuting authorities as well as that of the court as a whole.

FN22 Bell v. Director of Public Prosecutions [1985] 1 AC 937, PC.

FN23 Barker v. Wingo, 407 US 514 (1972); and see R. v. Smith [1989] 2 Can. S.C.R. 1120, and Morin v. R. [1992] 1 S.C.R. 771.

23. These criteria are correct; but I do not follow why it is thought that they were not applied by the Appeals Chamber. Their substance was considered in paragraphs 103-106 of the previous decision of the Appeals Chamber, footnote 268 whereof specifically referred to the leading cases of Barker v. Wingo and R. v. Smith, among others. Applying that jurisprudence in this case, it is difficult to see how the balance came out against the appellant. On the facts as they appeared to the Appeals Chamber, the delay was long; it was due to the Tribunal; no adequate reasons were given for it; the appellant repeatedly complained of it; and, there being nothing to rebut a reasonable presumption that it prejudiced his position, a fair inference could be drawn that it did.

24. The breach of the appellant's rights appears even more clearly when it is considered that the jurisprudence which produced principles about balancing competing interests developed largely, if not wholly, out of cases in which the accused was in fact brought before a judicial officer shortly after being charged, but in which, for one reason or another, the subsequent trial took a long time to approach completion. By contrast, the problem here is not that the proceedings had taken too long to complete, but that they had taken too long to begin. It is not suggested that those principles are irrelevant to the resolution of the present problem; what is suggested is that, in applying them to the present problem, the difference referred to has to be taken into account. To find a solution it is necessary to establish what is the proper judicial approach to detention in the early stages of a criminal case, and especially in the pre-arraignment phase.

25. The matter turns, it appears to me, on a distinction between the right of a person to a trial within a reasonable time and the right of a person to freedom from arbitrary interference with his liberty. The right to a trial within a reasonable time can be violated even if there has never been any arrest or

detention; by contrast, a complaint of arbitrary interference with liberty can only be made where a person has been arrested or detained. I am not certain that the distinction was recognised by the prosecution. [FN24] In the view of its counsel, which he said was based on the decision of the Appeals Chamber and on other cases, the object of the Rule 62 requirement for the accused to be brought "without delay" before the Trial Chamber was to allow him "to know the formal charges against him" and to enable him "to mount a defence". [FN25] The submission was that, in this case, both of these purposes had been served before the initial appearance, the indictment having been given to the appellant while he was still in Cameroon. But it seems to me that, as counsel later accepted, [FN26] there was yet another purpose, and that that purpose could only be served if there was an initial appearance. That purpose -- a fundamentally important one -- was to secure to the detained person a right to be placed "without delay" within the protection of the judicial power and consequently to ensure that there was no arbitrary curtailment of his right to liberty. That purpose is a major one in the work of an institution of this kind; it is worthy of being marked.

FN24 Transcript, Appeals Chamber, 22 February 2000, pp. 97-98.

FN25 Ibid., pp. 72-73.

FN26 Ibid., pp. 95-97.

26. For present purposes, the law seems straightforward. It is not in dispute that the controlling instruments of the Tribunal reflect the internationally recognised requirement that a detained person shall be brought "without delay" to the judiciary as required by Rule 40bis(J) and Rule 62 of the Tribunal's Rules of Procedure and Evidence, or "promptly" as it is said in Article 5(3) of the European Convention on Human Rights and Article 9(3) of the ICCPR, the latter being alluded to by the appellant in paragraph 11 of the brief in support of his motion of 19 February 1998, as mentioned above. It will be convenient to refer to one of these provisions, namely, Article 5(3) of the European Convention on Human Rights. This provides that "[e]veryone arrested or detained in accordance with the provisions of paragraph 1.c of this article [relating to arrests for reasonable suspicion of having committed an offence] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...''.

27. So first, as to the purpose of these provisions. Apart from the general entitlement to a trial within a reasonable time, it is judicially recognised that the purpose is to guarantee to the arrested person a right to be brought promptly within the protection of the judiciary and to ensure that he is not arbitrarily deprived of his right to liberty. [FN27] The European Court of Human Rights, whose case law on the subject is persuasive, put the point by observing that the requirement of promptness "enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty.... Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5§3 [of the European Convention on Human Rights], which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of

law, 'one of the fundamental principles of a democratic society ...'''. [FN28]

FN27 Eur. Court H.R., Schiesser judgment of 4 December 1979, Series A no. 34, p. 13, para. 30.

FN28 Eur. Court H.R., Brogan and Others judgment of 29 November 1988, Series A no. 145-B, p. 32, para. 58.

28. Second, as to the tolerable period of delay, the decision of the Appeals Chamber of 3 November 1999 correctly recognised that this is short. The work of the United Nations Human Rights Committee shows that it is about four days. In Portorreal v. Dominican Republic, a period of 50 hours was held to be too short to constitute delay. [FN29] But a period of 35 days was considered too much in Kelly v. Jamaica. [FN30] In Jijón v. Ecuador [FN31] a five-day delay was judged to be violative of the rule.

FN29 United Nations Human Rights Committee, Communication No. 188/1984 (5 November 1987).

FN30 United Nations Human Rights Committee, Communication No. 253/1987 (8 April 1991).

FN31 United Nations Human Rights Committee, Communication No. 277/1988 (26 March 1992).

29. The same tendency in the direction of brevity is evident in the case law of the European Court of Human Rights. In McGoff [FN32], on his extradition from the Netherlands to Sweden, the applicant was kept in custody for 15 days before he was brought to the court. That was held to be in violation of the rule. De Jong, Baljet and van den Brink [FN33] concerned judicial proceedings in the army. "[E]ven taking due account of the exigencies of military life and military justice", the European Court of Human Rights considered that a delay of seven days was too long.

FN32 Eur. Court H.R., McGoff judgment of 26 October 1984, Series A no. 83, pp. 26-27, para. 27.

FN33 Eur. Court H.R., de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52.

30. In Koster, [FN34] which also concerned judicial proceedings in the army, a five-day delay was held to be in breach of the rule. The fact that the period included a weekend and two-yearly military manoeuvres, in which members of the court - a military court - had been participating was disregarded; in the view of

the European Court of Human Rights, the rights of the accused took precedence over matters which were "foreseeable". [FN35] The military manoeuvres "in no way prevented the military authorities from ensuring that the Military Court was able to sit soon enough to comply with the requirements of [Article 5(3) of the European Convention on Human Rights], if necessary on Saturday or Sunday''. [FN36]

FN34 Eur. Court H.R., Koster judgment of 28 November 1991, Series A no. 221.

FN35 Ibid., para. 25.

FN36 Ibid., emphasis added.

31. No doubt, as it was said in de Jong, Baljet and van den Brink, "The issue of promptness must always be assessed in each case according to its special features". [FN37] The same thing was said in Brogan. [FN38] But this does not markedly enlarge the normal period. Brogan was a case of terrorism; the European Court of Human Rights was not altogether unresponsive to the implications of that fact, to which the state concerned indeed appealed. [FN39] Yet the Court took the view that a period of six days and sixteen and a half hours was too long; indeed, it considered that even a shorter period of four days and six hours was outside the constraints of the relevant provision. The Court began its reasoning by saying:

FN37 Eur. Court H.R., de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52.

FN38 Eur. Court H.R., Brogan and Others judgment of 29 November 1988, Series A no. 145-B, para. 59.

FN39 Ibid., para. 62.

No violation of Article 5§3 [of the European Convention on Human Rights] can arise if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible ... If the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer. [FN40]

FN40 Ibid., para. 58.

32. Thus, in measuring permissible delay, the Court started out by having regard to the time within which it would have been "feasible" to establish judicial control of the detention in the circumstances of the case. The idea of feasibility obviously introduced a margin of flexibility in the otherwise strict requirement of promptness. But how to fix the limits of this flexibility? The Court looked at the "object and purpose of Article 5", or, as it said, at the "aim and ... object" of the Convention", and stated that --

the degree of flexibility attaching to the notion of 'promptness' is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features ..., the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 §3 [of the European Convention on Human Rights], that is to the point of effectively negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority. [FN41]

FN41 Ibid., para. 59.

