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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Emmanuel Ayoola, Presiding
Judge A. Raja N. Fernando
Judge George Gelaga King
Judge Renate Winter
Judge Geoffrey Robertson, QC

Registrar: Mr Robin Vincent

Date filed: 31 August 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

CASE NO. SCSL – 2004 – 14 – T

ADDITIONAL AUTHORITIES CITED IN "PROSECUTION APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 2 AUGUST 2004 REFUSING LEAVE TO FILE AN INTERLOCUTORY APPEAL"

Office of the Prosecutor:
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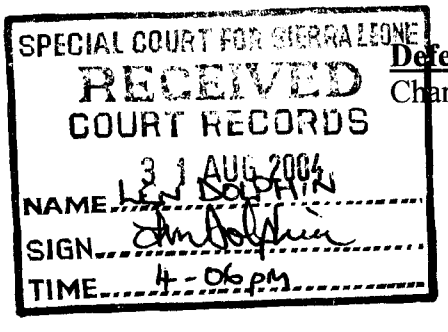

SPECIAL COURT FOR SIERRA LEONE
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AUTHORITIES

1. *Prosecutor v. Tadic, Appeal Judgement on Allegations of Contempt by Prior Counsel*, Case No. IT-94-1-A-AR77, Appeals Chamber, 27 February 2001.

2. *Prosecutor* v. *Brdanin and Talic, Decision on Interlocutory Appeal,* Case No. IT-99-36-AR73.9, Appeals Chamber, 11 December 2002.

3. *Prosecutor v. Milosevic, Decision on the Interlocutory Appeal by the* Amici Curiae *Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case*, Case No. IT-02-54-AR73.6, Appeals Chamber, 20 January 2004.

4. *Prosecutor v. Delic et al., Judgement on Sentence Appeal*, Case No. IT-96-21-A*bis*, Appeals Chamber, 8 April 2003.

5. William A. Schabas, *An Introduction to the International Criminal Court (2001).*

6. *Prosecutor v. Milosevic, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder*, Case No. IT-99-37-AR73, Appeals Chamber, 18 April 2002.

7. *Prosecutor v. Bizimungu, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment*, Case No. ICTR-99-50-AR50, Appeals Chamber, 12 February 2004.

8. *Prosecutor v. Karemera, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File Amended Indictment*, Case No. ICTR-98-44-AR73, Appeals Chamber, 19 December 2003.

9. *Prosecutor v. Tadic, Decision on Motion for Review*, Case No. IT-94-1-R, Appeals Chamber, 30 July 2002.

10. *Kanyabashi v. Prosecutor, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I; Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia*, Case No. ICTR-96-15-A, Appeals Chamber, 3 June 1999.

11. *Prosecutor v. Barayagwiza, Decision*, Case No. ICTR-97-19-A, Appeals Chamber, 3 November 1999.

12. *Prosecutor v. Naletilic and Martinovic, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment*, Case No. IT-98-34-PT, Trial Chamber, 14 February 2001.

13. *Prosecutor v. Kajelijeli, Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File and Amended Indictment*, Case No. ICTR-98-44A-T, Trial Chamber, 25 January 2001.

14. Report of the United Nations High Commissioner for Human Rights, *Systematic rape, sexual slavery and slavery-like practices, during armed conflicts* (UN Doc. E/CN.4/Sub.2/2004/35), 8 June 2004.

AUTHORITIES

1. *Prosecutor v. Tadic, Appeal Judgement on Allegations of Contempt by Prior Counsel*, Case No. IT-94-1-A-AR77, Appeals Chamber, 27 February 2001.

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IN THE APPEALS CHAMBER

Before:
President Claude Jorda
Judge Mohamed Bennouna
Judge Patricia Wald
Judge Fausto Pocar
Judge Liu Daqun

Registrar:
Mr. Hans Holthuis

Judgement of: 27 February 2001

PROSECUTOR

v.

DUSKO TADIC

APPEAL JUDGEMENT ON ALLEGATIONS OF CONTEMPT AGAINST PRIOR COUNSEL, MILAN VUJIN

Counsel for the Appellant:

Mr. Vladimir Domazet for Milan Vujin

Counsel for the Interested Party:

Mr. Anthony Abell for Dusko Tadic

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter "the International Tribunal"),

NOTING the Judgement on allegations of contempt against prior counsel, Milan Vujin (hereinafter "the Appellant") issued by the Appeals Chamber, ruling in the first instance, on 31 January 2000 (IT-94-1-A-R77) (hereinafter "the Judgement");

NOTING that the Appeals Chamber, ruling in the first instance, found the Appellant guilty of contempt of the International Tribunal pursuant to Rule 77 of the Rules of Procedure and Evidence of the International Tribunal (hereinafter "the Rules") and, accordingly, fined the Appellant Dfl 15,000 and directed the Registrar to consider striking him off the list of assigned counsel kept pursuant to Rule 45 of the Rules;

NOTING the Application for leave to appeal against the Judgement on allegations of contempt against prior counsel, Milan Vujin (IT-94-1-A-AR77), filed by the Appellant on 7 February 2000 (hereinafter "the Application");

NOTING the Response by the interested party, Dusko Tadic, to the Application for leave to appeal filed on 17 February 2000, (hereinafter "the Interested Party" and "the Response" respectively);

NOTING the Respondent's Reply to the Response by the Interested Party, Dusko Tadic, to the Application for leave to appeal filed confidentially on 22 February 2000;

NOTING the Order of the President assigning Judges to a bench of the Appeals Chamber (hereinafter "the Bench") issued in French on 8 March 2000;

NOTING the Decision on the Application for leave to appeal issued in French on 25 October 2000 whereby the Bench granted leave to appeal having concluded that "the arguments advanced in support of the Application for leave to appeal justify a more thorough review by the Appeals Chamber";

NOTING the Order of the President assigning Judges to the Appeals Chamber issued in French on 26 October 2000;

NOTING the Appellant's Brief filed confidentially on 3 November 2000, in which the Appellant submits, *inter alia*, that: (i) the Tribunal does not have the power to set up a procedure for contempt and to punish such contempt; (ii) that Rule 77 of the Rules does not provide for the striking off the list of eligible counsel by the Registrar; and (iii) that the Appeals Chamber, ruling in the first instance, incorrectly found him guilty in relation to the allegation that he had: (a) put forward to the Appeals Chamber in support of an application pursuant to Rule 115 of the Rules a case which was known to the Appellant to be false in relation to the weight to be given to statements made by one Mladjo Radic and in relation to the responsibility of one Goran Borovnica for the killing of the two Muslim policemen, and (b) manipulated the proposed testimony of witnesses A and B;

CONSIDERING the Response by the Interested Party, Dusko Tadic, to the Appellant's Brief filed on 5 December 2000 (hereinafter "the Response");

NOTING that Rule 77 of the Rules does not expressly provide for the right to appeal a contempt conviction of the Appeals Chamber;

CONSIDERING, however, that the Rules must be interpreted in conformity with the International Tribunal's Statute which, as the United Nations Secretary-General states in his report of 3 May 1993 (S/25704) must respect the "internationally recognized standards regarding the rights of the accused" including Article 14 of the International Covenant on Civil and Political Rights (hereinafter "the International Covenant");

CONSIDERING that Article 14(5) of the International Covenant on Civil and Political Rights guarantees that "SeCveryone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law";

CONSIDERING moreover that Article 14 of the International Covenant reflects an imperative norm of international law to which the Tribunal must adhere;

CONSIDERING that the procedure established under Rule 77 of the Rules is of a penal nature, and that

a person convicted pursuant to Rule 77 of the Rules faces a potential custodial sentence of up to 7 years' imprisonment;

CONSIDERING that this means that a person found guilty of contempt by the Appeals Chamber must have the right to appeal the conviction;

CONSIDERING that the preferred course in this case would have been for the contempt trial to have been initially referred to a Trial Chamber, thereby providing for the possibility of appeal, rather than being heard by the Appeals Chamber, ruling in the first instance;

CONSIDERING however that it is the duty of the International Tribunal to guarantee and protect the rights of those who appear as accused before it;

DECIDES therefore that due to the special circumstances of this case, it is appropriate for the Appeals Chamber to consider the merits of the Appellant's complaints;

CONSIDERING paragraphs 12 to 29 of the Judgement in which the basis of the International Tribunal's power to prosecute and punish matters of contempt is clearly set out;

CONSIDERING that Article 15 of the Tribunal's Statute instructs the Judges of the International Tribunal to "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**" (*emphasis added*);

CONSIDERING that in order to function effectively and fairly, the International Tribunal must have the power to prosecute and punish contempt;

CONSIDERING that the adoption of rules to prosecute and punish contempt falls within the purview of "other appropriate matters" as required by Article 15 of the Statute;

DECIDES that the Appellant's submission regarding the International Tribunal's lack of power to prosecute and punish contempt is without merit;

NOTING that Rule 77 of the Rules does not provide for the striking off the list of eligible counsel as punishment following a conviction for contempt;

NOTING also that the Judgement of the Appeals Chamber did not order that the Appellant be struck off the list of eligible counsel but merely directed the Registrar to "consider" striking the Appellant off the list;

CONSIDERING that when convicted of contempt pursuant to Rule 77 of the Rules, counsel can expect to be either suspended or struck off the list of assigned counsel kept by the Registrar pursuant to Rule 45 of the Rules;

DECIDES that the Appellant's submission regarding the direction of the Appeals Chamber, ruling in the first instance, to the Registrar to consider striking him off the list is without merit;

CONSIDERING that the Appeals Chamber may only overturn a Chamber's finding of fact, when ruling in the first instance, "where the evidence relied on could not have been accepted by any reasonable tribunal or where the evaluation of evidence is wholly erroneous"[1];

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CONSIDERING that it was not submitted during the contempt proceedings before the Appeals Chamber, in the first instance, that the allegations made against the Appellant, if established, would not constitute contempt of the International Tribunal in the sense of knowingly and wilfully interfering with the administration of justice;

CONSIDERING that the Appeals Chamber, ruling in the first instance, heard twelve witnesses who testified as to events which were capable of supporting the allegations of contempt, heard eight witnesses called by the Appellant, and heard the Appellant's testimony;

CONSIDERING the detailed and careful analysis of the evidence as set out by the Appeals Chamber, ruling in the first instance, in its Judgement;

NOTING that the Appellant sought to admit additional evidence for consideration, namely the statement of Vlado Krckovski, taken in Prijedor on 4 February 2000 (hereinafter "the Statement");

CONSIDERING that, pursuant to Rule 115 of the Rules, a party may present additional evidence to the Appeals Chamber only if such proof was not available to it during the trial;

CONSIDERING that the Appellant has not made any submissions regarding the availability or otherwise of the Statement at trial;

DECIDES therefore that the Statement is inadmissible for the purposes of the present appeal;

DECIDES that the evidence relied upon for the Judgement would have "been accepted by any reasonable tribunal" and that the evaluation of the evidence was not "wholly erroneous" and, accordingly, that there is no basis to consider overturning the findings of fact;

DECIDES that the Appellant's submissions regarding the Appeals Chamber's findings of fact, ruling in the first instance, are wholly without merit;

CONSIDERING that, pursuant to Rule 116 *bis* (A) of the Rules, an appeal of a Decision rendered pursuant to Rule 77 may be determined entirely on the basis of the parties' written briefs;

CONSIDERING also that, pursuant to Rule 116 *bis* (D) of the Rules, the Presiding Judge, after consulting members of the Appeals Chamber, may decide not to pronounce the judgement in public in the presence of the parties;

DECIDES that, pursuant to Rule 116 *bis* (A) and (D) of the Rules, this Appeal will be determined entirely on the basis of the written briefs and that the judgement will not be pronounced in public in the presence of the parties;

FOR THE FOREGOING REASONS,

ORDERS that:

(i) the Judgement of the Appeals Chamber, ruling in the first instance, is upheld;
(ii) the Appellant's appeal is dismissed;
(iii) the Appellant is to pay a fine of Dfl 15,000 to the Registrar of the Tribunal within twenty one days;
(iv) the Registrar may consider, bearing in mind the factual findings against the Appellant

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by the Appeals Chamber ruling in the first instance and in accordance with his powers, to strike off or suspend the Appellant for a set period from the list of assigned counsel kept pursuant to Rule 45 of the Rules and to report his conduct as found by the Appeals Chamber, ruling in the first instance, to the professional body to which he belongs.

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

Done this twenty-seventh day of February 2001
At The Hague
The Netherlands

/signed/

Claude Jorda
President
Appeals Chamber

Judge Wald has appended to this Judgement a Separate Opinion dissenting from the finding of jurisdiction.

[Seal of the Tribunal]

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1. Judgement, *The Prosecutor v. Zlatko Aleksovski*, Case no.: IT-95-14/1-A, Appeals Chamber, 24 March 2000, para. 63.

AUTHORITIES

2. *Prosecutor* v. *Brdanin and Talic, Decision on Interlocutory Appeal,* Case No. IT-99-36-AR73.9, Appeals Chamber, 11 December 2002.

IN THE APPEALS CHAMBER

Before:
Judge Claude Jorda, President
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Asoka de Z. Gunawardana
Judge Theodor Meron

Registrar:
Mr. Hans Holthuis

Decision of:
11 December 2002

PROSECUTOR
v.
RADOSLAV BRDJANIN
MOMIR TALIC

DECISION ON INTERLOCUTORY APPEAL

Counsel for the Appellant Jonathan Randal:

Mr. Geoffrey Robertson
Mr. Steven Powles

Counsel for the Prosecution:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for Radoslav Brdjanin:

Mr. John Ackerman

Counsel for the *Amici Curiae*:

Mr. Floyd Abrams
Mr. Joel Kurtzberg
Ms. Karen Kaiser

I. Background

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons

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Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber " and "International Tribunal" respectively) is seised of the "Motion to Appeal the Trial Chamber's 'Decision on Motion on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence'" filed on 26 June 2002 ("Appeal") by counsel for Mr. Jonathan Randal ("Appellant"), pursuant to Rule 73 of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

2. The Appeal concerns a subpoena issued by Trial Chamber II to compel the testimony of a war correspondent concerning an interview he conducted while reporting on the conflict in the former Yugoslavia. The questions presented are whether this International Tribunal should recognize a qualified testimonial privilege for war correspondents , and, if so, whether the privilege requires the quashing of the subpoena.

3. The Appellant served as a correspondent for the *Washington Post* in Yugoslavia . On 11 February, 1993, the *Washington Post* carried a story ("Article") by the Appellant containing quoted statements attributed to Radislav Brdjanin, one of the Accused, about the situation in Banja Luka and the surrounding areas.[1] The Article described Brdjanin as a "housing administrator" and "avowed radical Serb nationalist." He was quoted as saying that "those unwilling to defend [Bosnian Serb territory] must be moved out" so as "to create an ethnically clean space through voluntary movement." According to the article, Brdjanin said that Muslims and Croats "should not be killed, but should be allowed to leave – and good riddance." The article also quoted Brdjanin as saying that Serb authorities paid "too much attention to human rights" in an effort to please European governments and that "[w]e don't need to prove anything to Europe anymore. We are going to defend our frontiers at any cost . . . and wherever our army boots stand, that's the situation." The Article claimed that Brdjanin said that he was preparing laws to expel non-Serbs from government housing to make room for Serbs. The Appellant, who does not speak Serbo-Croatian, carried out the interview with the assistance of another journalist , who does speak Serbo-Croatian.

4. Brdjanin was charged in a 12-count indictment with, among other things, crimes against humanity and grave breaches of the Geneva Conventions of 1949 involving deportation, forced transfer, and appropriation of property. The Prosecution sought to have the Article admitted into evidence, claiming that it was relevant to establishing that the Accused possessed the intent required for several of the crimes charged . The Defense objected on several grounds, including that the statements attributed to Brdjanin were not accurately reported. The Defense stated that, if the article were admitted, they would seek to examine the Appellant so as to call into question the accuracy of the quotations noted above. The Prosecution then requested that the Trial Chamber issue a subpoena ("Subpoena") to the Appellant, and the Trial Chamber complied on 29 January 2002.

5. On 26 and 28 February 2002, 1 March 2002 and 18 March 2002, the Subpoena was discussed during sessions in the Trial Chamber. At these sessions, the Prosecution informed the Trial Chamber that the Appellant had refused to comply with the Subpoena . On 9 May 2002, the Appellant filed a written motion to set aside the Subpoena.[2] On the same day, the Prosecution filed its response.[3] On 10 May 2002, the Trial Chamber heard oral argument on this motion. On 7 June 2002, the Trial Chamber rendered its decision ("Impugned Decision"). Refusing to recognise a testimonial privilege for journalists when no issue of protecting confidential sources was involved, the Trial Chamber upheld the Subpoena. It also found that the *Article* was admissible.

6. On 14 June 2002, the Appellant sought certification for leave to appeal from the Trial Chamber.[4] The Trial Chamber granted it on 19 June 2002.[5] On 26 June 2002, the Appellant filed the Appeal. On 4 July 2002, the Appellant filed written submissions in support of the Motion to Appeal.[6] The Prosecution

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responded on 15 July 2002 and the Appellant replied on 6 August 2002.[7]

7. On 1 August 2002, pursuant to Rules 74 and 107 of the Rules, the Appeals Chamber granted the request of 34 media companies and associations of journalists to file a brief as *Amici Curiae* supporting the Appellant, which was filed on 16 August 2002.[8] On 4 September 2002, the Appeals Chamber issued a scheduling order granting the request made in the briefs of the Appellant and the *Amici Curiae* for an oral hearing.[9] On 3 October 2002, the Appeals Chamber heard the arguments of the parties and of the *Amici Curiae*.[10]

II. Impugned Decision and Submissions of the Parties and the *Amici Curiae*

(a) The Impugned Decision

The Trial Chamber acknowledged that "'journalists reporting on conflict areas play a vital role in bringing to the attention of the international community the horrors and realities of the conflict'"[11] and that they should not be "subpoenaed unnecessarily."[12] It took the view, however, that, whatever the proper approach when confidential materials or sources are at issue[13], when the testimony sought concerns already published materials and already identified sources, compelling the testimony of journalists poses only a minimal threat to the news gathering and news reporting functions. Indeed, the Trial Chamber found that a published article is the equivalent of a public statement by its author and that when such a statement is entered in evidence in a criminal trial and its credibility challenged, the author, like anyone else who makes a claim in public, must expect to be called to defend its accuracy.[14]

In determining whether to issue a subpoena to compel the testimony of a journalist concerning already public materials and sources, the Trial Chamber thus held that it is sufficient if the testimony sought is "pertinent" to the case.[15] The Trial Chamber also considered whether requiring the Appellant to testify would place him in physical danger. Noting that the Appellant was retired from being a war correspondent and was living in France, the Trial Chamber found that he faced no prospect of harm from testifying about the contents of his article. The Trial Chamber thus upheld the validity of the Subpoena.

(b) The Appellant

The Appellant seeks the reversal of the Impugned Decision and the setting aside of the Subpoena. The Appellant submits that the Trial Chamber erred: (i) in not recognising a qualified testimonial privilege for journalists; and (ii) in not finding , on the facts of this case, that the Appellant should not be compelled to appear for testimony.

11. With regard to the first ground, the Appellant submits that the Trial Chamber erred in law by not recognising a qualified privilege for journalists. Such a privilege is warranted, the Appellant contends, in order to safeguard the ability of journalists to investigate and report effectively from areas in which war crimes take place. Without a qualified privilege, journalists may be put at risk personally, may expose their sources to risk, and may be denied access to important information and sources in the future. The result, in the Appellant's view, will be less journalistic exposure of international crimes and thus the hindering of the very process of international justice that international criminal tribunals such as this Tribunal are designed to serve. In support of these contentions, the Appellant submits statements from two journalists, the general secretary of the International Federation of Journalists , and the publisher of the *Washington Post*.

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12. The Appellant suggests that the International Tribunal has recognised testimonial privileges for certain other classes of individuals. Rule 97 establishes a privilege for communications between attorneys and their clients. In *Simic , (footnote 16)* a Trial Chamber afforded an absolute immunity from testifying to a former employee of the International Committee of the Red Cross ("ICRC") in order to protect the impartiality of the ICRC. Trial Chambers have also granted or recognized privileges against testifying to employees and functionaries of the ICTY[17] and to the Commander in Chief of the United Nations Protection Force.[18]

13. The Appellant also points to certain international legal materials in support of the qualified privilege he urges the Tribunal to adopt. He recalls that Rule 73 of the International Criminal Court ("ICC") recognises that certain relationships and classes of professionals should be granted some form of testimonial privilege . He suggests that Article 79 of the 1977 Protocol I Additional to the Geneva Conventions recognises that journalists are exposed to great dangers and thus have a special position in conflict zones, as do several documents produced by the European Council's Committee of Ministers to Member States on the Protection of Journalists in Situations of Conflict and Tension. He also contends that the decision of the European Court of Human Rights in *Goodwin* v. *United Kingdom*, supports the establishment of a qualified privilege.[19]

14. The Appellant claims that certain judicial decisions from the United States and the United Kingdom support the establishment of a qualified privilege for journalists . The Appellant also draws the Tribunal's attention to the internal guidelines of the United States Department of Justice visualising that subpoenas will be issued against members of the news media. Those guidelines, in the Appellant's view, recognize the importance of seeking subpoenas against members of the press only as a last resort when the information sought is crucial to the case and cannot reasonably be acquired by other means.

15. The Appellant submits that in determining whether to issue a subpoena to a journalist , it is not sufficient merely to find, as the Trial Chamber did, that the evidence is "pertinent" to the case. Rather, he asserts that a Trial Chamber should issue a subpoena only if it determines that the compelled journalist's testimony would provide admissible evidence that: (1) is "of crucial importance" to determining a defendant's guilt or innocence; (2) cannot be obtained "by any other means or from any other witness"; (3) will not require the journalist to breach any obligation of confidence; (4) will not place the journalist, his family, or his sources in reasonably apprehended personal danger; and (5) will not serve as a precedent that will "unnecessarily jeopardise the effectiveness or safety of other journalists reporting from that conflict zone in the future."[20]

16. The Appellant's second contention is that the Trial Chamber erred in fact when it found the Appellant's testimony to be pertinent to the Prosecution's case . According to the Appellant, his testimony cannot materially assist the Prosecution or the Defence. He does not speak Serbo-Croatian, and the interview in question was thus conducted through another journalist, who does. Hence, the Appellant asserts that he can only comment on *Brdjanin's* demeanor during the interview and cannot vouch for the accuracy of the translations of *Brdjanin's* statements as they appeared in his Article.

17. Moreover, the Appellant asserts that the Trial Chamber should have undertaken a careful analysis of the importance of the Appellant's testimony before issuing the subpoena, not just after the fact.

(c) The *Amici Curiae*

The *Amici Curiae* make largely the same arguments as the Appellant concerning the importance of a qualified privilege to ensuring journalists' ability to investigate in and report from areas where war crimes are taking place. Compelling journalists to testify against their own sources, confidential or

otherwise, will make news sources less likely to come forward, less likely to speak freely, and more likely to fear that journalists are acting as possible agents of their future prosecutor . It will rob war correspondents of their status as observers and transform them into participants, undermining their credibility and independence and thus their ability to gather information. The *Amici Curiae* contend that this will curtail the important benefits that journalists provide to the public and to the courts.

The *Amici Curiae* assert that the Trial Chamber on the basis that the evidence need merely "be pertinent", permits the Tribunal to compel journalists to testify even when the relevance of their testimony is uncertain. According to the *Amici Curiae,* the standard applied by the Trial Chamber is so vague that it will inevitably lead to unease and confusion in the journalistic community and result in journalists being subpoenaed unnecessarily.

20. Those arguments lead the *Amici Curiae* to offer a simpler and somewhat less demanding test for the proposed qualified privilege than does the Appellant . According to the *Amici Curiae*, a Trial Chamber should not issue a subpoena to compel the testimony of a journalist unless the Trial Chamber determines that : (1) the testimony is essential to the determination of the case; and (2) the information cannot be obtained by any other means. For the testimony to be essential , "its contribution to the case must be critical to determining the guilt or innocence of a defendant."[21]

21. Applying this test, the *Amici Curiae* assert that the Appellant should not be compelled to testify. His testimony, in their view, is not absolutely essential to the case. Even if it were, the Prosecution has not demonstrated that his testimony is the only means of obtaining the same information.

(d) The Prosecution

22. The Prosecution submits that the Trial Chamber: (i) correctly declined the Appellant's invitation to create a precise journalistic privilege; and (ii) correctly determined , on the facts of this case, that the Appellant should be compelled to testify.