33. In paragraph 62 of its judgment in Brogan, the European Court of Human Rights again mentioned that the "scope for flexibility in interpreting and applying the notion of 'promptness' is very limited". Thus, although the Court appreciated the special circumstances which terrorism represented, it said that "[t]he undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5§ 3". [FN42]

FN42 Ibid., para. 62.

34. To refer again to McGoff, in that case the European Commission of Human Rights recalled that, in an earlier matter, it had expressed the view that a period of four days was acceptable; "it also accepted five days, but that was in exceptional circumstances". [FN43]

FN43 Eur. Court H.R., McGoff judgment of 26 October 1984, Series A no. 83, Annex, Opinion of the Commission, p. 31, para. 28.

35. In the case at bar, counting from the time of transfer to the Tribunal's detention unit in Arusha (19 November 1997) to the date of initial appearance before a Trial Chamber (23 February 1998), the period - the Arusha period - was 96 days, or nearly 20 times the maximum acceptable period of delay.

36. As a matter of juristic logic, any flexibility in applying the requirements concerning time to the case of war crimes has to find its justification not in the nature of the crimes themselves, but in the difficulties of investigating, preparing and presenting cases relating to them. Consequently, that flexibility is not licence for disregarding the requirements where they can be complied with. It is only "the austerity of tabulated legalism", an idea not much favoured where, as here, a generous interpretation is called for [FN44], which could lead to the view that, once a crime is categorised as a war crime, that suffices to justify the conclusion that the requirements concerning time may be safely put aside.

FN44 See the criticism made by Lord Wilberforce in Minister of Home Affairs v.

Fisher [1980] AC 319, PC, at 328 G-H.

37. In this case, it is not easy to see what difficulty beset the authorities in bringing the appellant from the Tribunal's detention unit to the Trial Chamber. That scarcely inter-galactic passage involved no more than a fifteen minute drive by motor car on a macadamised road. To plead the character of the crimes in justification of the manifest breach of an applicable requirement which was both of overriding importance and capable of being respected with the same ease as in the ordinary case is to transform an important legal principle into a statement of affectionate aspiration.

38. On the facts as they earlier appeared to it, the Appeals Chamber could not come to any conclusion other than that the rights of the appellant in respect of the period between transfer and initial appearance had been breached, and very badly so. As today's decision finds, the new facts do not show that they were not breached. I agree, however, that the new facts show that the breach was not as serious as it at first appeared, it being now clear that defence counsel, although having opportunities, did not object and could be treated as having acquiesced in the passage of time during most of the relevant period.

(iv) Whether a breach could be remedied otherwise than by release

39. Now for the question of remedy, assuming the existence of a breach. In this respect, the prosecution argues that, if there was a breach of the appellant's rights, it was open to the Appeals Chamber to grant some form of compensatory relief short of release and that it should have done so. In support, notice may be taken of a view that, particularly though not exclusively in the case of war crimes, the remedy for a breach of the principle that a trial is to be held within a reasonable time may take the form of payment of monetary compensation or of adjustment of any sentence ultimately imposed, custody being meanwhile continued. [FN45]

FN45 See, inter alia, P. van Dijk and G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, 3rd ed. (The Hague, 1998), pp. 449- 450; and see generally the cases cited therein, including Neubeck, D & R 41 (1985), p. 57, para. 131; H v. Federal Republic of Germany, D & R 41 (1985), pp. 253-254; and Eckle, Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no.51, p. 31, para. 67.

40. That view is useful, although not altogether free from difficulty; [FN46] it is certainly not an open-ended one. If the concern of the law with the liberty of the person, as demonstrated by the above-mentioned attitude of the courts, means anything, it is necessary to contemplate a point of time at which the accused indisputably becomes entitled to release and dismissal of the indictment. In this respect, it is to be observed that, according to the European Commission of Human Rights, contrary to an opinion of the German Federal Court, in 1983 a committee of three judges of the German Constitutional Court held that "unreasonable delays of criminal proceedings might under certain circumstances only be remedied by

discontinuing such proceedings". [FN47] As is shown by the last paragraph of the report of Bell's case, supra, the only reason why a formal order prohibiting further proceedings was not made in that case by the Privy Council was because it was understood that the practice in Jamaica was that there would be no further proceedings. Paragraph 108 of the decision of the Appeals Chamber of 3 November 1999 cites cases from other territories in which further proceedings were in fact prohibited. I find no fault with the position taken in those cases; true, those cases concerned delay in holding and completing the trial, but I do not accept that the principle on which they rest is necessarily inapplicable to extended pre-arraignment delay.

FN46 See discussion in van Dijk and van Hoop, loc. cit.

FN47 H v. Federal Republic of Germany, application no. 10884/84, D & R, no. 41, decision of 13 December 1984, p. 253.

41. More importantly, the view that relief short of release is possible is subject to any statutory obligation to effect a release. In this respect, in its previous decision the Appeals Chamber held that Rule 40 bis of the Tribunal's Rules of Procedure and Evidence applied to the Cameroon period of detention. I respectfully disagreed with that view and still do, but it is the decision of the Appeals Chamber which matters; and so I proceed on the basis that the Rule applied. Now, Sub-Rule (H) of that Rule provided as follows:

The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event that the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released ... (emphasis added).

42. Consistently with the judicial approach to detention in the early phases of a criminal case, the object of the cited provision is to control arbitrary interference with the liberty of the person by guaranteeing him a right to be released if he is not charged within the stated time. In keeping with that object, the Rule, which has the force of law, provides its own sanction. Where that sanction comes into operation through breach of the 90-day limit set by the Rule, release is both automatic and compulsory: a court order may be made but is not necessary. The detained person has to be mandatorily released in obedience to the command of the Rule: no consideration can be given to the possibility of keeping him in custody and granting him a remedy in the form of a reduction of sentence (if any) or of payment of compensation; any discretion as to alternative forms of remedy is excluded, however serious were the allegations.

43. In effect, the premise of the conclusion reached by the Appeals Chamber that the appellant had to be released was the Chamber's interpretation, on the facts then before it, that the Rule applied to the Cameroon period of detention. These being review proceedings and not appeal proceedings, the premise would continue to apply, and so would the conclusion, unless displaced by new facts.

(v) Whether there are new facts

44. So now for the question whether there are new facts. The temptation to use national decisions in this area may be rightly restrained by the usual warnings of the dangers involved in facile transposition of municipal law concepts to the plane of international law. Such borrowings were more frequent in the early or formative stages of the general subject; now that autonomy has been achieved, there is less reason for such recourse. It is possible to argue that the current state of criminal doctrine in international law approximates to that of the larger subject at an earlier phase and that accordingly a measure of liberality in using domestic law ideas is both natural and permissible in the field of criminal law. But it is not necessary to pursue the argument further. The reason is that, altogether apart from the question whether a particular line of municipal decisions is part of the law of the Tribunal, no statutory authority needs to be cited to enable a court to benefit from the scientific value of the thinking of other jurists, provided that the court remains master of its own house. Thus, nothing prevents a judge from consulting the reasoning of judges in other jurisdictions in order to work out his own solution to an issue before him; the navigation lights offered by the reflections of the former can be welcome without being obtrusive. This is how I propose to proceed.

45. The books are full of statements, and rightly so, concerning the caution which has to be observed, as a general matter, in admitting fresh evidence. Latham CJ noted that "[t]hese are general principles which should be applied to both civil and criminal trials". [FN48] Accordingly, there is to be borne in mind the principle familiar in civil cases, somewhat quaintly expressed in one of them, that it is the "duty of [a party] to bring forward his whole case at once, and not to bring it forward piecemeal as he found out the objections in his way". [FN49]

FN48 Green v. R. (1939) 61 C.L.R. 167, at 175.