23. The Prosecution argues that, whatever beneficial effects a privilege for the protection of confidential sources and confidential information may have in promoting vigorous reporting and thus ultimately the cause of international justice , no such benefits accrue from a privilege protecting testimony concerning published materials and openly identified sources. The Prosecution stresses that this case fits in the latter category. In the Prosecution's view, what creates the admittedly significant risks for journalists operating in war zones – of physical harm and of loss of access to sources – is the publication of their stories exposing the conduct of parties to the conflict, not the later possibility that they might be called to testify about matters they have already revealed to the public in their stories.[22]

24. The Prosecution maintains that adoption of the privilege advocated by the Appellant would undermine the International Tribunal's ability to reach accurate judgements by requiring the exclusion of essential evidence. Moreover, the Prosecution contends that too generous a privilege could compromise the due process rights of accused persons.[23]

25. The Prosecution argues that the testimonial privileges extended by the International Tribunal to certain other classes of persons are distinguishable from the journalists' privilege proposed here. Those other privileges rest on concerns about confidentiality (ICRC), have long-established roots in national legal systems (attorney-client), or have independent bases in international law (ICRC, functional immunity for state officials). By contrast, according to the Prosecution, a privilege for journalists concerning non-confidential matters would be unprecedented in international or national legal systems.

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26. The Prosecution asserts that the Trial Chamber was correct in interpreting the decision of the European Court of Human Rights in *Goodwin*[24] and the case law from the United States and the United Kingdom as being concerned largely, if not exclusively, with the protection of confidential sources.

27. The Prosecution submits that no precise journalists' privilege is warranted. Rather, the Appeals Chamber should endorse the approach of the Trial Chamber, which , in its view, was to balance "the legitimate interests of journalists" against "the interests of the international community and the victims of crime in ensuring the availability of all relevant and probative evidence" and, when appropriate " the interest of the Accused in exercising his right to examine witnesses against him."[25] Engaging in such a balancing , and considering that the statements by the Accused in question have already been published and attributed to him and that the Appellant himself faces no risk of physical harm or loss of journalistic access in the area of the former Yugoslavia , the Trial Chamber correctly found that there was no basis for exempting the Appellant from his duty to testify.

Further, the Prosecution argues that even under the tests proposed by the Appellant and the *Amici Curiae*, the Trial Chamber would still have been correct to issue a subpoena for the Appellant's testimony. First, the statements by the Accused in the Article are essential to the Prosecution's case because they constitute direct evidence of the intent required for the establishment of some of the offences with which he is charged. Secondly, the evidence at issue is unavailable from other sources, as the only other witness to the Accused's statements was the journalist who served as an interpreter for the Appellant.

III. Discussion

(a) Preliminary Considerations

29. At the outset, the Appeals Chamber notes that, although the parties and the *Amici Curiae* frame the issue before the Appeals Chamber as one concerning journalists in general, it is important to appreciate that the case really concerns a smaller group, namely, war correspondents. It is the particular character of the work done and the risks faced by those who report from conflict zones that it is at stake in the present case. By "war correspondents," the Appeals Chambers means individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict. This decision concerns only this group.

30. The issue of compelled testimony by war correspondents before a war crimes tribunal is a novel one. There does not appear to be any case law directly on point. War correspondents who have previously testified at the International Tribunal did so on a voluntary basis.[26] War correspondents are of course free to testify before the International Tribunal, and their testimony assists the International Tribunal in carrying out its function of holding accountable individuals who have committed crimes under international humanitarian law. The present ruling concerns only the case where a war correspondent, having been requested to testify, refuses to do so.

31. Neither the Statute nor the relevant Rules offer much guidance on the issue being considered here. Under Rule 54 of the Rules, a Trial Chamber may, at the request of either party or on its own initiative, issue a subpoena when it finds that doing so is "necessary for the purposes of an investigation or for the preparation or conduct of the trial." The discretion of the Trial Chambers, however, is not unfettered. They must take into account a number of other considerations before issuing a subpoena. Subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction.

32. In determining whether to issue a subpoena, a Trial Chamber has first of all to take into account the admissibility and potential value of the evidence sought to be obtained. Under Rule 89(C) of the Rules, a Trial Chamber "may admit any relevant evidence which it deems to have probative value," and under Rule 89(D) may "exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial." Secondly, the Trial Chamber may need to consider other factors such as testimonial privileges. For instance, Rule 97 of the Rules states that "all communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless: (i) the client consents to such disclosure ; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure." Similarly, in the *Simic* case, the Trial Chamber made it clear that the ICRC has a right under customary international law to non-disclosure of information so that its workers cannot be compelled to testify before the International Tribunal .[27]

33. In this decision, the Appeals Chamber will address the factors that need to be considered before the issuance of a subpoena to war correspondents.

(b) Analysis

34. In the Appeals Chamber's view, the basic legal issue presented raises three subsidiary questions. Is there a public interest in the work of war correspondents ? If yes, would compelling war correspondents to testify before a tribunal adversely affect their ability to carry out their work? If yes, what test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court and, where it is implicated, the right of the defendant to challenge the evidence against him? The Appeals Chamber will consider each of these questions in turn.

(i) *Is there a public interest in the work of war correspondents?*

35. The Appeals Chamber is of the view that the answer to the first question is clearly "Yes," as the Trial Chamber expressly recognised. Both international and national authorities support the related propositions that a vigorous press is essential to the functioning of open societies and that a too frequent and easy resort to compelled production of evidence by journalists may, in certain circumstances , hinder their ability to gather and report the news. The European Court of Human Rights has recognised that journalists play a "vital public watchdog role" that is essential in democratic societies and that, in certain circumstances, compelling journalists to testify may hinder "the ability of the press to provide accurate and reliable information."[28] National legislatures and courts have recognised the same principles in establishing laws or rules of evidence shielding journalists from having to disclose various types of information. As one federal court of appeals in the United States has put it, "society's interest in protecting the integrity of the newsgathering process, and ensuring the free flow of information to the public, is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'"[29]

36. The Appeals Chamber is of the view that society's interest in protecting the integrity of the newsgathering process is particularly clear and weighty in the case of war correspondents. Wars necessarily involve death, destruction, and suffering on a large scale and, too frequently, atrocities of many kinds, as the conflict in the former Yugoslavia illustrates. In war zones, accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well. The transmission of that information is essential to keeping the international public informed about matters of life and death. It may also be vital to assisting those who would prevent or punish the crimes under international humanitarian law that fall within the jurisdiction of this Tribunal. In this regard, it may be recalled that

the images of the terrible suffering of the detainees at the Omarska Camp that played such an important role in awakening the international community to the seriousness of the human rights situation during the conflict in Bosnia Herzegovina were broadcast by war correspondents. The Appeals Chamber readily agrees with the Trial Chamber that war correspondents "play a vital role in bringing to the attention of the international community the horrors and reality of conflict."[30] The information uncovered by war correspondents has on more than one occasion provided important leads for the investigators of this Tribunal.[31] In view of these reasons, the Appeals Chamber considers that war correspondents do serve a public interest.

37. The public's interest in the work of war correspondents finds additional support in the right to receive information that is gaining increasing recognition within the international community. Article 19 of the Universal Declaration of Human Rights provides that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." This principle is reproduced in all the main international human rights instruments .[32] As has been noted,[33] the right to freedom of expression includes not merely the right of journalists and media organizations freely to communicate information. It also incorporates a right of members of the public to receive information. As the European Court of Human Rights put it in its decision in *Fresso and Roire v. France*: "Not only does the press have the task of imparting information and ideas on matters of public interest: the public also has a right to receive them."[34]

38. Recognition of the important public interest served by the work of war correspondents does not rest on a perception of war correspondents as occupying some special professional category. Rather, it is because vigorous investigation and reporting by war correspondents enables citizens of the international community to receive vital information from war zones that the Appeals Chamber considers that adequate weight must be given to protecting the ability of war correspondents to carry out their functions.

(ii) *Would compelling war correspondents to testify in a war crimes tribunal adversely affect their ability to carry out their work?*

39. The Trial Chamber took the view that since the case at hand concerns only published information and not confidential sources, compelling the Appellant to testify posed no threat to the ability of war correspondents to carry out their newsgathering role. Thus, the Trial Chamber held that it "fail[ed] to see how the objectivity and independence of journalists can be hampered or endangered by their being called upon to testify, [. . .] especially in those cases where they have already published their findings."[35]

40. The *Amici Curiae*, by contrast, insist that "[e]ven when findings are published and sources are known, the link between the forced disclosure and the loss of journalist's independence is compelling, as it significantly changes the tone of journalist's work and the willingness of sources to comply with reporters' requests for interviews."[36] The Appellant similarly argues:

> If it becomes known in conflict zones that reporters may be compelled to testify about crimes they may witness or have been incautiously confessed to them by officials, they will not be accorded important interviews and facilities. They will increasingly be excluded from conflict zones and from places or positions where they might witness war crimes. Some guilty parties will cease to boast about criminal acts, or to give interviews at all.[37]

The Appeals Chamber acknowledges that it is impossible to determine with certainty whether and to

what extent the compelling of war correspondents to testifying before the International Tribunal would hamper their ability to work. However, in the opinion of the Appeals Chamber, it is not a possibility that can be discarded lightly, as the Trial Chamber found, simply because the evidence sought concerned published information and not confidential sources. The potential impact upon the newsgathering function and on the safety of war correspondents as submitted by the Appellant and the *Amici Curiae* is great.

41. The Appeals Chamber recognises, as did the Trial Chamber, that many national jurisdictions afford a testimonial privilege for journalists only when it comes to protecting confidential sources.[38] It notes, however, that in some countries some privilege from testifying is also given in cases of non-confidential information.[39] In either case, the scope of the privilege rests on the legislature's or the courts' assessment of the need to protect the newsgathering function. By analogy, the Appeals Chamber considers that the amount of protection that should be given to war correspondents from testifying being the International Tribunal is directly proportional to the harm that it may cause to the newsgathering function.

42. The Appeals Chamber considers reasonable the claims of both the Appellant and the *Amici Curiae* that, in order to do their jobs effectively, war correspondents must be perceived as independent observers rather than as potential witnesses for the Prosecution. Otherwise, they may face more frequent and grievous threats to their safety and to the safety of their sources. These problems remain, contrary to what was held by the Trial Chamber, even if the testimony of war correspondents does not relate to confidential sources.

43. What really matters is the perception that war correspondents can be forced to become witnesses against their interviewees. Indeed, the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information . To publish the information obtained from an interviewee is one thing -- it is often the very purpose for which the interviewee gave the interview -- but to testify against the interviewed person on the basis of that interview is quite another. The consequences for the interviewed persons are much worse in the latter case, as they may be found guilty in a war crimes trial and deprived of their liberty. If war correspondents were to be perceived as potential witnesses for the Prosecution , two consequences may follow. First, they may have difficulties in gathering significant information because the interviewed persons, particularly those committing human rights violations, may talk less freely with them and may deny access to conflict zones. Second, war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk.

44. In view of the foregoing, the Appeals Chamber is of the view that compelling war correspondents to testify before the International Tribunal on a routine basis may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern. The Appeals Chamber will not unnecessarily hamper the work of professions that perform a public interest . In the next section, the Appeals Chamber will determine how the course of justice can be adequately assured without unnecessarily hampering the newsgathering function of war correspondents.

(iii) *What test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court?*

45. The Appellant proposes a five-part test for the issuance of subpoenas to war correspondents.[40] In the Appeals Chamber's view, that test amounts to a virtually absolute privilege. The *Amici Curiae* propose a

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more lenient test. In their view, war correspondents should be compelled to testify only if their evidence is essential to the case and cannot be obtained from another source. By "essential" they mean vital to the finding of guilt or innocence of the accused on a given charge.[41] The Prosecution asserts that both of these proposed tests are overly restrictive . For its part, the Trial Chamber in the Impugned Decision justified the issuing of the Subpoena on the ground that the evidence sought was "pertinent" to the Prosecution's case.

46. The Appeals Chamber considers that in order to decide whether to compel a war correspondent to testify before the International Tribunal, a Trial Chamber must conduct a balancing exercise between the differing interests involved in the case . On the one hand, there is the interest of justice in having all relevant evidence put before the Trial Chambers for a proper assessment of the culpability of the individual on trial. On the other hand, there is the public interest in the work of war correspondents, which requires that the newsgathering function be performed without unnecessary constraints so that the international community can receive adequate information on issues of public concern.

47. The test of "pertinence" applied by the Trial Chamber appears insufficient to protect the public interest in the work of war correspondents. The word "pertinent " is so general that it would not appear to grant war correspondents any more protection than that enjoyed by other witnesses. Thus, the Trial Chamber's test, while supposedly accounting for the public interest in the work of war correspondents, would actually leave that interest unprotected. On the other hand, the test proposed by the Appellant , as noted above, would amount to a virtually absolute privilege. Even the criteria proposed by *Amici Curiae* may be too stringent in that they may lead to significant evidence being left out.

48. In the opinion of the Appeals Chamber, it is only when the Trial Chamber finds that the evidence sought by the party seeking the subpoena is direct and important to the core issues of the case that it may compel a war correspondent to testify before the International Tribunal. The adoption of this criterion should ensure that all evidence that is really significant to a case is available to Trial Chambers . On the other, it should prevent war correspondents from being subpoenaed unnecessarily .

49. Furthermore, if the evidence sought is reasonably available from a source other than a war correspondent, the Trial Chamber should look first to that alternative source. The Trial Chamber did not do that here.

50. In view of the foregoing, the Appeals Chamber holds that in order for a Trial Chamber to issue a subpoena to a war correspondent a two-pronged test must be satisfied . First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere .

51. Finally, the Appeals Chamber will not address the submissions of the parties on the second ground of the appeal, that is, the application of the proper legal test to the facts. Having determined the principles governing the testimony of war correspondents before the International Tribunal, the Appeals Chamber considers that it is the role of the Trial Chamber to apply those principles in the particular circumstances of the case. The Appeals Chambers would, however, offer the following observations.

52. First, contrary to the Trial Chamber's apparent fear,[42] even if the Trial Chamber were to decide that the Appellant should not be subpoenaed to testify, that need not mean that the Article must be excluded (and the Prosecution disadvantaged to that extent). The admissibility of the Article depends principally on its probative value under Rule 89(C) and the balance between that probative value and its potential to undermine the fairness of the trial under Rule 89(D). Because the Article is hearsay, the Trial Chamber will also want to examine what indicia of reliability or unreliability it carries.[43] As with many pieces of

hearsay evidence, the inability of a party to challenge its accuracy by cross-examining the declarant (in this case the Appellant) does not mean that it must be excluded.[44] Rather, that inability would diminish the confidence the Trial Chamber could have in its accuracy and thus the weight the Trial Chamber would give it.

53. At the same time, and contrary to the Trial Chamber's apparent counterbalancing fear,[45] admitting the Article without subpoenaing the Appellant need not prejudice the Accused. The Defence may still question the Article's accuracy, and the Trial Chamber will have to take account of the unavailability of the Appellant in determining how much weight to give the Article.

54. Finally, whatever evidentiary value the Article may have, it is the Trial Chamber's task to determine whether the Appellant's testimony *itself* will be of direct and important value to determining a core issue in the case. The Defence has offered two justifications for seeking the Appellant's testimony. The first is that his testimony will enable the Defence to challenge the accuracy of the statements attributed to Brdjanin in the Article. The second is that the Appellant may place Brdjanin's statements in a context that will cast them in a more favourable light for the Defence . With regard in particular to the first justification -- concerning accuracy -- given that the Appellant speaks no Serbo-Croatian, and thus that he relied on another journalist for interpretation, the Appeals Chamber finds it difficult to imagine how the Appellant's testimony could be of direct and important value to determining a core issue in the case.[46] In any event, determining whether the Appellant's testimony on either score may have direct and important value to a core issue in the case requires a factual determination that is properly left to the Trial Chamber.

55. Therefore, should the Prosecution (or the Defence) still desire that the Appellant be subpoenaed to testify before the International Tribunal, it will have to submit a new application before the Trial Chamber to be considered in the light of the principles set out in the present decision.

Disposition

56. For the foregoing reasons, the Appeals Chamber:

1. allows the Appeal;

2. reverses the Impugned Decision;

3. consequently, sets aside the Subpoena.

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

_____

Claude Jorda
Presiding Judge

Judge Shahabuddeen appends a separate opinion.

Dated this 11th day of December 2002
At The Hague,

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The Netherlands.

[Seal of the Tribunal]

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1 - Jonathan C. Randal, "Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Process as Beyond Reversal", Washington Post, Feb. 11, 1993, p. A34. The quotations in this paragraph are from the article. See also *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-T, "Decision on Motion to Set Aside Confidential Subpoena to Give Evidence", 7 June 2002, para. 28.A.ii.
2 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-T, "Written Submissions on Behalf of Jonathan Randal to Set Aside 'Confidential Subpoena to Give Evidence' Dated 29 January 2002", 9 May 2002.
3 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-T, "Prosecution's Response to 'Written Submissions on Behalf of Jonathan Randal to Set Aside "Confidential Subpoena to Give Evidence" Dated 29 January 2002;', 9 May 2002.
4 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-T, "Application for Certification from Trial Chamber to Appeal 'Decision on Motion to Set Aside Confidential Subpoena to Give Evidence'", 14 June 2002.
5 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-T, "Decision to Grant Certification to Appeal the Trial Chamber's 'Decision on Motion to Set Aside Confidential Subpoena to Give Evidence'", 19 June 2002.
6 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-AR73.9, "Written Submissions in Support of Motion to Appeal Trial Chamber's 'Decision on Motion on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence'", 4 July 2002.
7 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-AR73.9, "Appellant's Reply to 'Prosecution's Response to Written Submissions in Support of Motion to Appeal Trial Chamber's "Decision on Motion on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence" Filed 4 July 2002'", 6 August 2002.
8 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-AR73.9, "Décision relative à la requête aux fins de prorogation de délai et autorisant à comparaître en qualité d'*amici curiae*",1 August 2002.
9 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-AR73.9, "Scheduling Order", 4 September 2002.
10 - Mr. Ackerman, counsel for the accused, had informed the Appeals Chamber that he would attend the hearing. Without explanation, he failed to appear.
11 - Impugned Decision, para. 25.
12 - *Id.* para. 27.
13 - The Trial Chamber implied that a qualified privilege was warranted to protect journalists from having to reveal confidential sources or materials. *Id.* para. 31.
14 - *Id.* para. 26.
15 - *Id.* para. 32.
16 - *Prosecutor v. Simic et al.*, "Decision on The Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness", Case No.: IT-95-9-PT, 27 July 1999 ("ICRC Decision").
17 - *Prosecutor v. Delalic et al.*, Case No.: IT-96-21-T, "Decision on the Motion *Ex Parte* by the Defence of Zdravko Mucic Concerning the Issue of a Subpoena to an Interpreter", 8 July 1997.
18 - *Prosecutor v. Blaskic*, Case No.: IT-95-14-T, "Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber", 12 May 1999.
19 - *Goodwin v. United Kingdom*, Judgement of 22 February 1996, 22 EHRR 123.
20 - Para. 18.
21 - Para. 43.
22 - Paras. 6-8, 25.
23 - Para. 26.
24 - *Supra* n.14.
25 - Para. 58.
26 - E.G. Martin Bell (BBC), Jacky Rowland (BBC), and Ed Vulliamy (The Observer/Guardian).
27 - *Supra* n.11, in particular paras 73-74 and disposition.
28 - *Supra* n.14, para. 40.
29 - *Schoen v. Schoen*, 5 F.3d 1289, 1292 (9th Cir. 1993).
30 - Impugned Decision at para 25.
31 - *See, e.g.*, Exhibit A to *Amici* Brief, Affidavit of Elizabeth Neuffler.
32 - Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 3 September 1953; Article 19 of the International Covenant on Civil and Political Rights of 23 March 1976; Article 13 of the American Convention on Human Rights of 18 July 1978; and in Article 9(1) of the African Charter on Human and Peoples Rights of 26 June 1981.
33 - Weramantry C.G., "Access to Information: A New Human Right. The Right to Know", Asian Yearbook of International Law, Vol. 4, 1995, pp. 99-111.

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34 - See *Fresso and Roire v. France*, Judgement of 21 January 1999, ECHR, para 51, *Erdogdu and Ince v. Turkey*, Judgement of 8 July 1999, ECHR, para 48 and *Sener v. Turkey*, Judgment of 18 July 2000, ECHR, para 41-42;
35 - Impugned Decision at para 26.
36 - *Amici* Brief at para. 36.
37 - Appellant's Brief at para. 9.
38 - *See, e.g.*, Contempt of Court Act 1981, Section 10, (United Kingdom); *Code de Procedure Penale Art.109* (France) and *Codice di Procedura Penale Art. 200(2)* (Italy).
39 - *See Strafprozessordnung § 53* (Germany), as amended on 15 February 2002; *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988); *United States v. Cuthbertson*, 630 F.2d 139, 147-48 (3d Cir. 1980) (United States). The Appeals Chamber also notes that the United States Department of Justice has established internal guidelines cautioning federal prosecutors to seek subpoenas against members of the media only when the information sought is essential and cannot reasonably be acquired from non-media sources. The guidelines appear to apply to subpoenas for non-confidential as well as confidential materials. *See* 28 C.F.R. § 50.10 (2002)."
40 - *See supra* para. 13; Appellant's Brief, para. 18.
41 - *See supra* para. 17; *Amici* Brief, para. 43.
42 - Impugned Decision, para. 32.
43 - *See Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of A Deceased Witness, paras. 23-24.
44 - *See, e.g., Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73.5, Decision on Prosecution's Appeal on Admissibility of Evidence, para. 27.
45 - Impugned Decision, para. 32.
46 - The Appeals Chamber makes this observation while recognising that the Appellant's inexplicably inconsistent claims concerning his ability to vouch for the accuracy of the quoted statements in the Article left the Trial Chamber in an unenviable position.

AUTHORITIES

3. *Prosecutor v. Milosevic, Decision on the Interlocutory Appeal by the* Amici Curiae *Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case*, Case No. IT-02-54-AR73.6, Appeals Chamber, 20 January 2004.

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APPEALS CHAMBER

The Prosecutor v. Slobodan Milosevic - Case No. IT-02-54-AR73.6

"Decision on Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case"

- **20 January 2004**
- **Appeals Chamber (Judges Meron [Presiding], Pocar, Shahabuddeen, Mumba and Weinberg de Roca)**

***Interlocutory appeals – Role of the* amici curiae**

Not being a party to the proceedings, the *amici curiae* are not entitled to use Rule 73 to bring an interlocutory appeal. The fact that the *amici* were instructed by the Trial Chamber to take all steps they consider appropriate to safeguard a fair trial for the Accused does not alter this conclusion.

Procedural Background

· On 2 September 2003, the Trial Chamber held a Status Conference to discuss the anticipated conclusion of the Prosecution's case and the preparation necessary for the Defence case. The Accused requested a continuance of over two years to prepare his defence, pointing to the fact that he is conducting his own defence, the complexity of the case, the large number of witnesses he intends to call and the extensive material disclosed by the Prosecution which he must examine. The *amici curiae* pointed to the same considerations and seconded the Accused's request for an adjournment of considerable duration without, however, suggesting a specific period.

· On 17 September 2003, the Trial Chamber granted the Accused a period of three months to prepare his defence and ordered that he file a list of the witnesses and exhibits he intends to present, within six weeks of the adjournment.[1]

· On 25 September 2003, the Trial Chamber granted the *amici curiae* certification to appeal the Order Concerning Preparation.[2] It considered that their request was within the scope of the Trial Chamber's instruction that they act in any way they consider appropriate in order to secure a fair trial for the Accused[3] and that this could be construed as a request for certification from the Accused's application for a two-year continuance.

Decision

The Appeals Chamber dismissed the appeal.

Reasoning

Admissibility of the appeal

The Appeals Chamber recalled that Rule 73, pursuant to which the appeal by the *amici curiae* was brought, entitles a "party" to appeal a decision of a Trial Chamber after having requested and obtained certification. It noted that the Rule "does not confer such right upon an *amicus curiae*

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appointed by a Trial Chamber " (para. 4) and recalled that the *amici* do not act as representatives of the Accused at trial but solely as assistants to the Trial Chamber.[4]

It found:

> "Not being a party to the proceedings, the *amici* are not entitled to use Rule 73 to bring an interlocutory appeal. The fact that the *amici* were instructed by the Trial Chamber to take all steps they consider appropriate to safeguard a fair trial for the Accused does not alter this conclusion" (para. 4).

The Appeals Chamber then relied on statements by the Accused that he did not accept the ruling of the Trial Chamber and sought its reconsideration.[5] The Appeals Chamber found an "identity of interests" between the *amici* and the Accused and held that its "consideration of this appeal would not infringe his interests".[6] It further noted that the Prosecution did not oppose consideration of the appeal[7] which would in this case "serve the interests of justice".[8] It therefore decided to consider the appeal.

Discussion

The Appeals Chamber pointed out that the Trial Chamber's order could only be overturned if it were proven that it had erred in the exercise of its discretion in setting the time limit.[9] It added that the *amici* had to demonstrate that the Trial Chamber "ha[d] given weight to extraneous or irrelevant considerations, or [...] failed to give weight or sufficient weight to relevant considerations, or [...] made an error as to the facts upon which it [...] exercised its discretion".[10] It reviewed the approach taken by the Trial Chamber and found that the Trial Chamber had considered all the relevant factors. The issue was therefore whether the Trial Chamber had erred in its analysis of these factors. In this respect the Appeals Chamber found that the Trial Chamber's Decision was informed "both by sufficient factual information and by the appropriate legal principles, and did not take into account any impermissible factors".[11] It dismissed the appeal.

Separate Opinion of Judge Shahabuddeen

While Judge Shahabuddeen agreed with the Decision of the Appeals Chamber to dismiss the interlocutory appeal, he did not consider that the Appeals Chamber had to go as far as to assess whether the Trial Chamber had correctly exercised its discretion . In his view, there was a preliminary reason for dismissal: the dismissal "should have rested on the more fundamental fact that the interlocutory appeal ha[d] not been brought by a 'party' within the meaning of Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal".[12]

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1. *Milosevic*, IT-02-54-T, Order Concerning the Preparation and Presentation of the Defence case, 17 September 2003 ("Order Concerning Preparation").
2. *Milosevic*, IT-02-54-T, Decision Granting Request by the *Amici Curiae* for Certification of Appeal against a Decision of the Trial Chamber, 25 September 2003.
3. Regarding the mandate of the amici curiae, see *Milosevic*, IT-02-54-T, Order Inviting Designation of *Amicus Curiae*, 30 August 2001, *Judicial Supplement* No. 26. See also *Milosevic* IT-02-54-T, Order Concerning *Amici Curiae*, 11 January 2002; *Milosevic*, IT-02-54-T, Order on Further Instructions to the *Amici Curiae*, 6 October 2003.
4. *Milosevic*, IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, 4 April 2003, para. 3, *Judicial Supplement* No. 41.
5. At the hearing of 17 September 2003, the Accused stated that he "categorically protest[ed]" against the ruling on the preparation and presentation of his defence case and added that "[e]very decision or ruling can be re-examined and abolished, and that is my request and demand, that it be rethought" (Transcripts of the 17 September 2003 Hearing, at 4).
6. Para. 5.
7. The Appeals Chamber referred to para. 2 of the Prosecution Response to the Request by the *Amici Curiae* dated 18

December 2003 for a Certificate Pursuant to Rule 73(B), 24 September 2003, in which the Prosecution accepted that the *amici* "may be considered to be a 'party' for the purposes of an interlocutory appeal".

8. Para. 5.

9. *Delalic* et al., IT-96-21-A, Judgement, 20 February 2001, paras. 292-293, *Judicial Supplement* No. 23.

10. *Milosevic*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5, *Judicial Supplement* No. 32.

11. Para. 18. The Appeals Chamber found that the Trial Chamber took into account both the necessity to safeguard a fair trial for the Accused and the need to ensure an expeditious trial.

12. Judge Shahabuddeen examined whether the *amici* can be considered as a party, whether the Accused could have been considered as acting by himself, and whether the appeal could have been considered as being brought by the Accused through the *amici curiae* acting as his counsel.

AUTHORITIES

4. *Prosecutor v. Delic et al., Judgement on Sentence Appeal*, Case No. IT-96-21-A*bis*, Appeals Chamber, 8 April 2003.

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Case: IT-96-21-*Abis*

IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Asoka de Zoysa Gunawardana

Registrar:
Mr Hans Holthuis

Judgment of:
8 April 2003

PROSECUTOR
v
Zdravko MUCIC, Hazim DELIC and Esad LANDZO

JUDGMENT ON SENTENCE APPEAL

Counsel for the Prosecution:

Mr Norman Farrell
Mr Anthony Carmona
Ms Helen Brady

Counsel for the Defence:

Mr Tomislav Kuzmanovic and Mr Howard Morrison QC for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landzo

1 The background to this appeal

1. The appellants – Zdravko Mucic, Hazim Delic and Esad Landzo (respectively "Mucic" "Delic" and "Landzo") – stood trial with Zejnil Delalic ("Delalic") on an indictment alleging serious violations of international humanitarian law in relation to persons detained in a camp, known as the Celebici camp, within the Konjic municipality in Central Bosnia and Herzegovina.[1] The Trial Chamber found that detainees were killed, tortured, sexually assaulted, beaten and otherwise subjected to cruel and inhumane treatment, and that Mucic, Delic and Landzo were responsible for that conduct. Mucic was found to have been the commander of the Celebici camp, Delic the deputy commander and Landzo a prison guard. Mucic was sentenced to an effective total imprisonment for seven years, Delic to an effective total imprisonment for twenty years, and Landzo to an effective total imprisonment for fifteen

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years. Delalic was acquitted.[2]

2. Mucic, Delic and Landzo each appealed against his conviction and sentence, on various grounds. The prosecution appealed against the acquittal of Delalic, certain findings in favour of Delic and the sentence imposed upon Mucic. Relevantly to the present proceedings, the Appeals Chamber:

(a) upheld the appeal by the appellants against the cumulative convictions imposed under both Article 2 ("Grave Breaches of the Geneva Conventions") and Article 3 ("Violations of the Laws or Customs of War") based upon the same acts of the appellants, and dismissed the Article 3 counts;

(b) upheld the appeal by Delic against his conviction on Count 1 of the indictment (the wilful killing of Scepo Gotovac), and quashed that conviction;

(c) upheld the appeal by the prosecution against the inadequacy of the effective total sentence imposed upon Mucic; and

(d) upheld the complaint by Mucic that the Trial Chamber had erred when sentencing him in making an adverse reference to the fact that he had not given evidence at the trial.

Each of the other grounds of appeal was dismissed, including a challenge by Delic to his convictions on Count 3 (the wilful killing of Zeljko Milosevic), Count 18 (the rape of Grozdana Cecez, amounting to torture) and Count 21 (the repeated incidents of forcible sexual intercourse and rape of Miloja Antic, amounting to torture).[3]

3. Each of those four determinations by the Appeals Chamber upholding grounds of appeal raised for consideration an issue as to whether the sentences imposed by the Trial Chamber should be adjusted. The parties had made no relevant submissions during the hearing of that appeal concerning the effect upon the sentences imposed by the original Trial Chamber of the dismissal of all the Article 3 counts. Because the resignation of one member of the Appeals Chamber was to take effect within a short time after the Appeals Chamber Judgment was delivered, it was not possible for such submissions to be made to the Appeals Chamber at that time. The Appeals Chamber therefore decided to remit the issues raised by all four determinations made by the Appeals Chamber to a Trial Chamber. Another reason for doing so was that an appeal from the Trial Chamber's judgment would be available to the parties, particularly in relation to the effect of the dismissal of the Article 3 counts upon the sentences imposed.[4]

4. The Appeals Chamber identified the issues remitted to the Trial Chamber, as follows :

> (i) [After dismissing the Article 3 counts against each of the appellants] "It REMITS to a Trial Chamber to be nominated by the President of the Tribunal ("Reconstituted Trial Chamber") the issue of what adjustment, if any, should be made to the original sentences imposed on Hazim Delic, Zdravko Mucic, and Esad Landzo to take account of the dismissal of these counts."[5]
>
> (ii) [After quashing the conviction of Delic on Count 1] "It would be convenient, when the matter is remitted, for the new Trial Chamber also to consider what adjustments should be made to the sentence of Delic in relation to the reversal of his conviction".[6]
>
> (iii) [After finding that the Trial Chamber had erred in making adverse reference when

imposing sentence to the fact that Mucic had not given oral evidence at the trial] "[...] it DIRECTS the Reconstituted Trial Chamber to consider the effect, if any, of that error on the sentence to be imposed on Mucic".[7]

(iv) [After upholding the prosecution appeal against the inadequacy of the sentence imposed upon Mucic] "[...] it REMITS the matter of the imposition of an appropriate revised sentence for Zdravko Mucic to the Reconstituted Trial Chamber, with the indication that, had it not been necessary to take into account a possible adjustment in sentence because of the dismissal of the [Article 3 counts], it would have imposed a sentence of around ten years".[8]

The President nominated a new Trial Chamber to determine the issues remitted.[9]

5. The new Trial Chamber ruled that the issues defined by the Appeals Chamber involved an adjustment of the sentences imposed by the original Trial Chamber and not a re -hearing, and that further evidence was unnecessary.[10] After hearing the arguments of the parties on the remitted issues, it then determined that:

(i) no adjustment should be made for the dismissal of the Article 3 convictions;

(ii) the effective total twenty year sentence imposed upon Delic should be reduced to a single sentence of eighteen years to reflect the quashing of his conviction on Count 1;

(iii) there should be "a small reduction" given to Mucic as a result of the adverse reference by the original Trial Chamber when sentencing him to the fact that he had not given evidence at the trial; and

(iv) an appropriate revised sentence for Mucic was a single sentence of imprisonment for nine years.[11]

Mucic, Delic and Landzo have all appealed against the Second Trial Chamber Judgment.

2 The issues raised by the appellants

6. There were two issues common to the case of each of the appellants:

(1) Did the Appeals Chamber, when hearing the original appeals against conviction and sentence, err when it remitted limited issues to be decided by a Trial Chamber? An alternative but related issue raised by Landzo and Mucic is: Did the Trial Chamber err when it ruled that further evidence was unnecessary?

(2) Did the Trial Chamber err in its determination that no adjustment should be made for the dismissal of the Article 3 convictions?

Mucic raised two further issues:

(3) Did the Trial Chamber err in reducing his effective total sentence by only a "small" amount as a result of the adverse reference by the original Trial Chamber when sentencing him to the fact that he had not given evidence at the trial?

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(4) Did the Trial Chamber err in imposing a single sentence of imprisonment of nine years upon him?

Delic also raised two further issues:

(5) Did the Trial Chamber err in reducing his effective total sentence by only two years to reflect the quashing of his conviction on Count 1?

(6) Should the Appeals Chamber now reconsider its previous rejection of his appeal against his convictions on Counts 3, 18 and 21?[12]

3 The power of the Appeals Chamber to remit limited issues and the decision of the Trial Chamber that further evidence was unnecessary

7. Two of the appellants (Landzo and Mucic) initially argued that the Appeals Chamber had no power to remit limited issues such as the adjustment of a sentence to a Trial Chamber for its determination.[13] The third of the appellants (Delic) accepted that the Appeals Chamber had power to remit a limited issue to a Trial Chamber, but he submitted that it should not have done so in this case where none of the judges of the original Trial Chamber could be a member of the new Trial Chamber.[14]

8. Article 25 of the Tribunal's Statute provides that the Appeals Chamber may "affirm, reverse or revise" the decisions taken by Trial Chambers. Rule 117(C) of the Rules of Procedure and Evidence ("Rules") permits the Appeals Chamber, in appropriate circumstances, to order that an accused be "retried according to law". Landzo and Mucic submitted that, as the Appeals Chamber did not itself "revise" the sentences imposed, it had power pursuant to Rule 117(C) only to order a new trial according to law; it was, however, conceded that such a new trial could have been limited to what sentence should be imposed.[15] In determining the sentence to be imposed according to law in any such new trial, they said, a Trial Chamber would be required by Rule 101(B) to take into account "such factors as [...] the individual circumstances of the convicted person"[16] as well as "such factors as [...] any mitigating circumstances".[17] They argued that the limitations placed by the Appeals Chamber upon the issues remitted to the Trial Chamber erroneously precluded it from taking those matters into account in adjusting the sentences imposed by the original Trial Chamber. For this reason, they contended, the order of the Appeals Chamber remitting those limited issues to the Trial Chamber was invalid.[18] However, at the conclusion of the oral hearing of the appeal, Counsel for Landzo accepted that the appellants had conceded during the argument that the Appeals Chamber could remit a "discrete" (ie, limited) issue to a Trial Chamber, but asserted that the new Trial Chamber was nevertheless obliged to "hold a trial on issues relevant to the remit".[19] The qualification made to this concession has been interpreted by the Appeals Chamber to be that, notwithstanding the limited nature of the issues remitted to it, the Trial Chamber was nevertheless obliged to hear further evidence in accordance with Rule 101(B). Counsel for Mucic did not demur in relation to the concession made.

9. The argument originally put as to the power of the Appeals Chamber to remit limited issues to a new Trial Chamber would in any event have been rejected. The Appeals Chamber considered its power to do so at the time when it exercised that power in its judgment in the earlier appeal. An appeal from the Trial Chamber's determination of those limited issues does not give to the parties the opportunity to appeal against the decision of the Appeals Chamber to remit those limited issues to the Trial Chamber.

10. Nor does the Appeals Chamber consider it appropriate to reconsider its power to remit limited issues to a new Trial Chamber. Its power to remit limited issues is clear. First, it is not disputed that, if

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the circumstances at the time when the Appeals Chamber Judgment was given had not prevented it from exercising that power, the Appeals Chamber had the power itself to resolve each of the issues which it remitted to the Trial Chamber.[20] Secondly, in the circumstances of this case, it could have done so in the course of its judgment in the previous appeal, without necessarily having to hear the parties further or to receive further evidence in relation to those issues, as the parties had already had that opportunity during the hearing of the original appeal.[21] Thirdly, it had power to remit the determination of those issues to another Chamber. Finally, and again in the circumstances of this case, the Chamber to which it remitted that determination was not bound to receive further evidence in relation to those issues. As the reasons for the decision of the Appeals Chamber to adopt this procedure were not expressed in its judgment on the original appeal, they are expressed now.

11. A general matter which it is convenient to deal with at the outset is the right of the parties to a sentence appeal to adduce further evidence upon the hearing of that appeal. Sentencing appeals, as with all appeals to the Appeals Chamber from the judgment of a Trial Chamber, are appeals *stricto sensu*. They are not trials *de novo*. This is clear from the terms of Article 25 of the Statute. The appellant must demonstrate, upon the trial record, that the Trial Chamber had made an appealable error. Evidence of post-sentence behaviour is irrelevant to whether the Trial Chamber erred in the exercise of its sentencing discretion.[22] It is only where the appellant succeeds in demonstrating that the Trial Chamber made such an error in relation to the sentence imposed that any issue of further evidence relating to the appropriate sentence can arise.[23] In those circumstances, it is within the discretion of the Appeals Chamber as to whether further evidence will be admitted. The exercise of that discretion is dependent mainly upon the nature of the error which has been demonstrated in the sentence appeal. The jurisprudence of the Tribunal provides guidance as to the manner in which the Appeals Chamber approaches the exercise of that discretion.

12. Where the nature of the error demonstrated is such that the Appeals Chamber is replacing the sentence with another which, in its view, the original Trial Chamber should have imposed, further evidence will not ordinarily be admitted.[24] Such a course was followed by the Appeals Chamber in *Prosecutor v Aleksovski*,[25] in which the prosecution successfully argued that the sentence imposed by the Trial Chamber was manifestly inadequate because it gave insufficient weight to the gravity of the accused's conduct and failed to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7.1 of the Statute. Without hearing the parties further and without further evidence, the Appeals Chamber was able to revise the sentence imposed by increasing it.

13. In *Prosecutor v Kupreskic*,[26] the Appeals Chamber had admitted additional evidence in the appeal by the appellant Vladimir Santic against his conviction. It reduced the sentence imposed upon that appellant because (i) the Trial Chamber in sentencing him had erroneously taken into account a fact which had not been established, (ii) the additional evidence on conviction demonstrated that Santic had now, at least in part, accepted his guilt, and (iii) he had provided substantial co-operation to the prosecution *after* his conviction. The Appeals Chamber stressed the absence of any *de novo* review, and it did not suggest that the appellant's late acceptance of his guilt would have been admissible had it not become apparent from evidence otherwise admissible in the appeal. The last consideration (co-operation *after* conviction) is expressly made relevant to sentencing by Rule 101(B)(ii), despite the absence of a *de novo* review of sentence. The Appeals Chamber held that evidence of such co-operation was thereby made admissible, in appropriate cases, in a sentence appeal.[27] The Appeals Chamber also held that, as all relevant information was already before it, it was unnecessary to remit the matter to a Trial Chamber,[28] having earlier stated that it had power to remit to a Trial Chamber the hearing of additional evidence which had been tendered pursuant to Rule 115.[29] No other evidence falling within

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Rule 101(B) was adduced before the Appeals Chamber.

14. On the other hand, where the nature of the error is such that it may be cured only by additional sentences to be imposed (or a new single sentence to cover additional convictions), the provisions of Rule 101(B) may apply to permit further relevant evidence to be adduced where that evidence is not already before the Appeals Chamber. Such a course was followed by the Appeals Chamber in *Prosecutor v Tadic*.[30] Tadic had been tried and convicted prior to the 1998 amendment to Rule 85, which now requires evidence relating to sentence to be given in the trial itself.[31] The evidence tendered in the separate hearing on sentence was limited to the nine counts upon which he had already been convicted. Tadic appealed separately against both his convictions and the sentences imposed in relation to them. On appeal against the convictions, the Appeals Chamber upheld a prosecution appeal against his acquittal on nine further counts. Because the Trial Chamber had already made findings sufficient to justify his conviction of those further nine counts, the Appeals Chamber entered convictions upon them.[32] It was agreed between the parties that, before hearing the appeal against the sentences which had been imposed earlier, it was preferable, in the circumstances of the case, to remit to a Trial Chamber to be designated by the President of the Tribunal the sentences to be imposed in relation to the additional convictions.[33] The appeal against sentence was adjourned pending those sentences being imposed.[34] Most of the additional convictions were based upon the facts which had already been considered on sentence in relation to the original convictions. Three of the new convictions, however, involved more serious facts than had previously been considered.[35] The proceedings before the designated Trial Chamber, which included the two judges of the original Trial Chamber who were still judges of the Tribunal, proceeded in accordance with Rule 101(B), but the proceedings were limited to the sentences to be imposed upon the new convictions. There was no consideration given to re-sentencing the accused in relation to the original convictions.

15. The appellants in the present case say that they wished to adduce before the new Trial Chamber evidence of their conduct since the original sentences were imposed, and of sentences imposed upon other accused persons.[36] None of this was sought to be adduced before the Appeals Chamber when hearing the original appeal. If that evidence had been relevant to the appeals which they had brought against sentence, it should have been adduced at that stage. The Appeals Chamber, however, is satisfied that none of that evidence sought to be adduced before the new Trial Chamber was relevant to the issues which arose out of the Appeals Chamber Judgment in relation to the adjustment of the original sentences imposed, so that the failure of the appellants to have adduced it at that earlier stage has not prejudiced them. In these circumstances, the Appeals Chamber would not have been conducting a new trial in relation to sentence if it had itself resolved the issues raised in the Appeals Chamber Judgment rather than remitting them to a new Trial Chamber. Rule 101(B) would not have required the Appeals Chamber to have regard to up-to-date evidence from the parties when determining those limited issues.

16. The powers of the Appeals Chamber in relation to an appeal are not limited to those expressly stated in Article 25 of the Tribunal's Statute or in Rule 117(C). As part of the Tribunal, it also has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done.[37] The circumstances previously outlined prevented the Appeals Chamber from exercising its power to resolve those issues itself. In those circumstances, it had the inherent power to remit those issues to be determined by another Chamber to ensure that justice was done to the parties in relation to the issues raised by the Appeals Chamber Judgment.[38] The challenge to the power of the Appeals Chamber to remit limited issues is rejected.

17. Such an inherent power should not, of course, be exercised where any of the parties is thereby

prejudiced. The appellants have argued that the procedure adopted in the present case denied them the right to adduce further evidence in order to bring up-to-date the material previously adduced in accordance with Rule 101(B). But, as already stated, the Appeals Chamber had the power to revise the sentences which had been imposed by resolving all of those issues itself in the course of its judgment without necessarily having to hear the parties further or to receive further evidence in relation to those issues. Once the Appeals Chamber exercised its inherent power to remit those limited issues to the Trial Chamber to be determined, the Trial Chamber had no power to go beyond determining the limited issues remitted to it. The Trial Chamber was not conducting a new trial on the issue of sentence, and – just as the situation would have been had the Appeals Chamber determined those limited issues itself – Rule 101(B) did not require the Trial Chamber to have regard to further evidence from the parties when determining those issues. The Trial Chamber's ruling, effectively that further evidence was inadmissible in the circumstances of this case, was correct. The argument that the Trial Chamber was obliged to receive further evidence in accordance with Rule 101(B) is rejected. The argument by Delic, that it was inappropriate to remit limited issues to a Trial Chamber which did not contain any judges from the original Trial Chamber (because none had been re-elected), depended upon the assertion that there had to be a new trial on sentencing. That argument, too, is rejected.

18. Where then is the prejudice to the appellants in the procedure adopted? They have lost nothing which they would have had if the Appeals Chamber had determined the issues for itself, and they were given something which they would not have had if the Appeals Chamber had determined the issues for itself – the opportunity (i) to be heard further upon those issues in the light of the judgment which was given, and (ii) to appeal if they were dissatisfied by the resolution of those issues. The procedure adopted was wholly in their favour. Their arguments that they were prejudiced by the procedure adopted are illusory.

19. Accordingly, there was no error made by the Appeals Chamber when it remitted the limited issues concerning the adjustment of the sentences imposed upon the appellants to a Trial Chamber, and there was no error made by the Trial Chamber when it considered only those limited issues which had been remitted to it and held that further evidence was unnecessary.

4 No adjustment for the dismissal of the Article 3 convictions

20. Prior to the Appeals Chamber Judgment, it had been usual within the Tribunal to convict an accused in relation to all crimes established in relation to the facts which had been proved to the satisfaction of the Trial Chamber, even though this resulted in multiple convictions based upon the same acts; potential issues of unfairness to the accused were addressed at the sentencing phase, usually by the imposition of concurrent sentences for all such multiple convictions.[39] The Appeals Chamber Judgment, however, determined that multiple criminal convictions entered relating to different offences but based upon the same conduct are permissible only if each such offence has a materially distinct element not contained in the other – that is, an element of each offence which requires proof of a fact not required by any element of the other offence.[40]

21. All three accused had been convicted cumulatively in relation to a number of counts under both Article 2 (Grave breaches of the Geneva Conventions of 1949) and Article 3 (Violations of the laws or customs of war) of the Statute. The conduct forming the factual basis of the charges was identical, and convictions were entered in relation to offences under both Articles in relation to that identical conduct. On appeal, the Appeals Chamber held that such convictions were impermissible, and it dismissed all cumulative Article 3 convictions.[41] As stated earlier, the Appeals Chamber remitted to the new Trial Chamber the issue of what adjustment, if any, should be made to the original sentences imposed to take account of the dismissal of the Article 3 convictions. The Appeals Chamber emphasised that the

governing criterion in sentencing is that the sentence should reflect the totality of the offender's conduct (the "totality" principle), and that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.[42] The new Trial Chamber rejected the appellants' argument that, because the number of convictions had been reduced, the sentence should also be reduced,[43] and it concluded that, in relation to these three accused, "the totality of their criminal conduct has not been reduced by reason of the quashing of the cumulative convictions".[44]

22. The three appellants have submitted that their sentence should have been reduced as a result of their acquittal upon a number of charges because of impermissible cumulative convictions.[45] They claim that the only reason that the Appeals Chamber remitted their sentences to a new Trial Chamber was to have them reduced in light of those acquittals.[46] Although the Appeals Chamber had removed the prejudice which ensued from the cumulative *convictions*, it is said that it was the new Trial Chamber's duty and responsibility to remove the prejudice which ensued from the cumulative *sentencing*.[47] In case of doubt as to whether or not the cumulative conviction may have had an effect on the sentence, the appellants say, the new Trial Chamber should have assumed that it *did* have such an effect and it should therefore have reduced their respective sentence accordingly.[48]

23. In response, the prosecution has argued that the appellants have failed to establish that the new Trial Chamber erred in law or that it committed a discernible error in the exercise of its sentencing discretion by not reducing the sentences as a result of the acquittal in relation to Article 3 counts. The prosecution says that the appellants are merely repeating arguments which they had unsuccessfully made before the Trial Chamber.[49] The new Trial Chamber was not bound to reduce the sentence, but was directed by the Appeals Chamber to determine whether an adjustment should be made and, if so, to determine the extent of that adjustment.[50] The prosecution has argued that the original Trial Chamber had sentenced the appellants "on the basis of the underlying conduct rather than for how such conduct was characterised",[51] that the new Trial Chamber had correctly accepted that the original Trial Chamber had avoided double punishment for the same conduct,[52] and that the new Trial Chamber's decision demonstrates that it too was well aware that the final sentence must reflect the totality principle.[53]

24. The appellants' argument that the new Trial Chamber was obliged to reduce their sentences as a result of the cumulative convictions being quashed necessarily fails. The Appeals Chamber was prepared only to say that, if such convictions had not been entered, a different outcome in terms of the length and manner of sentencing "might" have resulted.[54] It specifically directed the new Trial Chamber to determine what adjustment "if any" should be made,[55] and the Appeals Chamber commented that the new Trial Chamber "will no doubt consider whether the remarks of the original Trial Chamber indicated that there should be no adjustment downwards in the sentences imposed".[56] A conclusion that no reduction was appropriate was thus within the contemplation of the Appeals Chamber at that time.