FN49 In re New York Exchange, Limited (1888) 39 Ch. D. 415, at 420, CA.

46. The prosecution advanced a claim to several new facts. Agreeably to the caution referred to, the Appeals Chamber has not placed reliance on all of them. I shall deal with two which were accepted, beginning with the statement of Ambassador Scheffer as to United States intervention with the government of Cameroon. Five questions arise in respect of that statement.

47. The first question is whether the Ambassador's statement concerns a "new fact" within the meaning of Article 25 of the Statute. It has to be recognised that there can be difficulty in drawing a clear line of separation between a new fact within the meaning of that Article of the Statute and additional evidence within the meaning of Rule 115 of the Tribunal's Rules of Procedure and Evidence. A new fact is generically in the nature of additional evidence. The differentiating specificity is this: additional evidence, though not being merely cumulative, goes to the proof of facts which were in issue at the hearing; by contrast, evidence of a new fact is evidence of a distinctly new feature which was not in issue at the trial. In this case, there has not been an issue of fact in the previous proceedings as to whether the government of the United States had intervened. True, the intervention happened before the hearing, but that does not make the

fact of the intervention any the less new. As is implicitly recognised by the wording of Article 25 of the Statute and Rule 120 of the Rules of Procedure and Evidence of the Tribunal, the circumstance that a fact was in existence at the time of trial does not automatically disqualify it from being regarded as new; the newness has to be in relation to the facts previously before the court. In my opinion, Ambassador Scheffer's statement is evidence of a new fact.

48. The second question is whether the new fact "could not have been discovered [at the time of the proceedings before the original Chamber] through the exercise of due diligence" within the meaning of Rule 120 of the Rules. The position of the prosecution is that it did ask Ambassador Scheffer to intervene with the government of Cameroon. This being so, it is reasonable to hold that the prosecution knew that the requested intervention was needed to end a delay caused by Cameroon, and that it was also in a position to know that the intervention had in fact taken place and that it involved the activities in question. It is therefore difficult to find that the material in question could not have been discovered with due diligence. In this respect, I agree with the appellant.

49. But, for the reasons given in today's judgment, that does not end the matter. Certainly the general rule is that "the interests of justice" will not suffice to authorise the admission of material which was available at trial, diligence being a factor in determining availability. The principle of finality supports that view. But, as has been recognised by the Appeals Chamber of the ICTY, "the principle [of finality] would not operate to prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice". [FN50] As was also observed by that Chamber, [FN51] """"the principle of finality must be balanced against the need to avoid a miscarriage of justice". I see no reason why the necessity to make that balance does not apply to a review.

FN50 Tadic, IT-94-1-A, 15 October 1998, para. 72. The context suggests that the word "not" in the expression "not available" in line 8 of para. 35 of that decision was inserted per incuriam.

FN51 Ibid., para. 35.

50. Thus, there has to be recognition of the possibility of there being a case in which, notwithstanding the absence of diligence, the material in question is so decisive in demonstrating mistake that the court in its discretion is obliged to admit it in the upper interests of justice. This was done in one case in which an appeal court observed, "All the evidence tendered to us could have been adduced at the trial: indeed, three of the witnesses, whom we have heard... did give evidence at the trial. Nevertheless we have thought it necessary, exercising our discretion in the interests of justice, to receive" their evidence. [FN52] It is not the detailed underlying legislation which is important, but the principle to be discerned.

FN52 See R v. Lattimore (1976) 62 Cr. App. R. 53, at 56.

51. The principle was more recently affirmed by the Supreme Court of Canada in the case of R v. Warsing. [FN53] There the leading opinion recalled an earlier view that "the criterion of due diligence... is not applied strictly in criminal cases" and said: "It is desirable that due diligence remain only one factor and its absence, particularly in criminal cases, should be assessed in light of other circumstances. If the evidence is compelling and the interests of justice require that it be admitted then the failure to meet the test should yield to permit its admission". [FN54] In the same opinion, it was later affirmed that "a failure to meet the due diligence requirement should not '""override accomplishing a just result"DDDD'. [FN55]

FN53 [1998] 3 S.C.R. 579.

FN54 Ibid., para. 51 of the opinion of Justices Cory, Iacobucci, Major and Binnie.

FN55 Ibid., para. 56.

52. It may be thought that an analogous principle can be collected from Aleksovski, in which the Appeals Chamber of the ICTY held "that, in general, accused before this Tribunal have to raise all possible defences, where necessary in the alternative, during trial ...'', [FN56] but stated that it """""will nevertheless consider" a new defence. Clearly, if the new defence was sound in law and convincing in fact, it would have been entertained in the higher interests of justice notwithstanding the general rule.

FN56 See paragraph 51 of IT-95-14/1-A of 24 March 2000.

53. Thus, having regard to the superior demands of justice, I would read the reference in Rule 120 to a new fact which "could not have been discovered through the exercise of due diligence" as directory, and not mandatory or peremptory. In this respect, it is said that the "language of a statute, however mandatory in form, may be deemed directory whenever legislative purpose can best be carried out by [adopting a directory] construction". [FN57] Here, the overriding purpose of the provision is to achieve justice. Justice is denied by adopting a mandatory interpretation of the text; a directory approach achieves it. This approach, it is believed, is consonant with the broad view that, as it has been said, "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case". [FN58] That remark was made about rules of civil procedure, but, with proper caution, the idea inspiring it applies generally to all rules of procedure to temper any tendency to rely too confidently, or too simplistically, on the maxim dura lex, sed lex. [FN59] I do not consider that this approach necessarily collides with the general principle regulating the interpretation of penal provisions and believe that it represents the view broadly taken in all jurisdictions.

FN57 82 Corpus Juris Secundum (Brooklyn, 1990), pp. 871-872, stating also, at p. 869, that "a statute may be mandatory in some respects, and directory in others". And see Craies on Statute Law, 7th edn. (London, 1971), pp. 62, 249- 250, and 260-271.

FN58 In re Coles and Ravenshear [1907] 1 K.B. 1, at 4.

FN59 Cited sometimes in legal discourse, as in Serbian Loans, P.C.I.J., Ser. A, No. 20-21, p. 56, dissenting opinion of Judge de Bustamante.

54. The question then is whether, even if there was an absence of diligence, the material in this case so compellingly demonstrates mistake as to justify its admission. Ambassador Scheffer's statement makes it clear that the delay in Cameroon was due to the workings of the decision-making process in that country, that that process was expedited only after and as a result of his and his government's intervention with the highest authorities in Cameroon, that Cameroon was otherwise not ready to effect a transfer, and that accordingly the Tribunal was not to blame for any delay, as the Appeals Chamber thought it was. Has the Appeals Chamber to close its eyes to Ambassador Scheffer's statement, showing, as it does, the existence of palpable mistake bearing on the correctness of the previous conclusion? I think not.

55. The third question is which Chamber should process the significance of the new fact: Is it the Appeals Chamber? Or, is it the Trial Chamber? In the Tadic Rule 115 application, the ICTY Appeals Chamber took the position, in paragraph 30 of its Decision of 15 October 1998, that the "proper venue for a review application is the Chamber that rendered the final judgement". Well, this is a review and it is being conducted by the Chamber which gave the final judgement - namely, the Appeals Chamber. So the case falls within the Tadic proposition.