25. It may be accepted that the cumulative convictions of themselves involve an additional punishment – not only by reason of the social stigmatisation inherent in being convicted of that additional crime, but also the risk that, under the law of the State enforcing the sentence, the eligibility of a convicted person for early release will depend to some extent upon the number or nature of the convictions entered. The quashing of the cumulative convictions undoubtedly removed the punishment involved in the additional convictions themselves. The issue which the new Trial Chamber had to determine in the circumstances of the present case was whether, in determining the length of the concurrent sentences imposed, the original Trial Chamber had also added to the length of those

concurrent sentences because of those additional convictions. As already stated, the new Trial Chamber concluded that the totality of the appellants' criminal conduct had not been reduced by reason of the quashing of the cumulative convictions, and that the original Trial Chamber had this factor specifically in mind in passing "sentences which clearly would have been the same without the cumulative convictions".[57] Accordingly, it made no adjustment to the sentences by reason of the quashing of the cumulative convictions. The issue which the Appeals Chamber now has to determine is whether this conclusion of the new Trial Chamber was open to it.

26. The original Trial Chamber made it clear that its decision to make the sentences imposed concurrent was intended to avoid any prejudice to the appellants by reason of the cumulative convictions. In its judgment,[58] it referred to a defence motion brought early in the case challenging the form of the indictment, complaining (*inter alia*) of the cumulative charging "which without any base multiplies the responsibility of the accused".[59] The Trial Chamber, in rejecting this complaint, had relied upon a passage taken from a decision in an earlier case,[60] which it adopted in the present case:

> In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. **What is to be published by penalty is proven criminal conduct and that will not depend upon the technicalities of pleading.**[61]

The Trial Chamber added in that decision that such reasoning was similarly applicable in the present case. In its judgment, having referred to that decision, the Trial Chamber went on to say:[62]

> It is in this context that the Trial Chamber here orders that each of the sentences is to be served concurrently. The sentence *[sic]* imposed shall not be consecutive.

27. In the light of this material, the conclusion by the new Trial Chamber that the sentences "clearly would have been the same without the cumulative convictions " was open to the Trial Chamber. Accordingly, the challenge by all three appellants to the new Trial Chamber's determination that no adjustment should be made for the dismissal of the Article 3 convictions is rejected. That disposes of both issues raised by Landzo, and his appeal will accordingly be dismissed.

5 Extent of reduction given to Mucic for adverse reference to the absence of evidence from him at the trial

28. When assessing the factors relevant to sentencing, the original Trial Chamber had stated:[63]

> Zdravko Mucic has declined to give any oral evidence, notwithstanding the dominant position he played in the facts giving rise to the prosecution of the accused persons.

The Appeals Chamber held that the Trial Chamber had, by that statement, erroneously regarded Mucic's failure to give evidence in an adverse light and that, although it was not clear whether the Trial Chamber had regarded this as an aggravating factor, its remark "leaves open the real possibility that it did so".[64] Accordingly, the Appeals Chamber concluded that the Trial Chamber had erred, and it remitted to the new Trial Chamber the determination of the effect, if any, of that error on the sentence originally imposed on Mucic,[65] together with its task of determining the length of an appropriately revised sentence for Mucic following the determination by the Appeals Chamber that the sentence of seven years imposed by the original Trial Chamber was inadequate.[66]

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29. The new Trial Chamber stated that "it is not possible [...] to ascertain the precise effect, if any, which the comment may have had on his sentencing", but that it was "not in a position to say that it had no effect".[67] "Under those circumstances", the new Trial Chamber continued:[68]

> [...] the Trial Chamber is of the view that, since it may have had an effect, the original sentence should be reduced accordingly. However, this can be given proper effect by a small reduction, and the Trial Chamber considers that a single sentence of nine years' imprisonment is appropriate.

This was one year less than the sentence of "around ten years" which the Appeals Chamber had indicated that it would have imposed in substitution for the original sentence of seven years imposed by the original Trial Chamber had it not had to take into account the dismissal of the cumulative convictions.[69] However, as will be demonstrated shortly, the new Trial Chamber did not assess any specific reduction resulting from the adverse inference.

30. Mucic complains that he was entitled to a much more substantial reduction than a "token" reduction of one year.[70] He says that the error made by the original Trial Chamber was so basic a defect, by ignoring the burden and standard of proof, that it went "to the heart of the criminal process", and that the redress to which he is entitled had to be "as fundamental as the original error may well have been".[71] Unless the adjustment for such an error was not also fundamental, he has said, there would be no confidence in the criminal justice system.[72] The prosecution responded that the new sentence of nine years was within the new Trial Chamber's sentencing discretion.[73]

31. The approach taken by Mucic is itself fundamentally defective. If an error is made by a sentencing tribunal, the appellate tribunal does not compensate the appellant for the fact that an error was made; it adjusts the sentence to remove the effect of the error which was made. The fact that the error may have been a serious one from a lawyer's point of view does not alter the issue for the re- sentencing tribunal, which is to determine what the proper sentence should have been if the error had not been made. Moreover, the new Trial Chamber did *not* express the reduction which it allowed by reason of the error made as one of one year. It merely said that the reduction to be allowed should be a "small" one. It did so because it was also determining the length of an appropriately revised sentence for Mucic following the determination by the Appeals Chamber that the sentence of seven years imposed by the original Trial Chamber was inadequate. The new Trial Chamber correctly approached that issue upon the basis of an overall assessment of what was appropriate without reference to the absence of any evidence from Mucic, and it did not break that assessment up into separate compartments.

32. The issue which the Appeals Chamber has to determine is whether the new Trial Chamber's characterisation of the reduction warranted by the erroneous reference to the absence of evidence from Mucic as "small" was erroneous. The Appeals Chamber is not persuaded that the new Trial Chamber erred in doing so. The complaint is rejected.

6 Nine-year sentence imposed upon Mucic

33. The issue which had been remitted to the new Trial Chamber was the determination of an appropriately revised sentence for Mucic following the decision of the Appeals Chamber that the effective original sentence of seven years was inadequate, with the guidance from the Appeals Chamber that, had it not been necessary to take into account a possible adjustment in sentence because of the dismissal of the Article 3 counts, it would have imposed a sentence of around ten years.[74] As the new Trial Chamber determined that no adjustment should be made for the dismissal of the Article 2 convictions, the guidance given by the Appeals Chamber became more directly relevant to its decision,

although (as already stated) the new Trial Chamber had to assess the whole of Mucic's criminal conduct without reference to the absence of any evidence from Mucic which the original Trial Chamber had erroneously taken into account.[75]

34. Leaving aside the impermissibly cumulative convictions for violations of the laws or customs of war, Mucic was found guilty by the original Trial Chamber of grave breaches of the Geneva Conventions, as having been *directly* responsible, under Article 7(1) of the Tribunal's Statute, for the following crimes:

(1) **Wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp** (Count 46). The Trial Chamber found that the detainees:[76]

> [...] were exposed to conditions in which they lived in constant anguish and fear of being subjected to physical abuse. Through the frequent cruel and violent deeds committed in the prison-camp, aggravated by the random nature of these acts and the threats made by guards, the detainees were thus subjected to an immense psychological pressure which may accurately be characterised as 'an atmosphere of terror'.

The Trial Chamber also found that the detainees were deprived of adequate food, access to water, medical care and sleeping and toilet facilities.[77] Mucic was found to have "participated in the maintenance of the inhumane conditions that prevailed" in the camp by omitting to provide these necessities.[78]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[79]

(2) **Unlawful confinement of civilians** (Count 48). The Trial Chamber found that "the detention of civilians in the Celebici prison-camp was not in conformity with the relevant provisions of Geneva Convention IV", and it found that Mucic had the "primary responsibility for, and had the ability to affect, the continued detention of civilians".[80]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[81]

In addition, Mucic was found guilty by the original Trial Chamber of grave breaches of the Geneva Conventions, as having been responsible as a *superior*, under Article 7(3), for the following crimes (which had been committed by his subordinates):

(3) **Wilful killing of nine detainees and cruel treatment and wilfully causing great suffering or serious injury to a tenth detainee** (Count 13). Eight detainees died as a result of beatings by guards, and one was shot when he attempted to escape from a beating. The beating of one detainee was conducted with rifle butts and other wooden and metal objects and continued for a period of several hours. Another detainee was subjected to a similar beating at the same time as the first, and died the next day in his son's arms. A third detainee was already seriously injured when he arrived at the camp, and was then subjected to further beatings.[82]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[83]

(4) **Torture of six detainees** (Count 33). One detainee was imprisoned by another accused,

Delic, in a manhole for at least a night and a day without food or water, and was then beaten with a number of objects, including shovels and electric wires.[84] A second detainee was rendered unconscious after being kicked and hit with "karate chops" by another accused, Landzo, then forced to hold a heated knife, causing serious burns, and finally cut twice on his head with the knife.[85] A third detainee had a gas mask placed over his face by Landzo and tightened to block his air supply, then burnt on the hand, leg and thighs with a heated knife, then forced to eat grass and to drink water with his mouth full of clover while being kicked and hit.[86] A fourth detainee had his mouth forced open by Landzo in order to insert a pair of heated pincers on his tongue, causing burns to his mouth lips and tongue, and he was then burnt in the ear with the pincers.[87] A fifth detainee, a woman, was raped twice by Delic in the presence of other guards.[88] A sixth detainee, also a woman, was raped after being ordered to lie on the bed, with a rifle being pointed at her.[89]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[90]

(5) **Wilfully causing great suffering or serious injury to three detainees** (Count 38). One detainee was forced by Landzo to do push-ups whilst being kicked and hit with a baseball bat. Another detainee had a burning fuse cord placed against his genitals by Landzo. A third detainee was so seriously injured from beatings received before he arrived at the camp that he was unable to stand with his hands against a wall as ordered, and he was hit several times before being pulled away.[91]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[92]

(6) **Inhuman treatment of six detainees** (Count 44). A device similar to a cattle prod which emitted electric shocks was used by Delic on the neck of one detainee and on the bare chest of another detainee, causing the second detainee pain, burns, convulsions, twitching and scarring, despite his plea for mercy.[93] Two detainees, who were brothers, were forced by Landzo to commit fellatio upon each other in full view of a large number of other detainees.[94] Another two detainees, who were father and son, were forced by Landzo to beat each other over a period of ten minutes, being ordered to hit each other harder.[95]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[96]

(7) **Wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp** (Count 46). The conviction under this count related to both Mucic's superior responsibility for the actions of his subordinates (described in par (1), *supra*) and to his own direct responsibility for his participation in the maintenance of the inhumane conditions which prevailed.

The Trial Chamber appears to have intended to include the superior responsibility of Mucic for this offence in the sentence of imprisonment for seven years imposed for his direct responsibility under the same count.[97]

Each of the sentences was ordered to be served concurrently,[98] thus producing for Mucic an effective total sentence of imprisonment for seven years for these convictions. There are twenty-four individual victims named in these convictions for superior responsibility.

35. The Appeals Chamber held that the effective sentence of seven years imposed by the original Trial Chamber failed adequately to take into account:

(a) the influential effect of encouraging or promoting crimes and an atmosphere of lawlessness within the camp created by the ongoing failure of Mucic to exercise his duties of supervision;[99]

(b) the gravity of Mucic's offences, and specifically of the underlying crimes;[100] and

(c) the fact that both direct and superior responsibility was involved in the wilful causing of great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp (Count 46) required it either to treat Count 46 as charging two offences or to treat each responsibility as aggravating the seriousness of the other.[101]

36. It was in this context that the Appeals Chamber expressed the view that it would have imposed a sentence of "around ten years".[102] The Appeals Chamber added that the new Trial Chamber was entitled to pay regard to that indication in its own determination of the new sentence.[103] The new Trial Chamber stated that, although it was not bound by that indication, it was "plainly appropriate" that it should take it into account, treating the word "around" as leaving the sentence to be imposed to the discretion of the Trial Chamber.[104] As already stated, the Trial Chamber imposed a single sentence of imprisonment for nine years.[105]

37. Many of the arguments put by Mucic in support of his appeal against the length of the sentence imposed by the new Trial Chamber were put by him in his appeal against the original sentence of seven years and were rejected by the Appeals Chamber in its previous judgment. It is not proposed to revisit those issues in this present judgment. Other arguments were directed to the refusal of the new Trial Chamber to permit further evidence to be given before it. These have already been rejected in Section 3 of the present judgment. Yet further arguments should have been raised in the earlier appeal if they were to be relied on but were not raised, and it is too late now to attempt to reargue that appeal. They were beyond the scope of the remit to the new Trial Chamber, and therefore beyond the scope of this present appeal, which relates solely to the decision of the new Trial Chamber. Otherwise, no specific arguments were directed to the length of the nine year sentence which the new Trial Chamber imposed.

38. It is nevertheless perhaps appropriate to mention one of the issues now raised which is outside the scope of the present appeal, if only for the purpose of expressly refuting it. Mucic has complained that the "ceiling" of "around ten years" suggested by the Appeals Chamber unacceptably prejudged the sentence to be imposed by the new Trial Chamber.[106] This complaint is manifestly unfounded. The Appeals Chamber made it clear that this was no more than an indication to which the new Trial Chamber could pay regard if it wished to. The Appeals Chamber, possessing the power to impose its own sentence for that imposed by the original Trial Chamber, was entitled to express that view for the guidance of the new Trial Chamber as its own assessment of the cumulative effect of the errors which it had identified as having been made by the original Trial Chamber. The new Trial Chamber accepted what the Appeals Chamber said as no more than an indication, and with the full understanding that the Appeals Chamber had left the length of the new sentence to the discretion of the Trial Chamber. Once alleged errors of law are put to one side, this present appeal, like any sentence appeal, is concerned only with whether the Trial Chamber erred in the exercise of its discretion as to the length of the sentence it imposed. There would have been no error in the exercise of its discretion if the Trial Chamber had declined to pay regard to the indication which the Appeals Chamber had previously given, or if, having paid regard to it, the Trial Chamber had imposed a sentence which, although significantly different to

the "around ten years" indicated, remained within its discretionary power. To suggest otherwise betrays a fundamental misunderstanding of the nature of sentence appeals.

39. The sentence which is appropriate must reflect the inherent gravity of the criminal conduct of Mucic, and it requires a consideration of the particular circumstances of this case, as well as the form and degree of the participation of Mucic in the crimes for which he was convicted.[107] That criminal conduct was serious, as the brief description of that conduct already given vividly illustrates. Despite all of the matters which he has urged in mitigation at all stages, Mucic has failed to persuade the Appeals Chamber that the new Trial Chamber made any errors of law, or that it erred in the exercise of its discretion, in imposing a sentence of nine years in the present case. That disposes of all issues raised by Mucic, and his appeal will accordingly be dismissed.

7 Reduction of sentence for Delic following quashing of one wilful killing conviction

40. Again leaving aside the impermissibly cumulative convictions for violations of the laws or customs of war, Delic was found guilty by the original Trial Chamber of grave breaches of the Geneva Conventions, as having been *directly* responsible, under Article 7(1) of the Tribunal's Statute, for the following crimes:

> (1) **Wilful killings of Scepo Gotovac and of Zeljko Milosevic** (Counts 1 & 3). The Trial Chamber found that Gotovac was twice severely beaten by Delic and Landzo within a short period of time, that on the second occasion a metal badge was pinned to his forehead, and that a consequence of the second beating Gotovac died sometime later.[108] This is the conviction which the Appeals Chamber quashed, upon the basis that no reasonable tribunal of fact could be satisfied beyond reasonable doubt that Delic had participated in the second beating.[109]
>
> The Trial Chamber imposed a sentence of imprisonment for twenty years for this offence.[110]
>
> The Trial Chamber also found that Delic had inflicted numerous beatings on Milosevic whilst he was detained in the camp, that, following the refusal of Milosevic to comply with the requirement of Delic that he make certain confessions to journalists visiting the camp, Delic had later beaten Milosevic severely for a period of at least an hour, and that Milosevic later died as a consequence of that beating.[111]
>
> The Trial Chamber imposed a sentence of imprisonment for twenty years for this offence.[112]
>
> (2) **Wilfully causing great suffering or serious injury to body or health of Slavko Susic** (Count 11). The indictment charged Delic and Landzo with, *inter alia* , the wilful killing of Susic. The Trial Chamber found that Delic and Landzo had mistreated Susic over a continuous period in order to persuade him to reveal the location of a radio transmitter which he was suspected of using to guide Serb gun fire into his village, that when he did not respond they subjected him to serious mistreatment, including a beating with a heavy implement, that when a search of his house failed to recover the transmitter he was again subjected to a further severe beating, and that he later died. The Trial Chamber was not satisfied beyond reasonable doubt that his death was the direct consequence of the beatings and mistreatment by Delic and Landzo, and accordingly entered a conviction for the lesser

offence of wilfully causing Susic great suffering or serious injury to his body or health.[113]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[114]

(3) **Tortures by way of rape of Grozdana Cecez and of Witness A** (Counts 18 & 21). The Trial Chamber found that Cecez was interrogated by Delic upon her arrival at the camp, that he slapped her during the course of that interrogation, that she was subsequently raped by him in the presence of other guards, and that he had done so in order to obtain information about her husband who was considered to be an armed rebel, to coerce and to intimidate her into giving that information, to punish her for her inability to give that information, to punish her for her husband's acts and to intimidate other detainees by creating an atmosphere of fear and powerlessness. The rape caused Cecez to live in a state of constant fear and depression, suicidal tendencies and exhaustion.[115]

The Trial Chamber imposed a sentence of imprisonment for fifteen years for this offence.[116]

The Trial Chamber found that Witness A was also raped by Delic, on three occasions : the first upon her arrival at the camp, after Delic had interrogated her and threatened to shoot her and to have her transferred to another camp if she did not comply with his orders; the second at the same place, where he was seated in uniform with a pistol and a rifle, when he had anal intercourse with her, causing her to bleed, and then he had vaginal intercourse with her; and the third at a time when Delic, armed with hand grenades, a pistol and a rifle, had vaginal intercourse with her. The Trial Chamber found that each of the rapes was committed in order to intimidate, coerce and punish Witness A, that the first was also to obtain information from her, and that each of the rapes caused Witness A severe mental and physical pain and suffering.[117]

The Trial Chamber imposed a sentence of imprisonment for fifteen years for this offence.[118]

(4) **Inhuman treatment of detainees** (Count 42). The facts supporting this count have already been briefly described when discussing the superior responsibility of Mucic for the conduct of Delic.[119] The Trial Chamber found that Delic had used a device similar to a cattle prod which emitted electric shocks on the chest of one detainee, just below his neck. On another occasion, Delic made another detainee to remove his shirt and then used the device on his bare chest, causing him to fall over. Delic then applied the device to his chest again for a prolonged period. The Trial Chamber found that Delic had used this device on numerous detainees in the camp, causing pain, burns, convulsions, twitching and scarring, despite their pleas for mercy, and that that Delic derived sadistic pleasure from the use of this device and from the suffering and humiliation he caused.[120]

The Trial Chamber imposed a sentence of imprisonment for ten years for this offence.[121]

(5) **Wilfully causing great suffering or serious injury to body and health by virtue of the inhumane conditions in the camp** (Count 46). In support of his conviction upon this count, the Trial Chamber took into account the facts supporting the other counts upon

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which Delic had been convicted.[122] The Appeals Chamber noted in its earlier judgment that, notwithstanding the quashing of the conviction for the wilful killing of Scepo Gotovac, it would nevertheless have been appropriate for the Trial Chamber to take into account under this count the fact that Delic had participated in the first of the beatings of Gotovac.[123] The Trial Chamber also found that Delic had participated in the beating of a number of groups of detainees, as indicative of the degree of influence Delic had within the Celebici camp "on some occasions" in the criminal mistreatment of detainees.[124] It accepted evidence that there were severe restrictions upon the water which could be drunk by detainees, particularly during hot Summer days, despite there being no shortage of water available,[125] and that, under the threat of heavy beatings and even death, not a drop of water could be brought into the camp without the knowledge and permission of Delic,[126] that Delic told detainees who had requested medical care that they would die anyway, with or without medical assistance,[127] and that Delic severely restricted access to toilet facilities.[128] Although the Trial Chamber was not satisfied that Delic was responsible generally for the living conditions within the camp, it found that, by virtue of his direct participation in those specific acts of violence found against him, he had directly participated in the creation and maintenance of an atmosphere of terror in the Celebici camp.[129] The Trial Chamber described Delic has having shown a "total disregard for the sanctity of human life and dignity " and as having acted with a "general sadistic motivation".[130]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[131]

Each of the sentences was ordered to be served concurrently,[132] thus producing for Delic an effective total sentence of imprisonment for twenty years for these convictions. An appeal by Delic against that effective total sentence was dismissed by the Appeals Chamber,[133] subject to the adjustment to the length of the sentence resulting from the quashing of the conviction for the wilful killing of Scepo Gotovac.[134]

41. The new Trial Chamber correctly proceeded upon an acceptance of these findings (other than those relating to the wilful killing of Scepo Gotovac) in order to determine the appropriate sentence to be imposed upon Delic as a result of the quashing of that conviction. At the hearing before the new Trial Chamber, Delic submitted that the consequential reduction in his overall criminality should result in a reduction which was not "slight" (as the prosecution had argued), but one which reflected the fact that a conviction of murder has been quashed.[135] He suggested that an appropriate sentence would be one of approximately fifteen years.[136] During the hearing before the Trial Chamber, it was submitted on his behalf:[137]

> It's hard to determine, from reading the original Trial Chamber's judgment, how much of the total global sentence assessed against Mr Delic was based on the facts of the murder of Scepo Gotovac, counts 1 and 2 in the indictment.

42. As already stated, the new Trial Chamber imposed a single sentence of imprisonment for eighteen years.[138] It said:[139]

> Having considered all these factors, the Trial Chamber finds that, following his appeal, there has been some

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> reduction in the totality of criminality of the accused. Nonetheless, that reduction is slight given the very serious offences for which the accused remains convicted. Accordingly, the Trial Chamber considers that a reduction of two years in the sentence would correctly reflect the total criminality of the accused, and that a single sentence of 18 years is therefore appropriate.

43. On appeal, Delic complains, first, that the Trial Chamber abused its discretion by changing the issue which had been remitted to it by the Appeals Chamber.[140] The Trial Chamber stated in its judgment that the issue which had been remitted was:[141]

> What adjustment, if any, should be made to the sentence imposed on Delic as a result of the quashing of his convictions on counts 1 and 2;

The Appeals Chamber had not used the words "if any" when remitting that issue.[142] However, this complaint by Delic gives every appearance of being an afterthought. The Trial Chamber, from the beginning of the proceedings before it, had identified the issue remitted to it in these terms,[143] Delic himself used the same terms in his appellant's brief before the Trial Chamber,[144] and he raised no objection at the hearing before the Trial Chamber when the Presiding Judge used those terms again early in the hearing.[145] In any event, Delic goes too far in his argument that the Trial Chamber had, by the inclusion of the words "if any", "changed" the issue remitted to it. Even if the inclusion of those words had the effect of impermissibly *adding* to the issue remitted a further issue as to whether any adjustment should be made at all, no prejudice could be demonstrated by such an addition because, in the event, the Trial Chamber determined that the original sentence should be adjusted by reducing it. The complaint is rejected.

44. Delic complains, secondly, that the sentence imposed by the new Trial Chamber was an "unappropriate" adjustment to his sentence. He submits that the killing of Scepo Gotovac, "an old and sick man", was the "worst" of all the crimes for which he had been convicted by the original Trial Chamber.[146] He claims that all the Trial Chamber's conclusions concerning his "bad behaviour " and the gravity of his crimes, "were mostly based on that crime", and that such conclusions could not remain after this particular conviction was quashed.[147] He also claims that his total criminality has been "considerably" lowered, and submits that the original sentence should be reduced by at least five years.[148] In response, the prosecution submits that it has not been demonstrated that the Trial Chamber made any error of law or that it erred in the exercise of its sentencing discretion, and that, in view of the overall gravity of his acts and the principle of totality, the sentence imposed upon Delic was not outside the Trial Chamber's discretionary framework provided by the Statute and the Rules.[149]

45. The approach taken by Delic both before the new Trial Chamber and in the present appeal appears to proceed upon the basis that the reduction of his sentence should have been assessed by subtracting from the effective total of twenty years a period which could be identified as relating to the wilful killing of Scepo Gotovac. Such an approach would be erroneous. The original Trial Chamber, by ordering that all of its sentences imposed upon Delic were to be served concurrently, had assessed a total term of twenty years to be appropriate to the totality of his criminal conduct for all of the convictions which it had entered, a term which the Appeals Chamber held was not disproportionate.[150] The task of the new Trial Chamber was to assess the term which was appropriate to the totality of Delic's criminal conduct for all of the convictions which remained.