56. I would, however, add this: On the basis of the statement in question, there could be argument that the Appeals Chamber cannot itself assess a new fact where the Appeals Chamber is sitting on appeal. However, it appears to me that the statement need not be construed as intended to neutralise the implication of Rule 123 of the Rules of Procedure and Evidence of the Tribunal that the Appeals Chamber may itself determine the effect of a new fact in an appeal pending before it. That Rule states: "If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion". The word "may" shows that the Appeals Chamber need not send the matter to the Trial Chamber but may deal with it itself. The admissibility of this course is supported by the known jurisprudence, which shows that matter in the nature of a new fact may be considered on appeal. Thus, in R. v. Ditch (1969) 53 Cr. App. R. 627, at p. 632, a post-trial confession by a co-accused was admitted on appeal as fresh or additional evidence, having been first heard de bene esse before being formally admitted. [FN60] Structures differ; it is the principle involved which matters. The jurisprudence referred to above in relation to mandatory and directory provisions also works to the same end. In my view, that end means this: where the new fact is in its nature conclusive, it may be finally dealt with by the Appeals Chamber itself; a

reference back to the Trial Chamber is required only where, without being conclusive, the new fact is of such strength that it might reasonably affect the verdict, whether the verdict would in fact be affected being left to the evaluation of the Trial Chamber. [FN61]

FN60 Earlier cases suggested that this sort of evidence should be processed through the clemency machinery; but the position was changed by s. 23(2) of the Criminal Appeal Act 1968 (UK).

FN61 See the statement in a previous case cited by Ritchie, J., in his leading opinion in McMartin v. The Queen, 1964 DLR LEXIS 1957, 46 DLR 2d 372. The statement related to "fresh evidence" but there is no reason why the principle involved cannot apply to new facts under the scheme of the Tribunal.

57. The fourth question is whether the new fact brought forward in Ambassador Scheffer's statement "could have been a decisive factor in reaching the decision", within the meaning of Article 25 of the Statute. The simple answer is "yes". As mentioned above, the decision of the Appeals Chamber proceeded on the basis that the Tribunal was responsible for the delay in Cameroon and that the latter was always ready to make a transfer. The Ambassador's statement shows that these things were not so.

58. The fifth and last question relates to a submission by the appellant that the Appeals Chamber should disregard Ambassador Scheffer's activities because he was merely prosecuting the foreign policy of his government and had no role to play in proceedings before the Tribunal. As has been noticed repeatedly, the Tribunal has no coercive machinery of its own. The Security Council sought to fill the gap by introducing a legal requirement for states to co-operate with the Tribunal. That obligation should not be construed so broadly as to constitute an unacceptable encroachment on the sovereignty of states; but it should certainly be interpreted in a manner which gives effect to the purposes of the Statute. I cannot think that anything in the purposes of the Statute prevents a state from using its good offices with another state to ensure that the needed cooperation of the latter with the Tribunal is forthcoming; on the contrary, those purposes would be consistent with that kind of démarche. Thus, accepting that Ambassador Scheffer was prosecuting the foreign policy of his government, I cannot see that he was acting contrary to the principles of the Statute. Even if he was, I do not see that there was anything so inadmissibly incorrect in his activities as to outweigh the obvious relevance for this case of what he in fact did.

59. The statement of Judge Mballe of Cameroon is equally admissible as a new fact. It corroborates the substance of Ambassador Scheffer's statement in that it shows that, whatever was the reason, the delay was attributable to the decision-making process of the government of Cameroon; it was not the responsibility of the Tribunal or of any arm of the Tribunal.

(vi) The effect of the new facts

60. The appellant, along with others, was detained by Cameroon on an extradition request from Rwanda from 15 April 1996 to 21 February 1997. During that period of detention, he was also held by Cameroon at the request of the Prosecutor of the Tribunal for one month, from 17 April 1996 to 16 May 1996. In the words of the Appeals Chamber, on the latter day "the Prosecutor informed Cameroon that she only intended to pursue prosecutions against four of the detainees, excluding the Appellant". [FN62] Later, on "15 October 1996, responding to a letter from the Appellant complaining about his detention in Cameroon, the Prosecutor informed the Appellant that Cameroon was not holding him at her behest". [FN63] Today's judgment also shows that the appellant knew, at least by 3 May 1996, of the reasons for which he was held at the instance of the Prosecutor. These things being so, it appears to me that, from the point of view of proportionality, the Appeals Chamber focused on the subsequent period of detention at the request of the Tribunal, from 21 February 1997 to 19 November 1997, on which latter date the appellant was transferred from Cameroon to the Tribunal's detention unit in Arusha. How would the Appeals Chamber have viewed the appellant's detention during this period had it had the benefit of the new facts now available?

FN62 Decision of the Appeals Chamber, 3 November 1999, para. 5, original emphasis.

FN63 Ibid., para. 7.

61. Regard being had to the jurisprudence, considered above, on the general judicial attitude to delay in the early phases of a criminal case, it is reasonable to hold that Rule 40bis contemplated a speedy transfer. If the transfer was effected speedily, no occasion would arise for considering whether the provision applied to extended detention in the place from which the transfer was to be made. In this case, the transfer was not effected speedily and the Appeals Chamber thought that the Tribunal (through the Prosecutor) was responsible for the delay, for which it accordingly looked for a remedy. In searching for this remedy, it is clear, from its decision read as a whole, that the central reason why it was moved to hold that the protection of that provision applied was because of its view that there was that responsibility. In this respect, I note that the appellant states that it "is the Prosecutor's failure to comply with the mandates of Rule 40 and Rule 40bis that compelled the Appeals Chamber to order the Appellant's release". [FN64] I consider that this implies that the appellant himself recognises that the real reason for the decision to release him was the finding by the Appeals Chamber that the Prosecutor (and, through her, the Tribunal) was responsible for the delay in Cameroon. It follows that if, as is shown by the statements of Ambassador Scheffer and Judge Mballe, the Tribunal was not responsible, the Appeals Chamber would not have had occasion to consider whether the provisions applied and whether the appellant should be released in accordance with Rule 40bis(H).

FN64 Appellant's Response to Prosecutor's Motion for Review or Reconsideration, 17 February 2000, para.

62. Thus, without disturbing the previous holding, made on the facts then known to the Appeals Chamber, that Rule 40bis was applicable to the Cameroon period (with

which I do not agree), the conclusion is reached that, on the facts now known, the Appeals Chamber would not have held that the Rule applied to that period, with the consequence that the Rule would not have been regarded as yielding the results which the Appeals Chamber thought it did.

63. Argument may be made on the basis of the previous holding (with which I disagreed) that Cameroon was the constructive agent of the Tribunal. On that basis, the contention could be raised that, even if the delay was caused by Cameroon and not by the Tribunal, the Tribunal was nonetheless responsible for the acts of Cameroon. However, assuming that there was constructive agency, such agency was for the limited purposes of custody pending speedy transfer. Cameroon could not be the Tribunal's constructive agent in respect of delay caused, as the new facts show, by Cameroon's acts over which the Tribunal had no control, which were not necessary for the purposes of the agency, and which in fact breached the purposes of the agency. Hence, even granted the argument of constructive agency, the new facts show that the Tribunal was not responsible for the delay as the Appeals Chamber thought it was on the basis of the facts earlier known to it.

64. There are other elements in the case, but that is the main one. Other new facts, mentioned in today's judgment, show that the violation of the appellant's rights in respect of delay between transfer and initial appearance was not as extensive as earlier thought; in any case, it did not involve the operation of a mandatory provision requiring release. The new facts also show that defence counsel acquiesced in the non-hearing of the habeas corpus motion on the ground that it had been overtaken by events. Moreover, as is also pointed out in the judgment, the matter has to be regulated by the approach taken by the Appeals Chamber in its decision of 3 November 1999. Paragraphs 106-109 of that decision made it clear that the conclusion reached was based not on a violation of any single right of the appellant but on an accumulation of violations of different rights. As has now been found, there are new facts which show that important rights which were thought to have been violated were not, and that accordingly there was not an accumulation of breaches. Consequently, the basis on which the Appeals Chamber ordered the appellant's release is displaced and the order for release vacated.

(vii) Conclusion

65. There are two closing reflections. One concerns the functions of the Prosecutor; the other concerns those of the Chambers.