46. The principle of totality in sentencing where an offender is being sentenced in relation to more than one offence has been recognised and accepted by the Tribunal in a number of cases. In the earlier appeal in the present case, the Appeals Chamber stated that the "final" sentence (that is, the effective

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total sentence):[151]

> [...] should reflect the totality of the culpable conduct (the 'totality' principle), or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.

The Appeals Chamber went on to describe the goal in such cases as being:[152]

> [...] to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. This can be achieved through either the imposition of one sentence in respect of all sentences, or several sentences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber.

In other words, sentencing in relation to more than one offence involves more than just an assessment of the appropriate period of imprisonment for each offence and the addition of all such periods so assessed as a simple mathematical exercise. The total single sentence, or the effective total sentence where several sentences are imposed, must reflect the totality of the offender's criminal conduct but it must not exceed that totality. Where several sentences are imposed, the result is that the individual sentences must either be less than they would have been had they stood alone or they must be ordered to be served either concurrently or partly concurrently.

47. For these reasons, it would have been wrong for the new Trial Chamber to have attempted to assess the period which could be identified as relating to the wilful killing of Scepo Gotovac, and then to subtract that period from the period of twenty years which had been imposed by the original Trial Chamber, as Delic has argued. The Trial Chamber did not do so. Just as in the case of Mucic, it correctly approached its task upon an overall assessment of what was appropriate without reference to the evidence supporting the count which was quashed. The statement made by the Trial Chamber has already been quoted.[153] As the Trial Chamber said, the offences for which Delic remains convicted are very serious. The Appeals Chamber is satisfied that his criminal conduct deserved substantial punishment. He has failed to persuade the Appeals Chamber that the new Trial Chamber made any errors of law, or that it erred in the exercise of its discretion, in imposing a sentence of eighteen years in this case. That disposes of all the issues raised by Delic in relation to his appeal, which will accordingly be dismissed.

8 Application by Delic for reconsideration of his original appeal against conviction

48. Although this application was included in what is in form and substance an appeal against sentence, Delic made it clear that he was independently seeking to have the Appeals Chamber reconsider its decision dismissing his appeal against the convictions other than that relating to Scepo Gotovac.[154] The prosecution argued, *inter alia*, that, since the earlier judgment of the Appeals Chamber in this case, the issue of those convictions was now *res judicata* and cannot be litigated further.[155] Delic argued that, according to the "law of the case" doctrine, a party is entitled to litigate issues which have already been decided when the strict application of the *res judicata* principle would cause "manifest injustice" to a party.[156] The prosecution responded that the "law of the case" doctrine did not apply in this Tribunal, and that in any event it could apply only "during the course of a single continuing lawsuit".[157] The Appeals Chamber observes that this application by Delic would appear to have been made during the course of a "single continuing lawsuit", but it does not find it necessary to resolve the issue which was debated.

49. The Appeals Chamber has an inherent power to reconsider any decision, including a judgment where it is necessary to do so in order to prevent an injustice. The Appeals Chamber has previously

held that a Chamber may reconsider a decision, and not only when there has been a change of circumstances, where the Chamber has been persuaded that its previous decision was erroneous and has caused prejudice.[158] Whether or not a Chamber does reconsider its decision is itself a discretionary decision.[159] Those decisions were concerned only with interlocutory decisions, but the Appeals Chamber is satisfied that it has such a power also in relation to a judgment which it has given – where it is persuaded:

> (a) (i) that a clear error of reasoning in the previous judgment has been demonstrated by, for example, a subsequent decision of the Appeals Chamber itself, the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction, or
>
> (ii) that the previous judgment was given *per incuriam*; and
>
> (b) that the judgment of the Appeals Chamber sought to be reconsidered has led to an injustice.

50. It is now well accepted in the Tribunal's jurisprudence that it possesses an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded.[160] The principal purpose of the Tribunal's existence is to administer justice, and to ensure that its proceedings do not lead to injustice. The prevention of injustice arising from error is, in most systems, provided by rights of appeal. In the civil law system, the first level of appeal is usually a *de novo* rehearing, followed by two or more levels of appeal on matters of law, or on matters of both facts and law. In the common law system, there is usually no rehearing (except in relation to minor crimes tried before magistrates) but there is either one or two levels of appeal on matters of law, or on matters of mixed fact and law. Many common law systems, however, also provide for a reconsideration where a filtering authority (either the Attorney General or a government body) examines the basis for the reconsideration request and, where appropriate, refers it to a court of criminal appeal for such reconsideration.

51. This Tribunal has only one level of appeal. That is not a *de novo* rehearing but a limited form of appeal relating to errors on a question of law which invalidates the Trial Chamber's decision or an error of fact which has occasioned a miscarriage of justice.[161] The prospect of an injustice resulting from a judgment of the Appeals Chamber is not met by any further levels of appeal. Such a prospect must be met in some way to ensure that the Tribunal's proceedings do not lead to injustice. The right of review granted by Article 26 of the Tribunal's Statute is limited to the discovery of a new fact which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision. That right has been interpreted as excluding issues of law,[162] and it is therefore only a partial answer to the prospect of injustice. A partial answer still leaves outstanding a significant prospect of injustice. No court should allow that.

52. How then is the prospect of injustice to be prevented? The absence of any reference in the Tribunal's Statute to the existence of a power to reconsider is no answer to the prospect of injustice where the Tribunal possesses an inherent jurisdiction to prevent injustice. There was no reference in the Tribunal's Statute to the particular issues dealt with in the cases to which reference has already been made in which the Tribunal's inherent powers were exercised.[163] It was the very absence of any such reference which led to the exercise of those inherent powers, because it was necessary to do so in those cases in order to ensure that the Tribunal's exercise of the jurisdiction which is expressly given to it by that Statute was not frustrated and that its basic judicial functions were safeguarded. There is nothing in

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the Statute which is inconsistent with the existence of an inherent power of the Appeals Chamber to reconsider its judgment in the appropriate case. As was said by Lord Browne-Wilkinson, in the *Pinochet* Case in which the House of Lords agreed to reconsider its earlier judgment, given in proceedings for extradition on criminal charges.:[164]

> 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 *Broome v Cassell & Co Ltd (No 2)* S1972C 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.

The decision to reconsider the earlier judgment was unanimous. The test which is now stated is not satisfied where the Appeals Chamber is satisfied "just" that its previous decision was wrong; it must also be satisfied that its previous decision has led to an injustice.[165]

53. The Rules of Procedure and Evidence do not enlarge the powers of the Tribunal – they are intended only to establish the way in which the proceedings are conducted in the Tribunal.[166] The absence of any reference to this power in the Rules is therefore no bar to the existence of the inherent power to reconsider. There is nothing in the Rules which is inconsistent with the existence of such an inherent power. Nor does the possibility that the Appeals Chamber will be flooded with applications for reconsideration constitute any such bar. Justice cannot be denied merely because it may be inconvenient to administer it. In any event, there has been no flood of applications resulting from the existing right to seek reconsideration of interlocutory decisions in limited circumstances.[167] Over-enthusiastic counsel who file frivolous applications for reconsideration will fast lose their enthusiasm when they are denied payment of their fees and costs associated with the application.[168] If any pattern of abuse appears which cannot be prevented in that way, the adoption of a Rule imposing a filter upon such applications, such as a requirement of leave to seek reconsideration of a judgment, would stop that abuse.

54. In the present case, Delic has argued that there has been a "significant" change in the law relevant to the present case since the earlier judgment of the Appeals Chamber.[169] He claims that, in the *Kupreskic* Appeal Judgment, which is described as "one of the most important procedural decisions in the Tribunal's history",[170] the Appeals Chamber laid down a "new test" of the sufficiency of the evidence to support a conviction which, if it had been applied by the Appeals Chamber in its earlier judgment, would have resulted in the quashing of his convictions in respect of Counts 3, 18 and 31 of the indictment.[171]

55. The argument that the "test" applied in the *Kupreskic* Appeal Judgment is "new" is misconceived. In that judgment, the Appeals Chamber considered "the standard that applies with respect to the reconsideration of factual findings by the Trial Chamber" on appeal as permitting the Appeals Chamber to substitute its own finding for that of the Trial Chamber only "where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous'".[172] The standard has been stated in other cases in this way:[173]

> The test to be applied in relation to the issue as to whether the evidence is *factually* sufficient to sustain a

> conviction is whether the conclusion of guilt beyond reasonable doubt is one which *no* reasonable tribunal of fact *could* have reached.

There is no difference in substance between the two formulations. Such a standard has been adopted in one or other of these formulations in every appeal against conviction in the Tribunal.[174] The Appeals Chamber in the *Kupreskic* Appeal Judgment declined to lay down any universal test as to what constitutes a "wholly erroneous" evaluation of the evidence by a Trial Chamber, although it is clear from its approach in that appeal that there is in reality no difference in substance between that test and the unreasonableness one usually stated.[175]

56. The "new test" said by Delic to have been laid down in the *Kupreskic* Appeal Judgment related to the reliability (or the quality) of a witness's evidence, as opposed to the credibility (or truthfulness) of that witness. It was applied in relation to the evidence of identification given by a young girl, the only witness who was able to identify the accused as having taken part in the particular event in question. The distinction is well encapsulated in the observation made by the Appeals Chamber:[176]

> Even witnesses who are very sincere, honest and convinced about their identification are very often wrong.

Delic describes the "key" to the analysis by the Appeals Chamber is that "evidence from a truthful witness may be too unreliable to serve as the basis for a conviction,[177] and he asserts that this "watershed" decision contradicts the earlier judgment of the Appeals Chamber in the present case, so that the failure to apply it would work "a manifest injustice" on Delic.[178]

57. If there is indeed a contradiction between the two judgments, it did not impress itself upon the Appeals Chamber when hearing the *Kupreskic* appeal, as it cites its earlier judgment in the present case as supporting the passage just quoted. Delic had suggested that the *Kupreskic* Appeal Judgment would have been the "proverbial bombshell or blockbuster" in the United States,[179] but his counsel was obliged to concede that – as the *Kupreskic* Appeal Judgment itself makes clear – the test it applied was certainly well known elsewhere throughout the world.[180] Nor was it even "new " to the jurisprudence of the Tribunal. In *Prosecutor v Kunarac et al*,[181] a case in which the issue was the legal sufficiency of the evidence of identification to support a charge of rape, a Trial Chamber, after saying that the credit of the witness upon whom the prosecution case relied was not in issue at that stage, drew attention to the distinction which has to be drawn between the credibility of a witness and the reliability of that witness's evidence – credibility depends upon whether the witness should be believed; reliability assumes that the witness is speaking the truth, and it depends upon whether the evidence, if accepted, proves (or tends to prove) the fact to which it is directed.[182] The Trial Chamber referred to the uncertainty and the inherent frailties of identification evidence, and added:[183]

> For these reasons, special caution has been found to be necessary before accepting identification evidence because of the possibility that even completely honest witnesses may have been mistaken in their identification.

All of those propositions were taken from decisions which are cited in every worthwhile textbook on evidence.

58. What needs to be emphasised is that, in the earlier judgment in the present case, the Appeals Chamber expressly *declined* the application by Delic to consider the legal sufficiency of the evidence to support the convictions. This is an issue which usually arises at the close of the prosecution case in a trial, when the test applied by a Trial Chamber in determining whether there is a case to answer is

whether there is evidence upon which (if accepted) a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused.[184] The Appeals Chamber said that it had instead applied the usual test of whether the conclusion of guilt beyond reasonable doubt reached by the original Trial Chamber in relation to the five counts challenged by Delic was one which no reasonable tribunal of fact could have reached.[185] These issues were fully discussed in the earlier judgment of the Appeals Chamber, in the introductory part of Section VII ("Delic Grounds of Appeal Alleging Errors of Fact"). The procedure followed by the Appeals Chamber required a far wider inquiry than would an inquiry into the legal sufficiency of the evidence. An inquiry into the sufficiency of the evidence requires an acceptance of the truthfulness of the witness,[186] whereas the inquiry involved in the procedure adopted by the Appeals Chamber requires a consideration as to whether no reasonable tribunal of fact could have accepted the witness's evidence as either truthful or reliable or both.

59. The use made in the *Kupreskic* Appeal Judgment of the statement "Even witnesses who are very sincere, honest and convinced about their identification are very often wrong" was directed to a "critical component" of the Trial Chamber's finding that the evidence of the young girl's identification of the accused was truthful. After acknowledging that there had been criticisms levelled at her credibility, the Trial Chamber said:[187]

> [...] these criticisms are outweighed by the impression upon the Trial Chamber while she was giving evidence. Her evidence concerning the identification of the accused was unshaken.

When determining whether no reasonable tribunal of fact could have accepted the young girl's evidence, it was appropriate for the Appeals Chamber to refer to the uncertainty and the inherent frailties of identification evidence. That is a subject which arises frequently in identification cases where an application is made at the end of the prosecution case for a ruling that there is no case to answer, and it was quite natural for the Appeals Chamber, in overturning the Trial Chamber's finding, to have referred to the well established principles applied in such cases to make the point that there is a clear distinction between the honesty of an identification witness and the reliability of that witness's evidence.

60. Delic has not persuaded the Appeals Chamber that the *Kupreskic* Appeal Judgment laid down a "new test" for the examination of the challenges by him to the evidence upon which his convictions were based, or that the test which it stated did not in any event inform the Appeals Chamber in the course of that examination. The application for the appeal against conviction to be reconsidered is rejected.

9 Disposition

61. For the foregoing reasons –

1. The appeals against sentence are dismissed.

2. The sentences imposed by the Trial Chamber on 9 October 2001 are confirmed.

3. The time spent in custody for which each of the appellants is entitled to credit is, accordingly, as follows:

for Zdravko Mucic, from 18 March 1996 to the date of this Judgment; and

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for both Hazim Delic and Esad Landzo, from 2 May 1996 to the date of this Judgment.

4. The application by Hazim Delic to have his appeal against conviction reconsidered is rejected.

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

Dated this 8th day of April 2003,
At The Hague,
The Netherlands.

_____
Judge Theodor Meron
Presiding

Judges Meron and Pocar append a Separate Opinion to this Judgment.
Judge Shahabuddeen also appends a Separate Opinion to this Judgment.

[Seal of the Tribunal]

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SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I agree with the judgment of the Appeals Chamber, but propose to offer some supporting reasons for the existence of the power of reconsideration and to note the limits within which the power may be exercised.

A. Whether it is necessary to pronounce on reconsideration

2. But, first, having had the advantage of reading in draft the joint concurring opinion of President Meron and Judge Pocar, I must attend to the important question raised by them as to the necessity for much of the discussion in paragraphs 48-53 of the judgment concerning the authority of the Appeals Chamber to reconsider its judgments and the circumstances in which such authority should be exercised, including the question whether the power extends to a final judgment.

3. In support of the view that there was no such necessity, it may be said that it was open to the Appeals Chamber to say that, even if a power of reconsideration exists and is applicable to a final judgment, it is not exercisable in favour of Delic for the reason that the ground for its exercise, as given by him, does not exist. On that approach, the matter could be disposed of without the necessity to determine whether there is a power of reconsideration and, if it exists, whether it is applicable to a final judgment. That would accord with traditional, and wise , warnings against making unnecessary judicial pronouncements.

4. And, no doubt, that was an approach open to the Appeals Chamber. But it was not the approach which it took. The Appeals Chamber can choose its approach.[1] It can take the view that it has logically first to satisfy itself that a power, which it is asked to exercise, exists, and then, if it exists, to determine whether it is exercisable in the case before it. If, as it appears to me, that is the approach taken by the Appeals Chamber, then it is within its competence to pronounce on the matter, as is proposed in paragraphs 48-53 of the judgment.

B. The existence of the power of reconsideration

5. As to the existence of the power of reconsideration, weight has to be given to the fact that, the Tribunal being international in character, its powers might be expected to be set out in its organic instrument and not left to be spelt out in accordance with the norms applicable to a particular legal system with which all the judges of the Tribunal or counsel appearing before it may not be familiar. Still, the fact is that the Tribunal was established to do justice; if, therefore it finds that its actions create injustice of a kind which cannot be remedied in its normal appellate or review processes, it must possess the power of reconsideration , limited though this necessarily is.

6. The silence on the matter in the regulatory regime of the Tribunal was mentioned in *Kordic*, in which it was said "that motions to reconsider are not provided for in the Rules and do not form part of the procedures of the International Tribunal ".[2] But, as other cases have shown, the silence is not an impediment.

7. Without passing on cases involving additional evidence, it appears to me that in some domestic jurisdictions reconsideration is effectively made by way of rehearing . In *Metropolitan Water Dist. of Southern California v. Adams* (1942) 19 Cal . 2d 463 at 469, Shenk, J., said:

> There is no express provision of the Constitution or in the statutes for a rehearing of a cause in bank. It is, however, an essential ingredient of jurisdiction. This court has

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> inherent power to revise, modify, and correct its judgments so long as they are under its control and may, in the exercise of that power, grant rehearings on applications of the parties or on it own motion.[3]

8. In my opinion, when the Security Council established the Tribunal as a judicial entity, the body which came into being was clothed with the essential ingredients of jurisdiction referred to by Shenk, J; those ingredients included the power of reconsideration, by whatever name called. As paragraph 52 of the judgement of the Appeals Chamber correctly notices, the power was exercised in *Pinochet's* case,[4] to which I have referred elsewhere [5] in connection with this subject. It could also be exercised in other cases.[6]

9. There is a last point. In the *Adams* case, mentioned above, Shenk, J., expressed the view that the "inherent power (of a court(to revise, modify, and correct its judgments" was available "so long as they are under its control ..." In principle, the limitation was right; it is reflected in the general view that the court is *functus officio* once the decision has been announced or formalised .[7] The idea is in keeping with the principle of finality, and the guillotine which it imposes has to be respected. However, in extreme cases reconsideration is thereafter still possible if the circumstances meet the tests mentioned below.[8]

C. The limits within which the power of reconsideration may be exercised

10. Paragraph 49(b)(i) of today's judgment speaks of the power of reconsideration being exercisable by the Appeals Chamber in relation to a judgment "where it is persuaded ... that a clear error of reasoning in the previous judgment has been demonstrated by, for example, a subsequent decision of" certain senior judicial bodies, or "that the previous judgment was given *per incuriam*", and that "the judgment of the Appeals Chamber sought to be reconsidered has led to an injustice".

11. I accept that view, but would interpret it, my apprehension being that a party might seek to show that an ordinarily appealable "error" is a "clear error", that a resulting prejudice amounts to "injustice", and on that basis attempt, long after the case is closed in the normal judicial process, to bring what is effectively an appeal under the guise of reconsideration.

12. It seems to me that the proper criterion for determining what are the limits within which reconsideration is allowed is to be derived from holding a balance between the principle that a litigant has a right to a correct decision and the principle that his opponent has a right to rely on the finality of litigation. The balance would obviously be disturbed were the litigant, for example, to be given an open-ended right to relitigate the case after the Appeals Chamber has decided it; some restriction is required.

13. I consider that some guidance is to be had from the remarks made in 1947 on a petition for rehearing by the Tennessee Court of Appeals. The court observed:[9]

> The petition points out no matter of fact or law overlooked, but only reargues matters which counsel say were improperly decided. The office of a petition to rehear is to call the attention of the court to matters overlooked, not to those which counsel suppose were improperly decided after full consideration.

Similarly, in 1950 the Ohio Court of Appeals said:[10]

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> At present we have no rule permitting applications for rehearing and it is only in rare instances, where there is something which, manifestly, the court has overlooked in the original opinion that such applications are entertained.

14. Even where there are rules on the subject, some restriction is in principle required. Thus, in 1998 the Supreme Court of Nevada considered that, as it had "overlooked material matters and that rehearing will promote substantial justice, ... rehearing is warranted".[11] Likewise , in 2000 the Ohio Court of Appeals in the 10th District said:

> The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered or was not fully considered by the court when it should have been ... Here, Erie contends that this court committed an obvious error and failed to consider relevant Ohio law in two respects.[12]

15. It could be argued that the principle of finality is sufficiently honoured by the requirement, not only that there should be a "clear error", but also that the clear error should be one which causes "injustice". It may be, therefore, that what is involved is a question of nuance; be that as it may, I desire to state my understanding of the reference in the judgment to "clear error" to be a reference to something which the court manifestly or obviously overlooked in its reasoning and which is material to the achievement of substantial justice.

D. Conclusion

16. For these reasons, it appears to me that the power to reconsider exists; that, as the cases show, decisions which may be reconsidered include a final judgment; and that there are obvious restrictions which apply to the exercise of the power.

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

Mohamed Shahabuddeen

Dated 8 April 2003
At The Hague
The Netherlands

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1 - See, by way of analogy, *Northern Cameroons, I.C.J.Reports 1963*, p. 15, in which the court reversed the usual procedural approach, determining admissibility before jurisdiction.
2 - IT-95-14/2-PT, 15 February 1999. See similarly *Kovacevic*, IT-97-24-PT, 30 June 1998.
3 - See too *Lane v. Mathews*, (1952) 75 Ariz. 1 at 2.
4 - *R. v. Bow Sreet Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No.2) [1999] 1 All ER 577, HL, at 585-586, per Lord Browne-Wilkinson.
5 - *Barayagwiza*, ICTR 97-19-AR72, 31 March 2000, separate opinion.
6 - See *Halsbury's Laws of England*, 4th ed., vol.26, pp.279-288, referred to in footnote 3 of the separate opinion mentioned in footnote 5 above.
7 - *Cross* (1973) 57 Cr. App. R. 660, and *Roberts* [1990] Crim. L.R. 122.
8 - See *Daniel*, (1977) 64 Crim. App. R. 50.

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9 - *Black v. Love and Amos Coal Co.*, (1947) 206 S.W. 2d 432 at p. 437, per Felts J., Howell and Hickerson JJ. concurring, in the Tennessee Court of Appeals, Middle Section, 28 June 1947.
10 - *Wolf v. Glenn*, 99 N.E. 2d 320 at 323, 4 January 1950.
11 - *Calloway v. City of Reno*, (1998) 971 P. 2d 1250.
12 - *Erie Insurance Exchange v. Colony Development Corporation*, (2000) 736 N.E. 2d 950 at 952.

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SEPARATE OPINION OF JUDGES MERON AND POCAR

We write separately to say that we think that much of the discussion in paragraphs 48 to 53 of the Judgement concerning the Appeals Chamber's authority to re-consider its judgements and the circumstances in which such authority should be exercised is unnecessary to resolve the case at hand. In this case, the Appeals Chamber's earlier judgement affirmed several of Delic's convictions, and Delic now asks the Appeals Chamber to reconsider those affirmances. He defends the propriety of reconsideration here on one basis and one basis alone: that there has been an intervening change in the standard established by the Appeals Chamber for appellate review of certain factual findings of the Trial Chambers. If there had in fact been an intervening shift in the governing law, then the Appeals Chamber would have to decide whether that sort of shift was the kind that warrants reconsideration of an earlier judgement. The Appeals Chamber might also then have to decide whether its earlier judgement in this case was final or not and whether its final or non-final character should affect the Appeals Chamber's competence to reconsider the portion of that earlier judgement now challenged by Delic. But, as the Judgement carefully explains in paragraphs 54-60, there has in fact been no change in the governing legal standard. Thus, there is simply no reason for the Appeals Chamber in this case to address the circumstances in which it may re-consider its judgements. We believe that judicial restraint requires the Appeals Chamber to address those questions only when, in some future case, it is necessary to do so. In this regard, we recall what Lord Atkin said in *The Cristina* [1938] AC 485, at 493:

> In the present case I find it unnecessary to decide many of the interesting points raised in the argument for the appellants . . . . In matters of such grave importance as those involving questions of international law, it seems to me very expedient that Courts should refrain from expressing opinions which are beside the question actually to be decided.

We therefore reserve our position on the issue.

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

_____
Judge Theodor Meron, Presiding

_____
Judge Fausto Pocar

Dated this 8th day of April 2003,
At the Hague,
The Netherlands.

AUTHORITIES

5. William A. Schabas, *An Introduction to the International Criminal Court (2001).*

AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT

SECOND EDITION

WILLIAM A. SCHABAS

CAMBRIDGE
UNIVERSITY PRESS

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transfer of a Rwandan suspect to the Arusha tribunal.[63] Accordingly, that a national judge would consider a distinction between 'transfer or surrender' and 'extradition' to be little more than legal sophistry cannot be ruled out, despite the clear words of Article 102.[64]

Penalties may also pose problems for some States with regard to transfer and surrender. The issue was raised at Rome during the debates on the death penalty and life imprisonment, with some delegations noting their constitutional prohibition on extradition in the case of such severe penalties. For example, the Colombian Constitution forbids life imprisonment. Presumably, a Colombian accused could argue before domestic courts in proceedings to effect transfer to the International Criminal Court that eligibility for parole, as set out in Article 77 of the Statute, does not exclude the possibility of such a sentence.[65] Colombian courts might hold, by analogy with a recent decision of the Italian Constitutional Court,[66] that because they cannot or should not speculate upon whether parole might be granted, transfer or surrender must be denied. Portugal finessed the issue at the time of ratification, making the following declaration: 'The Portuguese Republic declares the intention to exercise its jurisdictional powers over every person found in the Portuguese territory, that is being prosecuted for the crimes set forth in Article 5, paragraph 1 of the Rome Statute of the International Criminal Court, within the respect for the Portuguese criminal legislation.' Nor should the prospect be gainsaid that some time in the future, regional or universal human rights bodies might determine that the sentences allowed by the Rome Statute, specifically life imprisonment without the possibility of parole before twenty-five years, are in breach of international human rights norms.[67] States preoccupied by their compliance with the Rome Statute might be led to contemplate reservations to

[63] Robert Kushen and Kenneth J. Harris, 'Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda', (1996) 90 *American Journal of International Law* 254.

[64] According to Cherif Bassiouni, 'in most States, surrender is equivalent to extradition': M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Irvington-on-Hudson, NY: Transnational Publishers, 1995, p. 787.

[65] Gisbert H. Flanz, 'Colombia', translated by Peter B. Heller and Marcia W. Coward, in Gisbert H. Flanz, ed., *Constitutions of the Countries of the World*, Dobbs Ferry, NY: Oceana Publications, 1995, Art. 34.

[66] *Venezia* v. *United States of America*, Decision No. 223, 25 June 1996 (Constitutional Court of Italy).

[67] See, for example, Dirk Van Zyl Smit, 'Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective', (1998) 9 *Criminal Law Forum* 1.

AUTHORITIES

6. *Prosecutor v. Milosevic, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder*, Case No. IT-99-37-AR73, Appeals Chamber, 18 April 2002.

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UNITED NATIONS

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

Cases: IT-99-37-AR73
IT-01-50-AR73
IT-01-51-AR73

Date: 18 April 2002

Original: French & English

BEFORE THE APPEALS CHAMBER

Before: Judge Claude Jorda, Presiding
Judge David Hunt
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron

Registrar: Mr Hans Holthuis

Decision of: 18 April 2002

PROSECUTOR

v

Slobodan MILOŠEVIĆ

REASONS FOR DECISION ON PROSECUTION INTERLOCUTORY APPEAL FROM REFUSAL TO ORDER JOINDER

Counsel for the Prosecutor:

Ms Carla Del Ponte, Prosecutor
Mr Geoffrey Nice
Ms Hildegard Uertz-Retzlaff
Mr Dirk Reyneveld

The Accused:

Mr Slobodan Milošević (unrepresented)

Amici Curiae

Mr Steven Kay
Mr Branislav Tapuskovic
Mr Mischa Wladimiroff

The appeal

1. Pursuant to leave granted by a Bench of the Appeals Chamber,[1] the Prosecutor ("prosecution") appealed against the decision of Trial Chamber III dismissing in part the application made to join the three indictments brought against Slobodan Milošević ("accused").[2] The Trial Chamber had ordered that two of the three indictments filed against the accused be joined, those relating to events in Croatia and Bosnia,[3] but it ordered that the first of the indictments, which related to events in Kosovo,[4] be tried separately and before the trial of the two joined indictments.[5]

2. Following an oral hearing of the interlocutory appeal,[6] the Appeals Chamber gave its formal decision by which it allowed the appeal. It ordered that there should be the one trial and that, for the purposes of that one trial, the three indictments were deemed to constitute one indictment.[7] It was stated that the Appeals Chamber's reasons for that decision would be issued in due course.[8] Those reasons are now stated.

The nature of the appeal

3. The prosecution accepts, correctly, that the decision of a Trial Chamber as to whether two or more crimes should be joined in the one indictment pursuant to Rule 49 of the Rules of Procedure and Evidence ("Rules") is a discretionary one.[9] A Trial Chamber exercises a discretion in many different situations – such as when imposing sentence,[10] in determining

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1 Decision on Prosecution Application for Leave to File an Interlocutory Appeal, 9 Jan 2002.
2 Decision on Prosecution's Motion for Joinder, 13 Dec 2001 ("Decision").
3 IT-01-50-I and IT-01-51-I, respectively.
4 IT-99-37-I.
5 Decision, par 53.
6 The hearing took place on 30 January 2002.
7 Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 1 Feb 2002 ("Formal Decision of Appeals Chamber"), p 3.
8 *Ibid*, p 4.
9 Interlocutory Appeal of the Prosecution Against "Decision on Prosecution's Motion for Joinder", 15 Jan 2002 ("Appellant's Written Submissions"), par 6. Rule 49, the full terms of which are discussed later, states: "Two or more crimes *may* be joined [...]" (the emphasis has been added).
10 *Prosecutor v Tadić*, IT-94-1-A and IT-94-1-A*bis*, Judgment in Sentencing Appeals, 26 Jan 2000 ("*Tadić* Sentencing Appeal"), par 22; *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Appeal"), par 187; *Prosecutor v Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000 ("*Furundžija* Appeal"), par 239; *Prosecutor v Delalić et al*, IT-96-21-A, Judgment 20 Feb 2001 ("*Delalić* Appeal"), pars 712, 725, 780; *Prosecutor v Kupreškić et al*, IT-96-16-A, Appeal Judgment, 23 Oct 2001 ("*Kupreškić* Appeal"), pars 408, 456-457, 460.

whether provisional release should be granted,[11] in relation to the admissibility of some types of evidence,[12] in evaluating evidence,[13] and (more frequently) in deciding points of practice or procedure.[14]

4. Where an appeal is brought from a discretionary decision of a Trial Chamber, the issue in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently. That is fundamental to any discretionary decision. It is only where an error in the exercise of the discretion has been demonstrated that the Appeals Chamber may substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber.

5. It is for the party challenging the exercise of a discretion to identify for the Appeals Chamber a "discernible" error made by the Trial Chamber.[15] It must be demonstrated that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.[16]

6. In relation to the Trial Chamber's findings of fact upon which it based its exercise of discretion, the party challenging any such finding must demonstrate that the particular finding

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[11] *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, par 22 (Leave to appeal denied: *Prosecutor v Brđanin & Talić*, IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 Sept 2000, p 3); *Prosecutor v Krajišnik & Plavšić*, IT-00-39&40-AR73.2, Decision on Interlocutory Appeal by Momčilo Krajišnik, 26 Feb 2002, pars 16, 22.

[12] *Prosecutor v Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 19; *Prosecutor v Kordić & Čerkez*, IT-95-14/2-73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, par 20; *Delalić* Appeal, pars 532-533.

[13] *Aleksovski* Appeal, par 64; *Kupreškić* Appeal, par 32.

[14] For example, granting leave to amend an indictment: *Prosecutor v Galić*, IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 Nov 2001, par 17; determining the limits to be imposed upon the length of time available to the prosecution for presenting evidence: *Prosecutor v Galić*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 Dec 2001, par 7.

[15] *Tadić* Sentencing Appeal, par 22; *Aleksovski* Appeal, par 187; *Furundžija* Appeal, par 239; *Delalić* Appeal, par 725; *Kupreškić* Appeal, par 408.

[16] *Tadić* Sentencing Appeal, par 20; *Furundžija* Appeal, par 239; *Delalić* Appeal, pars 725, 780; *Kupreškić* Appeal, par 408. *See* also *Serushago v Prosecutor*, ICTR-98-39-A, Reasons for Judgment, 6 Apr 2000, par 23.

was one which no reasonable tribunal of fact could have reached,[17] or that it was invalidated by an error of law. Both in determining whether the Trial Chamber incorrectly exercised its discretion and (in the event that it becomes necessary to do so) in the exercise of its own discretion, the Appeals Chamber is in the same position as was the Trial Chamber to decide the correct principle to be applied or any other issue of law which is relevant to the exercise of the discretion. Even if the precise nature of the error made in the exercise of the discretion may not be apparent on the face of the impugned decision, the result may nevertheless be so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[18] Once the Appeals Chamber is satisfied that the error in the exercise of the Trial Chamber's discretion has prejudiced the party which complains of the exercise, it will review the order made and, if appropriate and without fetter, substitute its own exercise of discretion for that of the Trial Chamber.[19]

The basis of the Trial Chamber's decision

7. The prosecution's argument before the Trial Chamber was that, although it had presented three separate indictments against the accused, the crimes charged in all three indictments should nevertheless be tried together because:

(i) they could all have been pleaded in the one indictment, because the acts upon which they are based were committed by the same accused,[20] and they formed part of the same transaction;

(ii) one trial would be the most fair and expeditious way of dealing with all the crimes charged;

(iii) the public interest in the efficient administration of international justice would best be served in having one trial;

(iv) the victims and witnesses would best be protected if they were required to give evidence only once; and

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[17] *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999 ("*Tadić* Conviction Appeal"), par 64; *Aleksovski* Appeal, par 63; *Furundžija* Appeal, par 37; *Delalić* Appeal, pars 434-435, 459, 491, 595; *Kupreškić* Appeal, par 30.

[18] *Aleksovski* Appeal, par 186.

[19] *cf* Tribunal's Statute, Article 25.2.

[20] Although the accused is charged with four other persons in the Kosovo indictment, and alone in the other two indictments, his four co-accused in the Kosovo indictment have not yet been arrested.

(v) inconsistent verdicts and sentences and multiple appeals would be avoided.[21]

8. The principal issue in dispute before the Trial Chamber was whether the events to which all three indictments related formed part of the same transaction. The prosecution's argument that they did so required an acceptance that the allegations made in the three indictments were all part of a common scheme, strategy or plan on the part of the accused to create a "Greater Serbia", a centralised Serbian state encompassing the Serb-populated areas of Croatia and Bosnia and all of Kosovo, and that this plan was to be achieved by forcibly removing non-Serbs from large geographical areas through the commission of the crimes charged in the indictments. Although the events in Kosovo were separated from those in Croatia and Bosnia by more than three years, they were, the prosecution claimed, no more than a continuation of that plan,[22] and they could only be understood completely by reference to what had happened in Croatia and Bosnia.[23] The events in Kosovo, it was said, amounted to a crime waiting to happen but which had been delayed by pressure from the international community.[24] The prosecution also argued that, were the Kosovo indictment to be heard separately, evidence of the accused's role in the events of Croatia and Bosnia would be admissible in that trial.[25]

9. The Trial Chamber described the "essence of the test" to be applied for joinder to be permitted as being –

> [...] to determine whether there were a series of acts committed which together formed the same transaction, *ie* part of a common scheme, strategy or plan. However, the reference to a "series" and the use of the phrase "committed together" in Rule 49 indicates that the acts must be connected in the same way that common law and civil law jurisdictions require. There is no power to join unconnected acts on the ground that they form part of the same plan. As Judge Shahabuddeen explained, the plan must be such that the counts represent interrelated parts of a particular criminal episode.[26] If

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[21] Prosecutor's Motion for Joinder, 27 Nov 2001 ("Motion"), pars 7, 8.

[22] Oral hearing of the Motion, 11 Dec 2001 ("Trial Chamber Hearing"), IT-01-51 Transcript p 77. References throughout this Decision are to the transcript taken in the Bosnia trial.

[23] Trial Chamber Hearing, IT-01-51 Transcript p 77.

[24] *Ibid*, pp 77-78.

[25] This is described in the Motion as similar fact evidence (par 30), but during the Trial Chamber Hearing it was said, more relevantly (but still not very clearly), that the evidence of the actions and thoughts of the accused in relation to Kosovo would be incomplete without the evidence of what happened in Croatia and Bosnia (Transcript, pp 51-52).

[26] Reference is made to *Prosecutor v Kovačević*, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, Separate Opinion of Judge Mohamed Shahabuddeen, pp 2-3: "Joinder of offences is of course possible, within limits. Additional charges must bear a reasonable relationship to the matrix of facts involved in the original charge. [...] the question is whether all the counts, old and new, represent interrelated parts of a particular criminal episode. [...] It is not necessary for all the facts to be identical. It is enough if the new charges cannot be alleged but for the facts which give rise to the old." That was said by Judge Shahabuddeen in an appeal from the refusal of a Trial Chamber to permit the [footnote continued next page]

there was no such series of acts and no plan, any application for joinder must fail. Where there is no similarity in time and in place, the conclusion that the counts represent interrelated parts of a particular criminal episode will be more difficult, albeit not impossible, to draw.[27]

10. When the Trial Chamber came to apply that test, it drew attention to the gap of more than three years between the last events in Bosnia and the first events in Kosovo,[28] to the facts that the conflicts in Croatia and Bosnia took place in neighbouring States to the Federal Republic of Yugoslavia ("FRY"), whereas those in Kosovo took place in the FRY itself,[29] and that the accused is alleged to have acted indirectly in relation to Croatia and Bosnia but directly (as the Supreme Commander of the Armed Forces of the FRY) in relation to Kosovo,[30] and to the circumstances that there is no reference to a "Greater Serbia" plan in the Kosovo indictment and the only reference to it in the Croatia and Bosnia indictments is in relation to other individuals.[31] The Trial Chamber concluded that such a nexus was –

> [...] too nebulous to point to the existence of "a common scheme, strategy or plan" required for the "same transaction" under Rule 49. As noted *supra*, there is a distinction in time and place between the Kosovo and the other Indictments and also a distinction in the way in which the accused is alleged to have acted. Consequently, the Trial Chamber does not consider that the acts alleged in the three Indictments form the same transaction for the purposes of Rule 49.[32]

On the other hand, the Trial Chamber concluded, the Croatia and Bosnia indictments "exhibit a close proximity in time, type of conflict and responsibility of the accused", and contained:

> [...] allegations of a series of acts which together formed the same transaction, *fe,* a plan to take over the areas with a substantial Serbian population in two neighbouring States.[33]

The Trial Chamber also relied upon a number of other matters affecting its discretion, to which reference will be made later.

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prosecution to add 14 counts (alleging breaches of the crimes falling within Articles 2, 3 and 5 of the Tribunal's Statute) to the original, sole, count of complicity in genocide (which falls under Article 4). The factual allegations in the original indictment were expanded for this purpose, but it is unclear from either the Decision or the Separate Opinion to what extent they went beyond the specific incidents pleaded in the original indictment. No point had been taken before the Trial Chamber that Rule 49 did not permit the joinder of the additional counts. Nor was any argument addressed to the Appeals Chamber to that effect. The Joint Decision made no reference to Rule 49.

27 Decision, par 36.
28 *Ibid*, par 42.
29 *Ibid*, pars 43-44.
30 *Ibid*, pars 43-44.
31 *Ibid*, par 45.
32 *Ibid*, par 45.
33 *Ibid*, par 46.

11. It is clear from these statements that the Trial Chamber's finding of fact for the purposes of Rule 49 – that the events in Kosovo did not form part of the same transaction as the events in Croatia and Bosnia – depended upon its interpretation of Rule 49 as requiring the acts to be "committed together" [« *commis ensemble* »]. The proper interpretation of Rule 49 was a question of law. If the Trial Chamber erred in relation to that question of law, its finding of fact was necessarily invalidated, and its discretion was wrongly exercised.

12. The issue of law upon which the Trial Chamber's finding of fact depended, therefore, was whether the prosecution had to establish that the events in Kosovo were "committed together" with the events in Croatia and Bosnia. To that issue, the Appeals Chamber now turns.

The relevant Rules, and their proper interpretation

13. Rule 49 ("Joinder of Crimes") has necessarily to be considered in conjunction with Rule 48 ("Joinder of Accused"), as each is based upon events which must form "the same transaction". That phrase is defined in Rule 2. As reference will be made to what could be a discrepancy between the English and French versions of Rule 49, and for convenience, the text of all three rules (Rule 2 so far as here relevant) is set out below in both languages.

Rule 48 **Joinder of Accused**	**Article 48** **Jonction d'instances**
Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.	Des personnes accusées d'une même infraction ou d'infractions différentes commises à l'occasion de la même opération peuvent être mises en accusation et jugées ensemble.
Rule 49 **Joinder of Crimes**	**Article 49** **Jonction de chefs d'accusation**
Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.	Plusieurs infractions peuvent faire l'objet d'un seul et même acte d'accusation si les actes incriminés ont été commis à l'occasion de la même opération et par le même accusé.
Rule 2 **Definitions**	**Article 2** **Définitions**
(A) In the Rules, unless the context otherwise requires, the following terms shall mean: [...] Transaction: A number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan;	A) Sauf incompatibilité tenant au contexte, les expressions suivantes signifient : [...] Opération: un certain nombre d'actions ou d'omissions survenant à l'occasion d'un seul événement ou de plusieurs, en un seul endroit ou en plusieurs, et faisant partie d'un plan, d'une stratégie ou d'un dessein commun ;

14. The English version of Rule 49 does contain the words "committed together" in sequence and, if Rule 49 were to be read in isolation, it is a possible interpretation of that Rule that it requires the prosecution to establish that all of the offences sought to be joined were committed together.[34] Such an interpretation, however, creates an unnecessary dichotomy between the test for the joinder of offences (which would require the indictment to show that they were committed together for the purposes of Rule 49) and the test for the joinder of defendants (where Rule 48 has no such requirement). Such an interpretation may also produce a difficulty of consistency with the definition of "transaction" in Rule 2. That definition clearly contemplates a much less restrictive approach by permitting the common scheme, strategy or plan to include one or a number of events at the same or different locations. There is no logical explanation immediately apparent for a distinction to be drawn between allowing different events at different locations but not allowing different events at different times.

15. More importantly, an interpretation of Rule 49 requiring the offences to have been committed together is not available in relation to the French version of the Rule where – for the words "if the series of acts committed together form the same transaction" – the Rule reads « *si les actes incriminés ont été commis à l'occasion de la même opération* », which translates literally as "if the acts charged have been committed as part of the same transaction". Rule 7 ("Authentic Texts") provides that the English and French texts of the Rules are equally authentic. In the case of a discrepancy, the Rule requires the version which is "more consonant with the spirit of the Statute and the Rules" to prevail, but this provision would normally be applied only where the discrepancy between the two versions is intractable. The Appeals Chamber is satisfied that the apparent discrepancy in the present case is not intractable.

16. Although neither the Tribunal's Statute nor its Rules of Procedure and Evidence are, strictly speaking, treaties, the principles of treaty interpretation have been used by the Appeals Chamber as guidance in the interpretation of the Tribunal's Statute, as reflecting customary rules.[35] Such principles may also be used appropriately as guidance in the interpretation of the

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[34] It is important to emphasise (as did the Trial Chamber) that, in an application under Rule 49, the Tribunal is concerned only with what is alleged in the indictment (or proposed indictment), and not with what may be established by evidence at the trial.

[35] *Tadić* Conviction Appeal, par 282; *Delalić* Appeal, pars 67-70. *See* also *Aleksovski* Appeal, par 98; *Prosecutor v Bagosora*, ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal From the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others, 9 June 1998, par 28.

Tribunal's Rules of Procedure and Evidence. Article 33 of the 1969 Vienna Convention on the Law of Treaties ("Interpretation of treaties authenticated in two or more languages") provides that the terms of a treaty are presumed to have the same meaning in each authentic text and that (except where the treaty provides that, in the case of divergence, a particular text shall prevail), when a comparison of the authentic texts discloses a difference of meaning which the application of the provisions of the Convention does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[36] In its Commentary upon Article 75 of the Draft Convention, which did not relevantly differ in substance from Article 33 of the Convention, the International Law Commission commented that there are few plurilingual treaties containing more than one or two articles without some discrepancy between the texts, if only through "the different genius of the languages".[37] The ILC stressed that, "in law there is only one treaty – one set of terms [...] and one common intention with respect to those terms – even when two authentic texts appear to diverge",[38] and that, because of the presumption that each of the authentic texts are to have the same meaning, "every effort should be made to find a common meaning for the texts before preferring one to another".[39]

17. The words in the English version of Rule 49 already quoted may also reasonably be interpreted as "if the series of acts committed [by the accused] together [in the sense of 'considered together as a whole'] form the same transaction". Such an interpretation would be fully consistent with the French version, and there would be no discrepancy between the two versions, or inconsistency with the definition of "transaction" in Rule 2 or with Rule 48, such as is produced by the interpretation which the Trial Chamber adopted.

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[36] For examples of instances where this principle has been applied, *see*: *Mavrommatis Palestine Concessions* case, 1924, CPIJ, Series A, No 2, pp 9, 18-19; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Dantzig Territory*, 1932, CPIJ, Series A/B, No 44, p 6; *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, *Judgment*, *ICJ Reports* 1988, pp 69, 89, par 45; *Electronica Sicula SpA (ELSI)*, *ICJ Reports* 1989, pp 15, 79, par 132; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Jurisdiction and Admissibility, *Judgment*, *ICJ Reports* 1995, p 6, pars 34-40; *Germany v United States of America*, "LaGrand Case", Judgment, 27 June 2001, par 101. *See* also, *Young Loan* Arbitration (1980), 59 ILR 495, pars 548-550. In the most recent of these, the "LaGrand Case", the International Court of Justice said (at par 101): "In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law. This provision reads 'when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'."

[37] *Yearbook of the International Law Commission*, 1964, Vol II, A/CN.4/SER.A/1964/ADD.1, p 63.

[38] *Ibid*, p 63.

[39] *Ibid*, pp 63-64.

18. The Appeals Chamber is satisfied that, properly interpreted, Rule 49 does *not* require the events in Kosovo to have been "committed together" with the events in Croatia and Bosnia. It is unfortunate that the argument put to the Appeals Chamber and based upon the inconsistency between the English and French versions of the Rule if the former were interpreted in the way suggested by the Trial Chamber was not put to the Trial Chamber for its consideration. As the Trial Chamber has been shown to have erred in relation to the proper interpretation of Rule 49 (a question of law), its finding of fact that the events in Kosovo did not form part of the same transaction as the events in Croatia and Bosnia based upon that interpretation is invalidated, and its discretion must be found to have been wrongly exercised as a result of that error of law.

The same transaction?

19. It therefore becomes necessary now for the Appeals Chamber to determine for itself whether all these events formed part of the same transaction – as being part of a common scheme, strategy or plan. Although this Chamber is not for that purpose bound by the particular matters which led to the Trial Chamber's decision that the events in Kosovo did not form part of the same transaction as the events in Croatia and Bosnia, it is nevertheless appropriate to consider them – particularly in the present case where there is, effectively, no contradictor to the prosecution's appeal. As already indicated,[40] those matters were the gap of more than three years between the last events in Bosnia and the first events in Kosovo, the facts that the conflicts in Croatia and Bosnia took place in neighbouring States to the Federal Republic of Yugoslavia ("FRY"), whereas those in Kosovo took place in the FRY itself, and that the accused is alleged to have acted indirectly in relation to Croatia and Bosnia but directly (as the Supreme Commander of the Armed Forces of the FRY) in relation to Kosovo, and the circumstances that there is no reference to a "Greater Serbia" plan in the Kosovo indictment and the only reference to it in the Croatia and Bosnia indictments is in relation to other individuals.

20. Each of those matters is a relevant consideration, but none is decisive. Nor are they in combination an answer to the prosecution's application when, as the Appeals Chamber has now held, it is unnecessary for the prosecution to establish that the events in Kosovo were "committed

[40] Paragraph 10, *supra*.

together" with the events in Croatia and Bosnia. The wording of the indictments could certainly have been better expressed to bring out the overall nature of the prosecution case but, when taken as a whole, the three indictments make it sufficiently clear that the purpose behind the events in each of the three areas for which the accused is alleged to be criminally responsible was the forcible removal of the majority of the non-Serb civilian population from areas which the Serb authorities wished to establish or to maintain as Serbian-controlled areas by the commission of the crimes charged.[41] The fact that some events occurred within a province of Serbia and others within neighbouring states does not alter the fact that, in each case, the accused is alleged to have acted in order to establish or maintain Serbian control over areas which were or were once part of the former Yugoslavia. The fact that the accused is alleged to have acted directly in the province but indirectly in the neighbouring states merely reflects the available means by which the accused is alleged to have sought to achieve the same result.