66. As to her functions, the Prosecutor appeared to be of a mind that the independence of her office was invaded by a judicial decision that an indictment was dismissed and should not be brought back. She stated that she had "never seen" an instance of a prosecutor being prohibited by a court "from further prosecution ...''. [FN65] In her submission, such a prohibition was at variance with her "completely independent" position and was "contrary to [her] duty as a prosecutor". [FN66] Different legal cultures are involved in the work of the Tribunal and it is right to try to understand those statements. It does appear to me, however, that the framework provided by the Statute of the Tribunal can be

interpreted to accommodate the view of some legal systems that the independence of a prosecutor does not go so far as to preclude a court from determining that, in proper circumstances, an indicted person may be released and may not be prosecuted again for the same crime. The independence with which a function is to be exercised can be separated from the question whether the function is itself exercisable in a particular situation. A judicial determination as to whether the function may be exercised in a given situation is part of the relief that the court orders for a breach of the person's rights committed in the course of a previous exercise of those functions. This power of the courts has to be sparingly used; but it exists.

FN65 Transcript, Appeals Chamber, 22 February 2000, p. 12.

FN66 Ibid.

67. Also, the Prosecutor stated, in open court, that she had personally seen """"5000 skulls" in Rwanda. [FN67] She said that the appellant was "responsible for the death of over ... 800,000 people in Rwanda, and the evidence is there. Irrefutable, incontrovertible, he is guilty. Give us the opportunity to bring him to justice." [FN68] Objecting on the basis of the presumption of innocence, [FN69] counsel for the appellant submitted that the Prosecutor had expressed herself in "a more aggressive manner than she should ...'' and had """"talked as if she was a depository of justice before" the Appeals Chamber. [FN70] I do not have the impression that the latter remark was entirely correct, but the differing postures did appear to throw up a question concerning the role of a prosecutor in an international criminal tribunal founded on the adversarial model. What is that role?

FN67 Ibid., p. 19.

FN68 Ibid., p. 14.

FN69 Ibid., p. 243.

FN70 Ibid., pp. 138-139.

68. The Prosecutor of the ICTR is not required to be neutral in a case; she is a party. But she is not of course a partisan. This is why, for example, the Rules of the Tribunal require the Prosecutor to disclose to the defence all exculpatory material. The implications of that requirement suggest that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel "ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice". [FN71] The prosecution takes the position that it would not prosecute without itself believing in guilt. The point of importance is that an assertion by the prosecution of its belief in guilt is not relevant to the proof. Judicial traditions vary and the Tribunal must seek to

benefit from all of them. Taking due account of that circumstance, I nevertheless consider that the system of the Statute under which the Tribunal is functioning will support a distinction between an affirmation of guilt and an affirmation of preparedness to prove guilt. In this case, I would interpret what was said as intended to convey the latter meaning, but the strength with which the statements were made comes so close to the former that I consider it right to say that the framework of the Statute is sufficiently balanced and sufficiently stable not to be upset by the spirit of the injunction referred to concerning the role of a prosecutor. I believe that it is that spirit which underlies the remarks now made by the Appeals Chamber on the point.

FN71 R v Banks [1916] 2 KB 621 at 623, per Avory J. In keeping with that view, it is indeed said that prosecuting counsel "should not regard himself as appearing for a party". See Code of Conduct of the Bar of England and Wales, para. 11(1).

69. As to the functions of the Chambers, whichever way it went, the decision in this case would call to mind that, on the second occasion on which Pinochet's case went to the British House of Lords, the presiding member of the Appellate Committee of the House noted that -

[t]he hearing of this case ... produced an unprecedented degree of public interest not only in this country but worldwide. ... The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. ... This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions. [FN72]

FN72 R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2), [1999] 1 All ER 577, HL, at pp. 580-581, per Lord Browne-Wilkinson.

Naturally, however, (and as in this case), "the members of the Appellate Committee were in no doubt as to their function ...''. [FN73]

FN73 Ibid.

70. Here too there has been interest worldwide, including a well-publicised suspension by Rwanda of cooperation between it and the Tribunal. On the one hand, the appellant has asked the Appeals Chamber to "disregard ... the sharp political and media reaction to the decision, particularly emanating from the Government of Rwanda". [FN74] On the other hand, the Prosecutor has laid stress on the necessity for securing the cooperation of Rwanda, on the seriousness of the alleged crimes and on the interest of the international community in prosecuting them.

FN74 Defence Reply to the Prosecutor's Motion for Review or Reconsideration, 6 January 2000, para. 53.

71. These positions have to be reconciled. How? This way: the sense of the international community has to be respectfully considered by an international court which does not dwell in the clouds; but that sense has to be collected in the whole. The interest of the international community in organising prosecutions is only half of its interest. The other half is this: such prosecutions are regarded by the international community as also designed to promote reconciliation and the restoration and maintenance of peace, but this is possible only if the proceedings are seen as transparently conforming to internationally recognised tenets of justice. The Tribunal is penal; it is not simply punitive.

72. It is believed that it was for this reason that the Security Council chose a judicial method in preference to other possible methods. The choice recalls the General Assembly's support for the 1985 Milan Resolution on Basic Principles on the Independence of the Judiciary, paragraph 2 of which reads: """"The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason". [FN75] That text, to which counsel for the appellant appealed, [FN76] is a distant but clear echo of the claim that the law of Rome was "of a sort that cannot be bent by influence, or broken by power, or spoilt by money". The timeless constancy of that ancient remark, cited for its substance rather than for its details, has in turn to be carried forward by a system of international humanitarian justice which was designed to function in the midst of powerful cross-currents of world opinion. Nor need this be as daunting a task as it sounds: it is easy enough if one holds on to the view that what the international community intended to institute was a system by which justice would be dispensed, not dispensed with.

FN75 See General Assembly Resolution 40/32 of 29 November 1985, para. 1, General Assembly Resolution 40/146 of 13 December 1985, para. 2, and Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August - 6 September 1985 (United Nations, New York, 1986), p. 60, para. 2.

FN76 Transcript, Appeals Chamber, 22 February 2000, pp. 213-214.

73. But this view works both ways. In this case, there are new facts. These new facts both enable and require me to agree that justice itself has to regard the effect of the previous decision as now displaced; to adhere blindly to the earlier position in the light of what is now known would not be correct.

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

Mohamed Shahabuddeen

Dated this 31st day of March 2000

2000 WL 33321762 (UN ICT (App)(Rwa))

At The Hague, The Netherlands

END OF DOCUMENT

6. *Prosecutor v Niyitegeka*, "Prosecution Response to "Extremely urgent Defence Reply" filed on 22 September 2003", 26 September 2003.

2003 WL 23192558 (UN ICT (App)(Rwa))

International Criminal Tribunal for Rwanda
In the Appeals Chamber

Before: Presiding Judge Theodor Meron, Judge Claude Jorda, Judge Mohamed Shahabuddeen, Judge Fausto Pocar, Judge Inés Weinberg de Roca

Registrar: Mr. Adama Dieng

Date Filed: 26 September 2003

THE PROSECUTOR
v.

ELIÉZER NIYITEGEKA

PROSECUTION RESPONSE TO "EXTREMELY URGENT DEFENCE REPLY" FILED ON 22 SEPTEMBER 2003

ICTR-96-14-A

The Office of the Prosecutor: Mr. Norman Farrell, Senior Appeals Counsel

Counsel for Eliézer Niyitegeka: Ms Sylvia Geraghty Lead Counsel

(A) Introduction

1. The Prosecution seeks leave to file this document in response to Eliezer Niyitegeka's (hereinafter "the Appellant") "Extremely Urgent Defence Reply" ("Defence Reply"). [FN1] The Defence Reply was in response to the "Prosecution Response to the Defence Extremely Urgent Defence Motion" (hereinafter "the Prosecution Response"). [FN2]

FN1. Filed on 22 September 2003, 103/H-95/H.

FN2. Filed on 15 September 2003

2. In the Defence Reply, the Appellant has raised fresh arguments and/or new requests [FN3] that have not been previously proffered in either his original

2003 WL 23192558 (UN ICT (App)(Rwa))

Defence Motion [FN4] (hereinafter "the Original Defence Motion") or its annexure. [FN5] The Prosecution submits that the Appellant has gone outside the scope and nature of a reply. Tribunal jurisprudence dictates that a reply is restricted to dealing with issues raised in an opposing party's response. If a party raises a new argument or request for the first time in a reply, then the opposing party is deprived of the opportunity to respond. This could harm the fairness of the trial proceedings. [FN6]

FN3. Defence Reply paras 9, 10, 11,15, 17, 18, 25, 26, 27, 28, 29,31,34,35, 39, 40, 41, 43 and 45

FN4. Extremely Urgent Defence Motion filed on 4 September 2003

FN5. Ibid vide Annexure A, letter of 9 August 2003

FN6. Prosecution v. Kupre{ki~ et al Decision on the motion of Appellants, Vlatko Kupre{ki~, Drago Josipovi} and Mirjan Kupre~ki} to admit additional evidence (confidential), IT-95-16-A, 26 February 2001 paras. 69-70

3. The Appeals Chamber has previously dealt with this type of "non-compliance" in two ways; it either strikes the impugned paragraphs on the basis of their containing new material going beyond the scope of what is permissible to include in a reply [FN7]; or grants the aggrieved party an opportunity to respond where it opines that there has been a "significant recasting" of the original motion. [FN8] These approaches re-emphasise the need to ensure strict adherence to the nature and scope of a reply in appeal proceedings. It has the salutary effect of maintaining the principle of finality, protecting the equality of arms and ensuring that non-compliance is not rewarded.

FN7. Prosecutor v Kvocka et al, Decision on Prosecution's Motion to strike portion of the reply, IT-98-30/I-A 30 September 2002. The Pre-Appeal judge granted the Prosecution Motion to strike two paragraphs from Zigi~'s Reply (one of the Appellants) which material was not included in his original Rule 115 Motion for additional evidence. It did state however that he could seek leave to effect same.

FN8. Prosecutor v Kordi} and ecez, Decision on Motion by Prosecution for variation of time limit to file a response to an application by the Appellants and permitting further response to be filed. IT-95-14?2-A 27 July 2001. The Pre-Appeal Judge ruled that Kordi}'s Reply to the Prosecution's Response to his Motion was a significant recasting of his original motion

4. The Prosecution proposes to respond to only those matters in the Defence Reply which it considers falling outside the ambit and scope of what is permissible in a reply.

5. Firstly, the Appellant challenges for the first time the locus standi of the Senior Appeals Counsel and his capacity to be impartial in the appeal proceedings [FN9]. He submits that this letter from the Senior Appeals Counsel was manifestly not written on behalf of and at the direction of the addressee nor by senior management of the Office of the Prosecutor. He states further that the information sought should not be "processed or filtered through the hands of a party to the appeal" and that the Senior Appeals Counsel should not be involved in the "investigative stage". He views the letter as a "highly improper intervention" claiming that it is "biased, obfuscating and obstructive" in nature and content.

FN9. Defence Reply paras 9, 10, 11, 15, 27, 34, 39 and 40

6. Secondly, he submits that "the Prosecution cannot be relied upon to voluntarily make Disclosure under Rule 68 or otherwise, not to the Defence not even to the Trial Chamber." [FN10] He appears to be suggesting that the Prosecution will be biased in the discharge of its obligations pursuant to Rule 68.

FN10. Defence Reply para. 41

7. Thirdly, he submits for the first time that he is unable to finalise his Appeal Brief [FN11] in the absence of the information sought. He claims that it would be unfair to require him to do so. The position now being put forward is that all the grounds of Appeal in the Notice of Appeal are contingent and dependent upon the information he seeks.

FN11. Ibid paras 17, 18, 31 and 45

8. Fourthly the Appellant seeks to vary the terms of the relief sought in the Original Motion [FN12] in two ways. He first requests that the Office of the Prosecutor not carry out the enquiry as originally requested. [FN13] He consequently requests that the Appeals Chamber order that an independent, impartial and comprehensive investigation be carried out by an independent, impartial and trustworthy person; [FN14] that the Final Report resulting thereof be made available to the Appellant; [FN15] that access be granted to unspecified persons who may assist the Appellant; [FN16] and that the 45 days allowed for filing the Appellant's appellate Brief begin to run from the date of receipt of the Final Report and not from the date on which the Judgement is served on him in the language he understands. [FN17]

FN12. Filed on 4 September 2003, 103/H-95/H

FN13. Defence Reply paras 25-28, 34, 35, 43, 45

FN14. Ibid.

FN15. Ibid para.45(iv)

FN16. Ibid paras 26, 28 and 45(v)

FN17. Ibid para 45(vi)

9. It is submitted that these new arguments and/or requests of the Appellant are unmeritorious and must be dismissed in its entirety for reasons outlined below.

(B) Prosecution's Response

10. The Appellant has raised for the first time in the Reply the locus standi of the Senior Appeals Counsel and his capacity to be impartial in the appeal proceedings. The Appellant cannot claim that the involvement of the Senior Appeals Counsel was never anticipated or that he intimated in any way that his role should be discounted. In the Defence Motion, the Appellant refers to a letter (Annexure B) from Ms Melanie Werrett Officer-in-charge, Office of the Prosecutor (OTP) which stated inter alia that the issues raised required consideration by both the senior management of the Office of the Prosecutor and the Senior Appeals Counsel in the Hague; it stated further that they would "do their best to resolve matters and revert as soon as possible". Any reversion would invariably involve an authorised source from the OTP as envisaged by the Statute [FN18], communicating with the Appellant with a view to ameliorating the stated concerns. The Prosecution is therefore at a loss why the locus standi of the Senior Appeals Counsel is being queried in a matter that concerns appellate issues.

FN18. Statute of the International Criminal Tribunal for Rwanda Article 15(3)

11. Being seized of the contents of the letter from Ms Melanie Werrett, the Appellant was well placed to advance any concerns he had with regard to the role of the Senior Appeals Counsel in his Original Defence Motion. Specifically, if he had concerns with the role of the Senior Appeals Counsel as are now apparent, the proper place to raise these concerns was the Original Defence Motion and not the Reply. Further the Senior Appeals Counsel never stated in that letter that he would be involved in any investigation. The letter of 12 September 2003 did not contain any such admission or notion. He comprehensively responded to the 17 questions posed in the Appellant's letter dated 9 August 2003. In so doing he was entitled to respond as appellate counsel to issues impacting on the appeal in the context of their relevance and applicability.

12. The Appellant in his Defence Reply has raised for the first time the capacity and integrity of the Prosecution to fulfil its obligations pursuant to Rule 68. The Prosecution has a duty, imposed by Rule 68, to disclose exculpatory material to the Defence and Prosecution counsel are presumed to discharge this duty in good faith [FN19]. Under Rule 68, the initial decision as to whether evidence is exculpatory has to be made by the Prosecutor. Without proof that the Prosecutor

abused its discretion in deciding what evidence fell within the ambit of Rule 68, the Appeals Chambers would not be inclined to intervene in the manner such discretion was exercised. [FN20] The Prosecution is under a continuing legal obligation to disclose exculpatory material in proceedings before the Appeals Chamber. [FN21] In instant matter the Prosecution does not resile from its stated position. [FN22] The scope of the Prosecution's Rule 68 obligation is not without limits as Rule 68 requires the disclosure of only exculpatory evidence and "not all or an entire section of the Prosecutor's documentation." [FN23] In dispensing its responsibilities under Rule 68 the Prosecution has a presumption of bona fides and unfounded allegations will not suffice to rebut this presumption. The Appellant's concern is therefore without justification.