21. On the other hand, the delay of three years between the last events in Bosnia and the first events in Kosovo is emphasised by the allegation in the Kosovo indictment that the joint criminal enterprise is pleaded as having come into existence "no later than October 1998",[42] rather than at a time when the joint criminal enterprise relating to the events in Croatia and Bosnia came into existence. Nevertheless, the Appeals Chamber does not interpret Rule 49 (together with the definition of "transaction" in Rule 2) as requiring the transaction in question to maintain exactly the same parameters at all times. A common scheme, strategy or plan may include the achievement of a long term aim. Here, that long term aim is alleged to have been to establish or to maintain control by the Serb authorities over particular areas which were or were once part of the former Yugoslavia. Each of the stages of the conflict in the Balkans has been marked by conflict breaking out in different places at different times, either as a result of or as requiring

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[41] In relation to the events in *Croatia*, Indictment IT-01-50 pleads (at par 6) that the purpose of the joint criminal enterprise of which the accused is alleged to have been a member was:

> [...] the forcible removal of the majority of the Croat and other non-Serb population from the approximately one-third of the territory of the Republic of Croatia that he planned to become part of a new Serb-dominated state through the commission of crimes in violation of Articles 2, 3, and 5 of the Statute of the Tribunal.

In relation to the events in *Bosnia*, Indictment IT-01-51 pleads (at par 6) that the purpose of the joint criminal enterprise of which the accused is alleged to have been a member was:

> [...] the forcible and permanent removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats, from large areas of the Republic of Bosnia and Herzegovina [...], through the commission of crimes which are in violation of Articles 2, 3, 4 and 5 of the Statute of the Tribunal.

In relation to the events in *Kosovo*, Indictment IT-99-37 pleads (at par 16) that the purpose of the joint criminal enterprise of which the accused is alleged to have been a member was:

> [...] *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province.

[42] Indictment IT-99-37, par 17. This allegation is repeated in the Pre-Trial Brief, par 113.

action by the Serb authorities (so the prosecution case would have it) to ensure their domination of those areas. A joint criminal enterprise to remove forcibly the majority of the non-Serb population from areas which the Serb authorities wished to establish or to maintain as Serbian controlled areas by the commission of the crimes charged remains the same transaction notwithstanding the fact that it is put into effect from time to time and over a long period of time as required. Despite the misleading allegation in the Kosovo indictment, therefore, the Appeals Chamber is satisfied that the events alleged in all three indictments do form part of the same transaction.

Discretionary considerations

22. Having determined that the requirements of Rule 49 have been satisfied by the prosecution, the Appeals Chamber must next determine whether it should nevertheless exercise the discretion given by that Rule to refuse the joinder sought notwithstanding that all the crimes charged in the indictments concern the same transaction. Again, although the Appeals Chamber is not bound by the particular matters which led the Trial Chamber to decide that it would in any event have refused the joinder in the exercise of its discretion,[43] it is nevertheless appropriate for the reason expressed earlier to consider them in the present case.[44] Those matters were (i) the prejudice seen to the accused's rights under Article 21 of the Tribunal's Statute to a fair and speedy trial which would be caused by the lack of readiness on the part of the prosecution to proceed with a trial which included the events in Croatia and Bosnia,[45] (ii) the interests of justice, in that the length of a single trial would make it less manageable than two separate trials,[46] (iii) the onerous nature of such a trial for the accused personally,[47] and (iv) the possible prejudice to him in relation to evidence relevant to Croatia and Bosnia but not relevant to Kosovo.[48]

23. The prosecution gave different estimates to the Appeals Chamber as to when it would be ready for a trial of the Croatia and Bosnia indictments to those which it gave to the Trial

[43] As the Trial Chamber had determined that the requirements of Rule 49 had not been satisfied by the prosecution, it was unnecessary for it to exercise its discretion under the Rule, but it was not inappropriate for the Trial Chamber to have done so as an alternative to its principal determination.
[44] Paragraph 18, *supra*.
[45] Decision, pars 38, 49, 52.
[46] *Ibid*, pars 39, 47.
[47] *Ibid*, par 50.
[48] *Ibid*, par 50.

Chamber. Even though those shorter estimates given to the Appeals Chamber may prove to be unduly optimistic, the Appeals Chamber nevertheless determined in its formal decision allowing the prosecution's appeal that, unless the Trial Chamber otherwise decided, the trial of the joined three indictments should commence on 12 February 2002, the date fixed by the Trial Chamber for the commencement of the trial of the Kosovo indictment. That order was made subject to the condition that evidence relevant only to the Kosovo events would be adduced until the material relating to the Croatia and Bosnia indictments (including that which must be disclosed pursuant to Rules 66 and 68) has been made available to the accused and until his rights pursuant to Article 21 of the Tribunal's Statute in relation to that material had been complied with.[49]

24. On appeal, the prosecution criticised the finding of the Trial Chamber that the length of a single trial in this case would make it less manageable than two separate trials, upon the basis that it had failed to elaborate in its Decision what those difficulties would be.[50] Such difficulties are obvious. The sheer number of different events which the prosecution has to establish to prove its case in relation to all three indictments, the usual (and understandable) inability of the parties to concentrate the production of their evidence in relation to each event, the time which necessarily elapses between hearing the evidence and the final submissions and writing the judgment, and the likelihood that counsel, too, will (understandably) for the same reasons be less able to assist the Trial Chamber because of the size of the trial are all so obvious that they did not need to be stated. It is important that the Trial Chamber described a single trial as being *less* manageable than two separate trials; it did not state that a single trial would be unmanageable. What the Trial Chamber said was no more than common sense.

25. That a single trial will indeed be long and complex is inevitable once the nature of the overall purpose which the prosecution seeks to establish in a trial of the joined charges is recognised. The prosecution will bear a heavy responsibility to ensure that the single trial which it wanted does not become unmanageable by overloading the Trial Chamber and the Defence with unnecessary material. The prosecution must ensure that only essential evidence to prove its case is presented, and that inessential evidence is discarded. If it sees that evidence which it leads in relation to a particular event is not relevantly and meaningfully challenged in cross-examination, it should not continue to call evidence in relation to that event. Subject to the

[49] Formal Decision of Appeals Chamber, p 3.
[50] Appellant's Written Submissions, par 70.

rulings of the Trial Chamber, substantial reliance should be placed upon the provisions of Rule 92*bis*, which permits evidence of a witness to be given in the form of a written statement in lieu of oral testimony of matters other than "the acts and conduct of the accused as charged" in the indictments, with the witnesses being called for cross-examination if the Trial Chamber so decides.

26. If the prosecution fails to discharge this responsibility, the Trial Chamber has sufficient powers under the Rules of Procedure and Evidence to order the prosecution to reduce its list of witnesses to ensure that the trial remains as manageable as possible. Finally, if with the benefit of hindsight it becomes apparent to the Trial Chamber that the trial has developed in such a way as to become unmanageable – especially if, for example, the prosecution is either incapable or unwilling to exercise the responsibility which it bears to exercise restraint in relation to the evidence it produces – it will still be open to the Trial Chamber at that stage to order a severance of the charges arising out of one or more of the three areas of the former Yugoslavia. Nothing in the present Decision or in these reasons will prevent it from doing so.

27. The third matter which the Trial Chamber took into account in the exercise of its discretion to refuse the application was the onerous nature of such a trial for the accused personally. That is a relevant matter, but there must be taken into account also the onerous nature of two successive trials which in total would inevitably take even longer than a single trial. As has been shown to be necessary in all long trials before this Tribunal, the Trial Chamber will from time to time have to take a break in the hearing of evidence to enable the parties to marshal their forces and, if need be, for the unrepresented accused to rest from the work involved. The responsibility for the accused's decision not to avail himself of defence counsel, however, cannot be shifted to the Tribunal. When asked his view by the Trial Chamber, the accused merely criticised the prosecution's reliance upon reasons of "judicial economy" by saying that the prosecution "certainly don't care whether I will be fatigued or not".[51] He was similarly asked by the Appeals Chamber to state whether he would prefer to defend himself in a single trial, and he replied:[52]

> [...] how you are going to conduct your proceedings, that's up to you. I will give you no suggestions regarding that.

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[51] Trial Chamber Hearing, IT-01-51 Transcript p 134.

[52] Oral Hearing of the Interlocutory Appeal, 30 Jan 2002 ("Appeals Chamber Hearing"), IT-01-51 Transcript p 352. References throughout this Decision are to the transcript taken in the Bosnia trial.

However, two of the *amici curiae* addressed the Trial Chamber to support the prosecution application for a joinder upon the basis that a single trial would be less burdensome for the accused than multiple trials,[53] a view which was reiterated before the Appeals Chamber.[54]

28. The last of the matters which the Trial Chamber is said to have taken into account in the exercise of its discretion to refuse the application was the possible prejudice to the accused in relation to evidence admissible in relation to Kosovo but not admissible in relation to Croatia and Bosnia. The Trial Chamber said this:[55]

> The Prosecution also argued that the accused would receive a fairer and more expeditious trial in the case of a single trial. However, in the Trial Chamber's view, the fact that the accused would have to defend himself on the contents of three Indictments together would be onerous and prejudicial, particularly in the case of the Kosovo Indictment and its different circumstances. The Trial Chamber, comprised as it is of professional judges, should not to [*sic*] be influenced by prejudicial evidence in one trial affecting another. However, if there is such a risk, the evidence must be excluded.

On appeal, the prosecution has argued that this statement has "raised the spectre of excluding evidence even in separate trials if the Trial Chamber would not be able to keep the matters separate", and that this would unnecessarily prejudice the prosecution.[56]

29. It must be said that the Trial Chamber perhaps did not make its meaning entirely clear in the passage quoted, but the interpretation placed upon it by the prosecution would necessarily create a contradiction between the last two sentences. A far more likely interpretation of the passage quoted – one which creates no such contradiction between the two sentences – is that, if evidence were to be admitted in the Kosovo trial which would be prejudicial to the accused in the Croatia and Bosnia trial, the members of the Trial Chamber as professional judges would be able to exclude that prejudicial evidence from their minds when they came to determine the issues in the Croatia and Bosnia trial. That is a task which is commonplace in domestic jurisdictions when, for example, a judge has to deal with two co-accused who have fought "cut throat" defences of blaming each other. It would be quite wrong to attribute an unreasonable interpretation to the Trial Chamber when such a reasonable one is the more likely. The Appeals Chamber does not accept that the Trial Chamber treated the issue as one which affected its discretion to refuse the joinder sought.

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[53] Mr Kay, purporting to express the views of all three *amici curiae*: Trial Chamber Hearing, IT-01-51 Transcript pp 118-119; Mr Wladimiroff: *Ibid*, p 111.
[54] Mr Tapušković: Appeals Chamber Hearing, IT-01-51 Transcript p 364; Mr Kay: *Ibid*, p 366.
[55] Decision, par 50.
[56] Appellant's Written Submissions, par 57.

30. The Appeals Chamber does not accept that any of these matters compels it to exercise its discretion to refuse the joinder sought. In the view of the Appeals Chamber, any possible prejudice to the accused in facing one trial (and it sees none of any significance) is completely outweighed by the fact that a substantial body of evidence relevant to the issue of the acts and conduct of the accused himself in the Croatia and Bosnia trial is also relevant to that issue in the Kosovo trial. If there were to be two separate trials, there would necessarily be a large amount of evidence which would have to be repeated in each.[57] In order to establish that the accused participated in a joint criminal enterprise (stated in general terms) to remove forcibly the majority of the non-Serb population from areas which the Serb authorities wished to establish or to maintain as Serbian controlled areas by the commission of the crimes charged, the prosecution must establish that he intended that those crimes be committed for that purpose.[58]

31. A person's state of mind is no different to any other fact concerning that person which is not usually visible or audible to others. It may be established by way of inference from other facts in evidence. Where, as here, the state of mind to be established is an essential ingredient of the basis of criminal responsibility charged, the inference must be established beyond reasonable doubt. If there is any other inference reasonably open from the evidence which is consistent with the innocence of the accused, the required inference will not have been established to the necessary standard of proof. Any words of or conduct by the accused which point to or identify a particular state of mind on his part is relevant to the existence of that state of mind. It does not matter whether such words or conduct precede the time of the crime charged, or succeed it. Provided that such evidence has some probative value, the remoteness of those words or conduct to the time of the crime charged goes to the weight to be afforded to the evidence, not its admissibility. The prosecution would therefore be entitled to prove in the Kosovo trial what is in effect its case in the Croatia and Bosnia trial. To have to do so twice would be a grave waste of the scarce resources available, for no discernible benefit.

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[57] This is not directed to the prosecution's complaint that many witnesses would have to give evidence twice (Appellant's Written Submissions, pars 54-55). It is directed to the evidence itself.

[58] *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999, par 196; *Prosecutor v Brđanin & Talić*, IT-99-36-PT, 26 June 2001, par 26.

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32. For all these reasons, the Appeals Chamber was satisfied that the joinder sought by the prosecution was justified and should, in the exercise of the Appeals Chamber's own discretion, be granted.

A technical submission

33. The prosecution's interlocutory appeal was heard expeditiously on the basis of the original record of the Trial Chamber, without requiring a formal record of proceedings, and without requiring the *detailed* Briefs from the parties which are otherwise required by Rules 111-113. This was done pursuant to Rule 116*bis*, which is directed to the hearing of interlocutory appeals and which permits such appeals (where appropriate) to be determined entirely on the basis of written briefs. In the present case, of course, there was an oral hearing.

34. It was submitted by Mr Tapušković (an *amicus curiae*) that, as the application for leave to appeal was filed by the prosecution pursuant to Rule 73(D) on 20 December 2001, no such procedure was then available for an expedited hearing.[59] His submission was that such a procedure only became available when Rule 116*bis* was amended to include applications for leave to appeal pursuant to Rule 73(D), the amendment becoming effective as from 28 December 2001.[60] This was, he submitted, untenable and contrary to legal principle.[61] Because of the importance of the issue raised and its delicate nature, he said, in fairness the expedited hearing procedure should not have been applied,[62] and its adoption had denied time for the *amici curiae* to file a Brief of thirty pages or so.[63]

35. These submissions are misconceived. Prior to the amendment of Rule 73 in April 2001, leave to appeal from decisions given on motions other than preliminary motions was sought and granted pursuant to Rule 73(B). At that time, Rule 116*bis* provided that an appeal under Rule 73(B) was to be heard expeditiously on the basis of the original record of the Trial Chamber and might be determined entirely on the basis of written briefs. This was the procedure adopted in most interlocutory appeals once leave had been granted.

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[59] Appeals Chamber Hearing, IT-01-51 Transcript, p 374.
[60] *Ibid*, p 354.
[61] *Ibid*, p 355.
[62] *Ibid*, p 358.
[63] *Ibid*, p 374.

36. In April 2001, Rule 73 was amended to insert new paragraphs (B) and (C), to deal with appeals from decisions rendered during the course of the trial on motions involving evidence and procedure. What had been Rule 73(B), dealing with the grant of leave for interlocutory appeals, became Rule 73(D). Rule 116*bis*, however, was not amended to conform with this change until 12 December 2001, by substituting "Rule 73" for "Rule 73(B)". This was the amendment which came into operation on 28 December 2001. It did no more than repeat the substance of the original rule, and to continue its application to interlocutory appeals from decisions given on motions other than preliminary motions. The submission that interlocutory appeals pursuant to Rule 73(D) could be heard expeditiously for the first time in December 2001, after the prosecution has sought leave to appeal, is therefore plainly wrong.

37. The complaint by Mr Tapušković concerning the denial of time to file a Brief is also misconceived. A party to the proceedings at first instance who wishes to oppose the grant of leave to appeal from an interlocutory decision of a Trial Chamber is permitted to file a response to the motion for leave within ten days of that motion.[64] Once leave has been granted, such a party may file a response to the interlocutory appeal itself within ten days.[65] Such a response may be thirty pages in length.[66] This remains the case whether the appeal is dealt with expeditiously or otherwise. The only difference between the ordinary appeal and an expeditious appeal in the present case is the absence of a formal record of the proceedings. The *amicus curiae* have therefore suffered no prejudice by the adoption of the expeditious appeal procedure.

38. The submission made by Mr Tapušković is unfounded.

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[64] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, 1 Oct 1999 (IT/155), par 5. The position is the same in par 5 of the Revised IT/155, 7 Mar 2002.

[65] *Ibid*, par 8. Again, the position is the same in par 8 of the Revised IT/155, 7 Mar 2002.

[66] Practice Direction on the length of Briefs and Motions, 19 Jan 2001 (IT/184), par 2(b)(2). The position is the same in par 2(b)(2) the Revised IT/185, 5 Mar 2002.

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Done in French and English, both texts being equally authoritative.

Dated this 18th day of April 2002,
At The Hague,
The Netherlands.

Judge Claude Jorda
Presiding

[Seal of the Tribunal]

AUTHORITIES

7. *Prosecutor v. Bizimungu, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment*, Case No. ICTR-99-50-AR50, Appeals Chamber, 12 February 2004.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding Judge
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 12 February 2004

THE PROSECUTOR

v.

CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JEROME BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-AR50

DECISION ON PROSECUTOR'S INTERLOCUTORY APPEAL AGAINST TRIAL CHAMBER II DECISION OF 6 OCTOBER 2003 DENYING LEAVE TO FILE AMENDED INDICTMENT

Counsel for the Prosecution Counsel for the Defence

Mr. Paul Ng'aruaMr. Ibukunolu BabajideMr. Elvis BazawuleMr. George Mugwanya Ms. Michelyne C. St. LaurentMr. Howard MorrisonMr. Ben GumpertMr. Pierre GaudreauMr. Tom Moran

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 ("Appeals Chamber" and "International Tribunal," respectively) is seised of the "Prosecutor's Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment," filed by the Prosecution on 3 November 2003 ("Appeal"). The Appeals Chamber hereby decides this interlocutory appeal on the basis of the written submissions of the parties.

Procedural History

2. On 26 August 2003, the Prosecution filed a request for leave to amend the indictment in the Trial Chamber ("Request"). Appended to the Request was an amended indictment dated 28 July 2003 ("Amended Indictment"), which the Prosecution sought to substitute for the operative indictment filed on 16 August 1999 ("Current Indictment"). Two of the Accused, Mugiraneza and Bicamumpaka, filed a joint response, arguing inter alia that the Prosecution's Request was untimely and would unduly postpone the commencement of trial. The Accused Bizimungu also filed a separate response, which argued inter alia that the Amended Indictment contained new allegations regarding which the Defence had not made any investigations, such that the Defence would be prejudiced if required to meet the case set forth in the Amended Indictment. The Accused Mugenzi did not file a response to the Prosecution's Request. The Prosecution submitted replies to both responses.

3. On 6 October 2003, the Trial Chamber issued its decision dismissing the Prosecution's Request ("Decision"). The Decision stated that the Request arose under Rule 50 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The Trial Chamber noted that, in exercising its discretion under Rule 50 of the Rules, it would consider "the particular circumstances of the case" and balance the rights of the Accused under Articles 19 and 20 of the Statute of the International Tribunal, including the "right to be informed promptly and in detail of the nature and cause of the charge against him or her, and the right to a fair and expeditious trial without undue delay," against "the complexity of the case."

4. The Trial Chamber held that some of the changes reflected in the Amended Indictment, namely removal of certain counts and deletion of the "Historical Context" section, did not necessarily require an amendment under Rule 50 of the Rules.

5. The Trial Chamber next held that the Prosecution's intention to replace two counts charging genocide and complicity in genocide with a single count charging genocide and, in the alternative, complicity in genocide, was "irregular and would render the count bad for duplicity and will pose problems particularly when [the Trial Chamber] has to pronounce judgment and sentence on one or the other of the charges." The Trial Chamber found that it was "not in the interests of judicial economy" to allow that amendment.

6. Finally, the Trial Chamber addressed the Prosecution's request to amend the Current Indictment following the discovery of new evidence that was not available at the time the Current Indictment was confirmed. The Trial Chamber concluded that "the expansions, clarifications and specificity made in support of the remaining counts do amount to substantial changes which would cause prejudice to the Accused." The Trial Chamber stated, as an example, the fact that although the Current Indictment "contains broad allegations in support of the Counts," the Amended Indictment contains "specific allegations detailing names, places, dates and times wherein the Accused are alleged to

have participated in the commission of specific crimes." The Trial Chamber found that "such substantial changes would necessitate that the Accused be given adequate time to prepare his defence."

7. The Trial Chamber also noted that trial was scheduled to begin on 3 November 2003. In the Trial Chamber's view, granting the Prosecution leave to amend the indictment would "not only cause prejudice to the Accused but would also result in a delay for the commencement of the trial for the reasons outlined above." In such circumstances, the Trial Chamber concluded that "it would not be in the interests of justice" to grant leave to amend the indictment. The Trial Chamber therefore denied the Prosecution's Request in its entirety.

8. The Trial Chamber subsequently certified the Decision for interlocutory appeal under Rule 73(B) of the Rules, and the Prosecution filed this Appeal. The Accused Mugiraneza filed a timely response, to which the Prosecution replied. The Accused Bizimungu moved for an extension of time in which to respond to the Appeal, which the Appeals Chamber granted; Bizimungu then filed a timely response to the Appeal on 25 November 2003, to which the Prosecution did not reply.

9. The Accused Bicamumpaka filed a response on 10 December 2003, 37 days after the filing of the Appeal and 14 days after the expiry of the extension granted to the Accused Bizimungu. The Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, dated 16 September 2002 ("Practice Direction"), provides that responses to interlocutory appeals governed by the Practice Direction are due ten days after the filing of the appeal. The Appeals Chamber notes, however, that the Practice Direction does not specifically provide a deadline for responses to appeals that follow certification of the Trial Chamber, although the Appeals Chamber has recently suggested that the response time of ten days should also apply to appeals following certification. The Appeals Chamber affirms this interpretation of the Practice Direction. However, since that interpretation may not have been apparent to the Accused Bicamumpaka, the Appeals Chamber has decided to consider his response.

Jurisdiction

10. The Accused Mugiraneza raises a threshold challenge to the Appeals Chamber's jurisdiction, claiming that the Amended Indictment is not a proper proposed indictment because it was signed by the Prosecutor on 28 July 2003 but subsequently altered before the Request was filed on 26 August 2003. This objection is not well-founded. A motion for leave to amend an indictment need only submit the proposed amendments to the indictment or the text of the proposed amended indictment. There is no requirement in Rule 50 that the proposed indictment be signed by the Prosecutor. Although the discrepancy between the date of signature and the date of finalization of the Amended Indictment might deserve an explanation (which the Prosecution has provided, namely that the results of further investigations warranted further changes between 28 July and 26 August 2003), the discrepancy does not deprive the Appeals Chamber of jurisdiction in this matter.

Discussion

11. The Appeals Chamber's recent decision in Prosecutor v. Karemera et al. ("Karemera") reaffirmed that Rule 50 of the Rules assigns the decision to allow an amendment to the indictment to the discretion of the Trial Chamber and that "appellate intervention is warranted only in limited circumstances." The party challenging the

exercise of discretion must show "that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion."

12. The Prosecution submits that the Trial Chamber balanced the right of the Accused to a trial without undue delay against the complexity of the case, but failed to take into account "a multiplicity of other material considerations or values against which the rights of the accused must be balanced to reach a correct decision." First, the Prosecution charges that the Trial Chamber did not consider "the obtaining of new and additional evidence since the confirmation of the old Indictment." The Appeals Chamber does not agree that the Trial Chamber ignored this factor. The Trial Chamber understood the Prosecution's position to be that "the Prosecution seeks leave to amend the current Indictment following the discovery of new evidence which was not available at the time of confirmation of the current Indictment." The Trial Chamber then stated, in the context of its discussion of the merits of the Prosecution's Request: "The Chamber considers the Prosecution's further request to amend the current Indictment following its discovery of new evidence which was not available at the time of confirmation of the current Indictment which thereby necessitates the expansion of the remaining Counts." In light of these statements, it is plain that the Trial Chamber considered the fact that the Prosecution's Request was based on newly obtained evidence.

13. The Prosecution also contends that the Trial Chamber failed to give due consideration to the fundamental purposes of the International Tribunal, including "the gravity or seriousness of the crimes with which the accused is/are indicted; the mandate or fundamental purpose of the [International] Tribunal to bring to justice all those responsible for the heinous crimes in Rwanda in 1994; the rights of victims; the obligation of the Prosecutor to prosecute the accused to the full extent of the law and to present before the [International] Tribunal all relevant evidence reflecting the totality of the accused's participation in the crimes; and establishing the totality of truth of what happened in Rwanda and those who are responsible in order to promote justice and reconciliation." Although the Trial Chamber did not mention these factors in the Decision, it does not follow that they were not considered at all. Furthermore, Karemera cautioned against placing significant weight on such factors when they are invoked "without further elaboration." The Prosecution's Appeal, like the appeal in Karemera, "has not shown that proceeding to trial on the Current Indictment will impair the rights of victims or undermine the mandate of the International Tribunal." The Appeals Chamber therefore cannot conclude that the Trial Chamber exceeded its discretion by failing to give weight to the factors advanced by the Prosecution.