FN19. The Prosecutor v. Tihomir Bla{ki}, "Decision on the Defence Motion for "Sanctions for Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence "IT-95-14-PT, 29 April 1998, paras.16-21

FN20. The Prosecutor v. Tihomir Bla{ki}, "Decision on the Appellant's Motion for the Production of Material, Suspension or extension of the Briefing Schedule and Additional Filings".IT-95-14-A 26 September 2000 para.39

FN21. Ibid

FN22. The Prosecution Response para. 13

FN23. The Prosecutor v. Tihomir Bla{ki}, Decision on the Defence Motion for "Sanctions for Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence "IT-95-14-PT, 29 April 1998 para.20

13. In paragraph 5 of the Original Defence Motion, the Appellant did mention that it may be necessary to vary the content and format of its Appeal Brief. He has now varied his position in his Reply to state that he is unable to finalise his appeal Brief in the absence of the information sought. This cannot be in the light of the nature and content of the Appellant's Notice of Appeal. The Notice of Appeal consists in the main of criticisms against the Trial Chamber's factual findings. A perusal of the Notice of Appeal would reveal that the majority of the paragraphs [FN24] bears no relationship to the anticipated information sought by the Appellant. The Appellant therefore is in a position to delineate his appellate arguments with regard to the majority of paragraphs in his Notice of Appeal and where appropriate, in relation to others, he can reserve his position on the impugned issues pending receipt of the appropriate information from the Prosecution pursuant to its Rule 68 obligations. By doing such, he is in a position to alleviate the very concerns he has expressed about the expeditious hearing of his appeal and further refute any suggestion of his exercising dilatory tactics. There is provision in the Rules that accommodate this situation during the appellate process. [FN25] The Appellant cannot therefore claim prejudice and/or unfairness.

FN24. The Prosecution Response. The Prosecution refers to Annexure I para. 4 of its 12 September 2003 letter to Defence Counsel which is relevant.

FN25. The Appellant is also entitled to file a Rule 115 Motion upon showing of a good cause in the event the Prosecution discloses material 75 days after the rendering of the Trial Judgement.

14. The Prosecution rejects any suggestion that the Appeals Chamber should order that an independent, impartial and trustworthy person carry out "the said investigation" [FN26] apart from the Prosecutor if the Prosecutor deems it fit. The Prosecutor is such a person and the Appellant has not shown, apart from the panoply of innuendoes and unsubstantiated insinuations, the Prosecutor to be incapable of responding to his concerns in a just and lawful manner. The Prosecution stands by its argument in paragraphs 11 12 and 13 of the Prosecution Response; the Appellant has not shown that the circumstances have changed to an extent warranting a request for an independent and impartial person. The Appeals Chamber should therefore reject this request.

FN26. Defence Reply para.45(ii)

15. There is nothing preventing the Appellant from making use of his entitlements under the Statute and in that regard he can make the appropriate application to the Appeals Chamber if any Rule 68 material sent to him by the Prosecution reveals that there exists "persons who may be in a position to assist the Defence" [FN27]. The requested relief is therefore premature.

FN27. Defence Reply para.45(v)

16. In light of its position in paragraph 13 of instant Reply, the Prosecution is of the view that there is no reasonable basis for revisiting the Scheduling Order [FN28] of the Pre-Appeal Judge.

FN28. Referred to in para.3 of the Defence Motion

(C) Conclusion

17. For these reasons, it is submitted there is no merit to the Appellant's requests. In the circumstances, the Prosecution requests that the Relief sought in the Defence Reply be rejected.

for Norman Farrell Senior Appeals Counsel

Done this 26th day of September 2003

2003 WL 23192558 (UN ICT (App)(Rwa))

The Hague, The Netherlands

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7. *Prosecutor v Delalic*, IT-96-21-T, Decision on Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996.

1996 WL 33339779 (UN ICT (Trial)(Yug))

International Criminal Tribunal for the Former Yugoslavia
IN THE TRIAL CHAMBER

Decision

Trial Chamber

Decision

PROSECUTOR
v.

ZEJNIL DELALIC

ZDRAVKO MUCIC also known as 'PAVO'

HAZIM DELIC

ESAD LANDZO also known as 'ZENGA'

Decision of: 26 September 1996

DECISION ON THE MOTION BY THE ACCUSED ZEJNIL DELALIC FOR THE DISCLOSURE OF EVIDENCE

DECISION ON THE MOTION BY THE ACCUSED ZEJNIL DELALIC FOR THE DISCLOSURE OF EVIDENCE

The Office of the Prosecutor: Mr. Eric Ostberg Ms. Teresa McHenry

Counsel for the Accused: Ms.Edina Residovic, for Zejnil Delalic, Mr. Branislav Tapuskovic, for Zdravko Mucic, Mr. Salih Karabdic, for Hazim Delic, Mr. Mustafa Brakovic, for Esad Landzo

Before: Judge Gabrielle Kirk McDonald, Presiding, Judge Ninian Stephen, Judge Lal C. Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

I. INTRODUCTION

1996 WL 33339779 (UN ICT (Trial)(Yug))

Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 ('the International Tribunal') is a Motion for the Disclosure of Evidence ('the Motion') filed on behalf of the accused Zejnil Delalic on 10 June 1996, together with an oral request by counsel for the accused for a determination of the parameters of Sub-rule 66(B) of the Rules of Procedure and Evidence of the International Tribunal ('Rules'). The Motion was responded to by the Office of the Prosecutor ('the Prosecution') on 28 June 1996. The parties presented oral arguments with regard to the Motion on 23 July 1996.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and the oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. The Pleadings

1. The request for guidelines from the Trial Chamber for the application of Rule 66 is a recurring one. The issue first arose during the status conference of 29 May 1996, during which counsel for Zejnil Delalic orally invoked Sub-rule 66(B) with a request that the Prosecution submit to the Defence all of the documents in its possession. Counsel for Zejnil Delalic at that time also acknowledged her responsibility to allow the Prosecution to review the evidence that the Defence intends to use at trial as required by Sub-rule 67(C). On 10 June 1996, counsel for Zejnil Delalic filed a written submission reiterating her request to be permitted to inspect all books, documents, statements and other tangible objects in the Prosecution's custody and control. The Prosecution responded on 28 June 1996 noting that, other than a specific request that had already been addressed by the Trial Chamber [FN1], counsel for Zejnil Delalic had not specified any evidence material to the preparation of the Defence that had not been supplied by the Prosecution. The Prosecution also noted that the accused was given a copy of the material which accompanied the request for confirmation of the indictment at the time of his initial appearance and, within three days, at the request of the accused, the Registrar translated all the supporting material into the language of the accused. The accused also received from the Prosecution a copy of the video-tape of his interview with its investigators and the transcript of the interview in Serbo- Croatian. An English transcript was to be completed on 28 June 1996. At a status conference held on 23 July 1996, the parties indicated that although they had engaged in extensive discussions about this and other pre-trial matters since the last status conference, questions remained regarding the limitation of evidence material to the preparation of the Defence and by whom the determination of materiality is to be made.

2. During a status conference held on 24 July 1996 with the Hazim Delic and Esad Landzo, Zejnil Delalic's co-accuseds, a similar issue arose. Counsel for Landzo and the Prosecution stated their different interpretations of Sub-rule 66(A) and indicated a desire to have judicial guidance with regard to Sub-rule 66(B). It has

become clear to the Trial Chamber that, because of the opposing positions regarding the meaning of these Sub-rules, there is a general need for their interpretation.

B. Analysis

3. This Decision is concerned with Rule 66, which is entitled Disclosure by the Prosecutor. It provides:

(A) The Prosecutor shall make available to the defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses.

(B) The Prosecutor shall on request, subject to Sub-rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose pursuant to Sub-rule (B). When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

A request by the Defence pursuant to Sub-rule 66(B) triggers Sub-rule (C) of Rule 67, which is entitled Reciprocal Disclosure:

(C) If the defence makes a request pursuant to Sub-rule 66(B), the Prosecutor shall be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial.

4. On 24 July 1996, the Prosecution indicated that it does not read Sub-rule 66(A) as requiring the disclosure of every statement obtained from every person regardless of whether or not that person will be a witness. Instead, it construes Sub-rule 66(A) as requiring it to turn over all supporting material as well as prior statements of only those witnesses that the Prosecution intend [[s] to call at trial. This interpretation is correct. Sub-rule 66(A) requires the disclosure of three types of material. The first, 'copies of supporting material which accompanied the indictment', is very clear and does not leave room for debate. This proviso includes all of the supporting material, including any witness

statements, that was given to the confirming Judge. The second type of material is 'all prior statements obtained by the Prosecutor from the accused'. This part of the Rule requires the Prosecution to disclose all statements of the accused that it has in its possession. This is a continuing obligation. The final component of this Sub-rule provides that the Prosecution must reveal to the Defence 'all prior statements obtained by the Prosecutor . . . from prosecution witnesses.' Accordingly, once the Prosecution makes a determination that it intends to call an individual as a witness at trial, it is obliged to disclose. 'as soon as practicable', any statement taken prior to the time that the witness testifies at trial. This obligation on the Prosecution is also continuing and, as the Prosecution decides on each witness, it must disclose the prior statements of that witness. In summary, Sub-rule 66(A) requires the Prosecution to disclose to the Defence all supporting material that accompanied the indictment at confirmation, all prior statements obtained by the Prosecution from the accused, and all prior statements obtained by the Prosecution from those whom it intends to present at trial.

5. The Defence contends that there is confusion surrounding the meaning of Sub-rule 66(B), which provides that the Prosecution must, on the Defence's request, allow the Defence access to 'any books, documents, photographs and tangible objects in his custody or control' that fit into three categories: (1) those that are material to the preparation of the defence; (2) those that are intended for use by the Prosecution as evidence at trial; and (3) those that were obtained from or belonged to the accused. At the status conference on 23 July 1996, the Trial Chamber indicated - with the parties' implicit agreement - that the Prosecution clearly has the responsibility to turn over for inspection all evidence in the third category. In regard to the second category, the Prosecution indicated that it was in the process of providing the Defence with material that it intends for use at trial, and agreed that this is a continuing obligation. Thus, the remaining dispute is concerned with, as it was framed at the status conference, the range of evidence that is 'material to the preparation of the defence'.

6. The Rules provide no guidance regarding the process of determining the materiality of evidence. However, Sub-rule 66(B) is substantially similar to Rule 16(a)(1)(C) of the United States' Federal Rules of Criminal Procedure, which provides:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belonged to the defendant.

Accordingly, interpretations of the United States rule as well as a review of its application will provide some guidance in analysing Sub-rule 66(A).

7. The significant jurisprudence in the United States federal courts on the scope

of 'materiality' demonstrates that it is generally accepted that to be material, the requested information must have 'more than . . . [an] abstract logical relationship to the issues.' See, e.g. United States v. Ross, 511 F.2d 757, 762 (U.S. Ct. App. 5th Cir.), cert. denied 423 U.S. 836 (U.S. Supreme Court 1975). The requested evidence must be 'significantly helpful to an understanding of important inculpatory or exculpatory evidence'; it is material if there 'is a strong indication that . . . it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.'' United States v. Jackson, 850 F. Supp. 1481, 1503 (U.S. Dist. Ct. D. Kan. 1994), quoting United States v. Lloyd, 992 F.2d 348, 351 (U.S. Ct. App. D.C. Cir. 1993). In the British system, the test of materiality was adopted by the Court of Appeal in R v. Keane, 99 CR. App. R.1, which similarly defines disclosable matter as

that which can be seen on a sensible appraisal by the prosecution;

(1) to be relevant or possibly relevant to an issue in the case;

(2) to raise or possibly raise a new issue whose existence is not

apparent from the evidence the prosecution proposes to use;

(3) to hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2).

8. The Advisory Committee notes to the United States rule which reflect the discussion of the drafters of the rule are also instructive. The notes indicate that the first category - items 'material to the preparation of the defence" - creates a residual classification that requires a preliminary showing of materiality. However, the Committee noted that some items are nearly always material without a special showing:

[L]imiting the rule to situations in which the defendant can show that the evidence is material seems unwise. . . . For this reason subdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant.

Advisory Committee's Notes on United States Fed. Rule Crim. Proc. 16, 18 U.S.C.A. p. 762. As with the United States rule, it is obvious that the Prosecution has the role of giving the evidence that falls within the second and third categories of Sub-rule 66(B) to the Defence on request. There is little room for speculation regarding that which the Prosecution intends to use at trial and that which was taken from the accused. As outlined above, however, this responsibility is not clearly delineated for those items deemed material to the preparation of the Defence, thus raising the issue of on whom the responsibility rests for making the

determination of materiality. A United States District Court Judge stated the issue before this Trial Chamber quite appropriately: aptly framed the issue as follows:

The phrase 'material to the preparation of the defendant's defense' is one that causes practical problems on both sides of the discovery equation. On the one hand, a defendant's counsel cannot know in most cases the precise nature of all the documents that should be available, but the defence counsel is going to be hard pressed to specifically argue materiality of individual documents. On the other hand, it is equally clear that the discovery rules do not require 'open file' discovery with the defendant being allowed to browse at will through the prosecution files. [citation omitted] Moreover, a good deal of inculpatory evidence will have already been turned over as evidence that the government will be using in its case-in-chief. The problem here is to define 'materiality" in such a way that it does not merely duplicate other discovery information definitions. Rule 16(a)(1)(C) was not intended to impose a completely redundant discovery obligation.

United States v. Liquid Sugars, Inc. & Mooney, 158 F.R.D. 466 (U.S. Dist. Ct. E.D. Cal. 1994).

9. As articulated in the British rule (see 7 supra), as a threshold matter, the Prosecution is initially the party responsible for deciding what evidence it has in its possession that may be material to the preparation of the Defence, by virtue of the simple fact that it is the party with possession of the evidence. If the Defence believes that the Prosecution has withheld evidence material to its preparation, it can challenge the Prosecution by reasserting its right to the evidence. At that point, there are three alternatives for the Prosecution. The Prosecution can: (1) hand over the requested evidence; (2) deny that it has the requested evidence in its possession; or (3) admit that it has the evidence but refuse to allow the Defence to inspect it. Only if there is a dispute as to materiality should the Trial Chamber become involved and act as a referee between the parties in order to make this determination. When presenting this issue to the Trial Chamber, the Defence should be guided by the above definitions of materiality. The Defence, however, may not rely on conclusory allegations or a general description of the information, but must make a prima facie showing of materiality and that the requested evidence is in the custody or control of the Prosecution. See United States v. Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990).

10. In this case, the Defence has noted its desire to have access to all documents and other objects within the Prosecution's custody and control having to do with the accused or Celebici camp on the basis that they are all material to its preparation. In its response to the Motion, the Prosecution indicated that it has fully complied with the provisions of Rule 66 and intends to continue to do so. The Defence has failed to identify specific material that the Prosecution has within its custody and control to which it has not given the Defence access. Given the absence of a specific identification of material evidence that the Defence alleges the Prosecution has withheld, it is inappropriate for the Trial Chamber to intervene at this time.

11. The principles set out in this Decision shall apply to all disclosure to be made in this matter in respect of all four accused.

In conclusion, Rule 66(A) requires the Prosecution to provide the Defence with all material, including statements of all witnesses, that accompanied the Indictment when submitted to the confirming judge and all prior statements of the accused. Rule 66(B) imposes on the Prosecutor the responsibility of making the initial determination of materiality of evidence within its possession and if disputed, requires the Defence to specifically identify evidence material to the preparation of the Defence that is being withheld by the Prosecutor.

III. DISPOSITION

For the foregoing reasons, THE TRIAL CHAMBER, being seized of the Motion filed by the Defence and

PURSUANT TO RULE 54,

HEREBY DENIES THE MOTION for discovery under Sub-rule 66(B).

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

Gabrielle Kirk McDonald

Presiding Judge

Dated this twenty-sixth day of September 1996

At The Hague

The Netherlands

[Seal of the Tribunal

Note 1.]

[FN1]. The Defence requested from the Prosecution a copy of the interview of a co-accused, Zdravko Mucic. The Prosecution asked for a delay in the production, which the Defence refused. The dispute was then brought before the Trial Chamber, which granted a fourteen-day delay.

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