14. The Prosecution also argues that, while the Trial Chamber did balance the right of the Accused to a trial without undue delay against the complexity of the case, it failed to give this latter factor "appropriate weight." Yet the Trial Chamber expressly noted in paragraph 27 of the Decision that the "complexity of the case" is a factor to be balanced against the rights of the Accused. The Trial Chamber was not required to itemize in the Decision the various obstacles that, according to the Prosecution, impeded a faster investigation of this case. In such circumstances, it suffices that the complexity of the case was taken into account as a factor weighing in the Prosecution's favour. The

Prosecution's objection that the complexity of the case should have tipped the balance is merely a claim that the Trial Chamber reached the wrong result, although it considered the right factor. Disagreement with the result of an exercise of discretion, without more, is not a basis for appellate interference.

15. The Prosecution's next argument challenges the Trial Chamber's reliance on the finding that amending the indictment would have delayed the start of trial past the scheduled start date of 3 November 2003. The Trial Chamber found that the amendments involved "substantial changes" which would cause prejudice and that "such substantial changes would necessitate that the Accused be given adequate time to prepare his defence." The Trial Chamber then concluded that the amendments would cause "a delay for the commencement of trial" and that it "would not be in the interests of justice to grant the Motion." The Prosecution contends that the Trial Chamber treated the start date of 3 November 2003 as absolutely inflexible and not subject to change under any circumstance. The Prosecution submits that the Trial Chamber should instead have considered the possibility of postponing the trial date if an amendment to the indictment is justifiable in light of the totality of the circumstances.

16. The Prosecution is certainly correct that the Trial Chamber must consider all of the circumstances bearing on a motion to amend the indictment. Interference with the orderly scheduling of trial, however, is one such circumstance. The Appeals Chamber stated in Karemera that "a postponement of the trial date and a prolongation of the pretrial detention of the Accused" are "some, but not all" of the considerations relevant to determining whether a proposed amendment would violate the right of the accused to a trial "without undue delay," which in turn bears on the broader question whether the amendment is justified under Rule 50 of the Rules. The Trial Chamber should also consider such factors as the nature and scope of the proposed amendments, whether the Prosecution was diligent in pursuing its investigations and in presenting the motion, whether the Accused and the Trial Chamber had prior notice of the Prosecution's intention to seek leave to amend the indictment, when and in what circumstances such notice was given, whether the Prosecution seeks an improper tactical advantage, and whether the addition of specific allegations will actually improve the ability of the Accused to respond to the case against them and thereby enhance the overall fairness of the trial. Likewise, the Trial Chamber must also consider the risk of prejudice to the Accused and the extent to which such prejudice may be cured by methods other than denying the amendment, such as granting adjournments or permitting the Accused to recall witnesses for cross-examination. The above list is not exhaustive; particular cases may present different circumstances that also bear on the proposed amendments.

17. In this case, it cannot be said that the Trial Chamber failed to consider the above-listed points. To begin with, they were specifically argued by the Prosecution in its Request and summarized in the Decision. Although the Decision does not mention them in its summary of its deliberations, that omission is not error of itself; the Trial Chamber is not required to enumerate and dispose of all of the arguments raised in support of a motion. Absent a showing that the Trial Chamber actually refused to consider any factors other than the determination that the amendment would delay the start of trial, or a showing that the Trial Chamber's conclusion was so unreasonable that it cannot have considered all pertinent factors, the Appeals Chamber must conclude that the Trial Chamber took account of all of the arguments put to it.

18. In this case, the Trial Chamber's Decision sufficiently shows that it considered factors other than delay in the commencement of trial. The Decision states that the factors of prejudice and delay are to some extent independent, i.e. the proposed amendments would "not only" prejudice the accused but "would also" cause a delay. This language suggests that the potential delay, which was required to give the Accused "adequate time to prepare" their defence, would not suffice to eliminate all of the prejudice to the Accused that would result from the Amended Indictment. In other words, the Trial Chamber concluded that the Accused would suffer prejudice in the conduct of their defence even if they were given more time to prepare, and that that prejudice was not sufficiently counterbalanced by any factors weighing in the Prosecution's favour.
19. The Trial Chamber's finding of incurable prejudice is supported by the submissions of the Accused that the Amended Indictment contains not only specific allegations that clarify the charges against the Accused – amendments that can actually enhance the overall fairness of the trial – but also an expansion of the charges beyond the scope of the Current Indictment. Although the Prosecution may seek leave to expand its theory of the Accused's liability after the confirmation of the original indictment, the risk of prejudice from such expansions is high and must be carefully weighed. On the other hand, amendments that narrow the indictment, and thereby increase the fairness and efficiency of proceedings, should be encouraged and usually accepted.
20. In this case, the Trial Chamber noted that the proposed changes in the Amended Indictment consist primarily of "expansions" as well as clarifications. Had the Prosecution solely attempted to add particulars to its general allegations, such amendments might well have been allowable because of their positive impact on the fairness of the trial. However, the Prosecution chose to combine changes that narrowed the indictment with changes that expanded its scope in a manner prejudicial to the Accused. Rather than distinguishing these categories of changes, which might have enabled the Trial Chamber to allow the former without allowing the latter, the Prosecution's Motion and Amended Indictment intertwined the two, such that they were not readily separable. In this context, the Trial Chamber was justified in dismissing the entire request. The Trial Chamber was not required to disaggregate the changes that would have caused prejudice from those that would not. However, this holding does not preclude the Prosecution from coming forward with a new proposed indictment that would provide greater notice of the particulars of the Prosecution's case without causing prejudice in the conduct of trial.
21. The Prosecution has not met its burden of showing that the Trial Chamber failed to consider any of the relevant factors placed before it, nor was its conclusion so unreasonable as to compel appellate intervention in this matter. On the contrary, the Trial Chamber's dismissal of the Motion was reasonable and lay within the Chamber's discretion.
22. The Prosecution also challenges the Trial Chamber's refusal of its request to charge genocide and complicity in genocide alternatively but in a single count. The Prosecution relies on the Trial Chamber judgement in Musema, which stated that an accused cannot be convicted of both genocide and complicity in genocide, since one cannot be both a principal perpetrator of an act and an accomplice thereto. While the Prosecution is correct that the Musema judgement would permit and indeed require that the crimes of genocide and complicity in genocide be charged in the alternative, it says nothing about charging

them in the same count.
23. The rule against duplicity generally forbids the charging of two separate offences in a single count, although a single count may charge different means of committing the same offence. The Appeals Chamber need not decide at this time whether genocide and complicity in genocide constitute separate offences or different means of committing the same offence. Regardless of which option is correct, the Trial Chamber was justified in concluding that there was no need to enter into this debate, which would have expended judicial time and resources in a manner that would have little effect on this case. This risk is evident from the suggestion of the Accused Mugiraneza that the amendment might have led him to file a motion under Rule 72 of the Rules challenging the form of the indictment. The Trial Chamber's conclusion that arguments about potential duplicity were "problems" that were "not in the interests of judicial economy" is reasonable, particularly given that the Prosecution does not allege that it has suffered any prejudice from the denial of this amendment. The Trial Chamber was therefore justified in avoiding the filing of further motions challenging the validity of the indictment. Accordingly, the Trial Chamber acted within its discretion in refusing this amendment. This aspect of the Appeal is therefore dismissed.
24. The Accused Bizimungu submits that the Prosecution should not be permitted to withdraw the section on "Historical Context" from the Current Indictment. The Trial Chamber stated that the Prosecution could drop material from the Current Indictment without seeking leave to amend it under Rule 50 of the Rules. The Accused Bizimungu did not seek certification to appeal this issue, so the Appeals Chamber is without jurisdiction to address it.
Disposition
25. The Appeals Chamber dismisses the Appeal.

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

Done this 12th day of February 2004,
At The Hague,
The Netherlands. _____
Theodor Meron
Presiding Judge

Judge Pocar appends an individual opinion to this decision.

[Seal of the International Tribunal]

INDIVIDUAL OPINION OF JUDGE POCAR

1. I concur with the decision of the Appeals Chamber to dismiss this appeal, and I also agree with its reasoning that the Trial Chamber correctly exercised its discretion under Rule 50 of the Rules. In my view, however, the decision should also state that an

amendment to an indictment should not be allowed if the conditions for confirming the indictment, set forth in Rule 47 of the Rules, are not satisfied. In failing to do so, both in this appeal and in the Karemera appeal decision rendered on 19 December 2003, the Appeals Chamber has neglected to provide necessary guidance to Trial Chambers on a crucial issue that may affect a number of cases in the future.

2. To me, therefore, this decision remains incomplete, and furthermore, it may be misleading. In paragraph 11 of the decision, it is stated that "...Rule 50 of the Rules assigns the decision to allow an amendment to the indictment to the discretion of the Trial Chamber...." This may give the impression that a decision to allow an amendment rests solely in the discretion of a Trial Chamber, without more. I do not believe, however, that such a decision is solely a matter of discretion, because the conditions set forth in Rule 47 of the Rules must be taken into account by the Trial Chamber when it carries out its assessment. To dispel confusion, the Appeals Chamber should have pronounced on the issue even if the parties did not raise it expressly.

3. Article 18(1) of the Statute of the International Tribunal provides that "[t]he judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed." The confirmation of an indictment can therefore only take place if a prima facie case exists. This statutory requirement is echoed in Rule 47(E) of the Rules, which states that "[t]he reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect."

4. Rule 50 of the Rules governs the amendment of indictments. This rule does not set forth conditions for allowing an amendment to an indictment. But it does preserve the rights of the accused in relation to new charges—for example, it provides for a further appearance to enable the accused to enter a plea on the new charges, and it also provides for a further period of thirty days to file preliminary motions pursuant to Rule 72 in relation to the new charges. Hence, after a request for an amendment is allowed, the new charges are subject to the same rules that would have applied if they had been presented in the original indictment.

5. In the same way, before an amendment is allowed, the inquiry must be governed by Rule 47, applicable to all indictments submitted, and a prima facie case must be presented. The illogic of any contrary view aside, the following may be noted. First, Rule 50 is placed in the same section in which the provisions for the confirmation of indictments are located, and no derogation from the general rule can be inferred from the text. Second, it cannot be that an amended indictment satisfies fewer requirements than those that were necessary for the original indictment's confirmation. Such an approach would allow the conditions set out in the Statute and Rule 47 to be circumvented in a given case on any number of additional amendments.

6. For these reasons, I believe that the Appeals Chamber should have stated, in this decision, that an amendment to an indictment should not be allowed if the conditions for confirming the indictment, articulated in Rule 47 of the Rules, are not satisfied.

Done this 12th day of February,

At The Hague,
The Netherlands. _____
Judge Fausto Pocar

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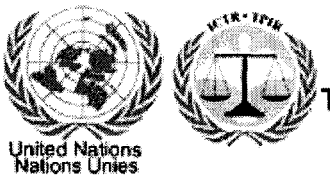

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

UNITED NATIONS
NATIONS UNIES

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 19 December 2003

THE PROSECUTOR
v.

ÉDOUARD KAREMERA
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA
ANDRÉ RWAMAKUBA

Case No. ICTR-98-44-AR73

DECISION ON PROSECUTOR'S INTERLOCUTORY APPEAL AGAINST TRIAL CHAMBER III DECISION OF 8 OCTOBER 2003 DENYING LEAVE TO FILE AN AMENDED INDICTMENT

Counsel for the Prosecution Counsel for the Defence

Mr. Don WebsterMs. Dior FallMs. Ifeoma OjemeniMs. Simone MonasebianMs. Holo MakwaiaMs. Tamara Cummings-John Mr. Didier SkornickiMr. John TraversiMr. Charles RoachMr. Frédéric WeylMr. Peter RobinsonMs. Dior DiagneMr. David HooperMr. Andreas O'Shea

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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 ("Appeals Chamber" and "International Tribunal," respectively) is seised of the "Prosecutor's Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment," filed by the Prosecution on 28 October 2003 ("Appeal"). The Appeals Chamber hereby decides this interlocutory appeal on the basis of the written submissions of the parties.

Procedural History

2. On 29 August 2003, the Prosecution filed a Consolidated Motion ("Motion") in the Trial Chamber. The Motion requested a separate trial for four of the accused in this case, the Accused Karemera, Ngirumpatse, Nzirorera, and Rwamakuba ("Accused"), on the ground that the other indictees remain at large and that postponing the trial until they are apprehended would be prejudicial to the four detained Accused. This request was unopposed and was granted by the Trial Chamber.

3. The Motion also requested leave to file a proposed amended indictment ("Amended Indictment"). The original indictment was filed on 28 August 1998 ("Original Indictment"); a first amended indictment, which is the operative indictment in this case, was filed on 21 November 2001 ("Current Indictment"). The Amended Indictment differs from the Current Indictment not only in that it omits allegations against accused other than the four Accused, but also in that it modifies the allegations against the Accused, most importantly by adding more detailed factual allegations to the general counts charged in the Current Indictment. The Amended Indictment also charges a new theory of commission of some of the alleged crimes, namely that the Accused were part of a joint criminal enterprise to destroy the Tutsi population throughout Rwanda, the natural and foreseeable consequence of which was the commission of numerous alleged crimes within the jurisdiction of the International Tribunal. The Prosecution claimed that the amendments relied on evidence that was not available at the time the Original Indictment was confirmed and that now made it possible to "expand the pleadings in the indictment with additional allegations and enhanced specificity." The Amended Indictment also sought to remove four of the eleven original counts, namely counts charging murder, persecution, inhumane acts as crimes against humanity, and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and Additional Protocol II.

4. The Accused opposed the Prosecution's request on various grounds, arguing inter alia that the Amended Indictment was an entirely new indictment and that the Motion, if granted, would result in delay that would violate right of the Accused to a fair trial within a reasonable time.

5. On 8 October 2003, Trial Chamber III issued its decision on the Motion ("Decision"). The Trial Chamber took notice of the argument of the Accused that, with trial scheduled to begin on 3 November 2003, an amendment to the indictment would leave them with insufficient time to prepare their defence. Any further postponement in the trial date would prolong the time the Accused spent in pretrial detention and, according to the Trial Chamber, would violate their right to be tried without undue delay.

6. In response to the Prosecution's argument that the Amended Indictment sought to charge participation in a joint criminal enterprise and relied on new evidence obtained in investigations subsequent to the confirmation of the Original Indictment, the Trial Chamber found that the Prosecution was submitting a totally new indictment. In the view of the Trial Chamber, a new indictment was unnecessary, since the defects in the Original Indictment had already been corrected by the Current Indictment. The Trial Chamber also found that amending the indictment would be contrary to judicial economy.

7. The Trial Chamber nonetheless approved one of the requested amendments, namely the removal of four of the eleven counts in the Current Indictment, and invited the Prosecution to file an amended indictment consistent with the Decision. The Prosecutor filed such an indictment on 13 October 2003.

8. The Trial Chamber subsequently certified the Decision for interlocutory appeal under Rule 73(B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), and the Prosecution filed this Appeal. The Appeal contends that the Trial Chamber erred in holding that allowing the amendment

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would cause undue delay to the prejudice of the Accused, in holding that the proposed Amended Indictment constituted a "new indictment," and in accepting the Prosecution's request to withdraw four counts from the Current Indictment while refusing the remainder of the amendment. Responses to the Appeal were filed by the Accused Karemera, Ngirumpatse, and Rwamakuba. No response was received from the Accused Nzirorera and no reply was filed by the Prosecution.

Discussion

9. Because the question whether to grant leave to amend the indictment is committed to the discretion of the Trial Chamber by Rule 50 of the Rules, appellate intervention is warranted only in limited circumstances. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") has explained, the party challenging the exercise of a discretion must show "that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion." If the Trial Chamber has properly exercised its discretion, the Appeals Chamber may not intervene solely because it may have exercised the discretion differently. However, if the Trial Chamber has committed an error that has prejudiced the party challenging the decision, the Appeals Chamber "will review the order made and, if appropriate and without fetter, substitute its own exercise of discretion for that of the Trial Chamber."

10. Although the exact grounds of the Decision are unclear, the Trial Chamber cited four considerations in its reasoning: first, that the indictment was effectively a new indictment; second, that errors in the Original Indictment had already been corrected by the filing of the Current Indictment in 2001; third, that an amendment at this stage would prolong the already lengthy pretrial detention of the Accused, thus violating their right to trial within a reasonable time; and fourth, that the amendment would violate judicial economy.

11. Regarding the first point, the difference between an "amended" indictment and a "new" indictment is not useful. It is true that if an amended indictment includes new charges, it will require a further appearance by the accused in order to plead to the new charges under Rule 50(B). (The Appeals Chamber takes no position on whether the Amended Indictment contains new charges requiring a further appearance under Rule 50(B), but observes that the Prosecution appears to assume that it does.) By contrast, it is not obvious what the Trial Chamber means by a "new indictment" or why its "newness" compels denial of the Motion. Nothing in Rule 50 prevents the prosecution, as a general matter, from offering amendments that are substantial.

12. Similarly, with regard to the second point, the fact that errors in the Original Indictment were corrected by the Current Indictment filed on 21 November 2001 is not a valid reason for denying a further motion to amend the indictment. The Prosecution did not submit the Amended Indictment in order to correct errors in the Current Indictment, but rather to streamline the pleadings and, in the Prosecution's words, to "allege the criminal conduct and responsibility of each accused with greater specificity and expand[] the factual allegations for those seven (7) counts pleaded in the [Current Indictment] that are retained in the [Amended Indictment]." The Prosecution is entitled to decide that its theory of the accused's criminal liability would be better expressed by an amended indictment. Even if the trial can proceed on the basis of the Current Indictment, the Prosecution is not thereby precluded from seeking to amend it.

13. The third point considered by the Trial Chamber was delay. This factor arises from Article 20(4)(c) of the Statute of the International Tribunal, which entitles all accused before the International Tribunal to be "tried without undue delay," and is unquestionably an appropriate factor to consider in determining whether to grant leave to amend an indictment. Guidance in interpreting Article 20(4)(c) can be found in the ICTY case of Prosecutor v. Kovacevic, in which the Trial Chamber refused amendment of an indictment on grounds that included undue delay. The ICTY Appeals Chamber framed the question as "whether the additional time which the granting of the motion for leave to amend would occasion is reasonable in light of the right of the accused to a fair and expeditious trial." The ICTY Appeals Chamber noted that the requirement of trial without undue delay, which the Statute of the ICTY

expresses in language identical to Article 20(4)(c) of the Statute of the International Tribunal, "must be interpreted according to the special features of each case." Additionally, the specific guarantee against undue delay is one of several guarantees that make up the general requirement of a fair hearing, which is expressed in Article 20(2) of the Statute of the International Tribunal and Article 21(2) of the ICTY Statute. "[T]he timeliness of the Prosecutor's request for leave to amend the Indictment must thus be measured within the framework of the overall requirement of the fairness of the proceedings."

14. Kovacevic stands for the principle that the right of an accused to an expeditious trial under Article 20(4)(c) turns on the circumstances of the particular case and is a facet of the right to a fair trial. This Appeals Chamber made a similar point recently when it stated, albeit in a different context, that "[s] peed, in the sense of expeditiousness, is an element of an equitable trial." Trial Chambers of the International Tribunal have also used a case-specific analysis similar to that of Kovacevic in determining whether proposed amendments to an indictment will cause "undue delay."

15. In assessing whether delay resulting from the Motion would be "undue," the Trial Chamber correctly considered the course of proceedings to date, including the diligence of the Prosecution in advancing the case and the timeliness of the Motion. As already explained, however, a Trial Chamber must also examine the effect that the Amended Indictment would have on the overall proceedings. Although amending an indictment frequently causes delay in the short term, the Appeals Chamber takes the view that this procedure can also have the overall effect of simplifying proceedings by narrowing the scope of allegations, by improving the Accused's and the Tribunal's understanding of the Prosecution's case, or by averting possible challenges to the indictment or the evidence presented at trial. The Appeals Chamber finds that a clearer and more specific indictment benefits the accused, not only because a streamlined indictment may result in shorter proceedings, but also because the accused can tailor their preparations to an indictment that more accurately reflects the case they will meet, thus resulting in a more effective defence.

16. The Prosecution also urges that the Trial Chamber erred by failing to consider the rights of victims, the mandate of the International Tribunal to adjudicate serious violations of international humanitarian law, and the Prosecutor's responsibility to prosecute suspected criminals and to present all relevant evidence before the International Tribunal. The Appeals Chamber is hesitant to ascribe too much weight to these factors, at least when they are presented at such a level of generality. The mandate of the International Tribunal, the rights of victims, and the obligations of its Prosecutor are present in every case, and mere reference to them without further elaboration does not advance the analysis.

17. Finally, the determination whether proceedings will be rendered unfair by the filing of an amended indictment must consider the risk of prejudice to the accused.

18. The fourth point considered by the Trial Chamber was "judicial economy." Although the Trial Chamber did not elaborate on this factor, the Appeals Chamber agrees that judicial economy may be a basis for rejecting a motion that is frivolous, wasteful, or that will cause duplication of proceedings.

19. In this case, it appears that the Trial Chamber confined its analysis of undue delay to the question whether the filing of the Amended Indictment would result in a postponement of the trial date and a prolongation of the pretrial detention of the Accused. This analysis addresses some, but not all, of the considerations discussed above that inform the question of undue delay. The Trial Chamber failed to assess the overall effect that the Amended Indictment could have on the proceedings by making allegations more specific and averting potential challenges to the indictment at trial and on appeal. In this respect, the Trial Chamber "failed to give weight or sufficient weight to relevant considerations." Likewise, the Trial Chamber "g[ave] weight to extraneous or irrelevant considerations" by considering the "newness" of the Amended Indictment and the fact that prior errors had been corrected by an earlier amendment. Finally, the Trial Chamber's invocation of "judicial economy" did not rest on a finding that the Motion was wasteful, frivolous, or duplicative, and therefore also failed to give weight or sufficient weight to relevant considerations. It is on these bases that the Appeals Chamber will proceed to consider the matter.

20. The Prosecution has provided very little information regarding its diligence in investigating the facts that underlie the Amended Indictment. Its brief on appeal makes repeated references to the acquisition of

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"new evidence" acquired "recently" but does not elaborate on the nature of that evidence or specify when it was acquired. This information is relevant, for although Rule 50 does not require the Prosecution to amend the indictment as soon as it discovers evidence supporting the amendment, neither may it delay giving notice of the changes to the Defence without any reason. The Prosecution cannot earn a strategic advantage by holding an amendment in abeyance while the defence spends time and resources investigating allegations that the Prosecution does not intend to present at trial. In this regard, it is worth recalling that a substantial delay will be considered undue "if it occur[s] because of any improper tactical advantage sought by the prosecution." Strategic efforts to undermine the conduct of proceedings cannot be tolerated, especially if designed to disadvantage the ability of the Defence to respond to the Prosecution's case.

21. However, the record on this interlocutory appeal does not disclose any basis for concluding that the Prosecution has sought leave to file the Amended Indictment in order to gain a strategic advantage over the Accused. The Trial Chamber did not base its Decision on any misconduct by the Prosecution, and the Accused do not allege bad faith in their responses to the Appeal. While there is an oblique suggestion that the Prosecution brought this Motion in order to delay the start of trial because it is not ready to proceed, this allegation is not developed.

22. The record is nonetheless silent as to whether the Prosecution acted with diligence in securing the new evidence and in bringing the Motion in the Trial Chamber, information that is solely within the control of the Prosecution. Thus, although the Appeals Chamber will not draw an inference of improper strategic conduct by the Prosecution, neither can it conclude that the Prosecution has shown that the factors of diligence or timeliness support granting its Motion in this case. The Prosecution's failure to show that the amendments were brought forward in a timely manner must be "measured within the framework of the overall requirement of the fairness of the proceedings."

23. Nor is the Appeals Chamber convinced that the rights of victims, the mandate of the International Tribunal to try serious violations of international humanitarian law, and the Prosecutor's obligation to present all relevant evidence are have any particular bearing on this matter. The Prosecutor has not shown that proceeding to trial on the Current Indictment will impair the rights of victims or undermine the mandate of the International Tribunal.

24. The Appeals Chamber next considers the likely effect that allowing the filing of the Amended Indictment will have on the overall proceedings. The Trial Chamber found that granting the Motion would result in a substantial delay in the trial. The Prosecution does not dispute this finding, and the Appeals Chamber sees no reason to depart from it. Neither the Trial Chamber nor the Accused offer an estimate of the delay that filing the Amended Indictment would cause. One may safely assume a delay on the order of months, due to motions challenging the Amended Indictment under Rules 50(C) and 72 and additional time to allow the Accused to prepare to respond to the new allegations in the Amended Indictment. The question is whether this delay may be outweighed by other benefits that might result from amending the indictment. Answering this question requires evaluating the scope of the amendments proposed in the Amended Indictment.

25. The major differences between the Amended Indictment and the Current Indictment fall into two categories. The first category consists of amendments that will not cause any significant delay at all. For instance, the Amended Indictment dispenses with several pages of background material in the Current Indictment, including pages regarding "Historical Context" and "The Power Structure" that do not specifically relate to any charge against the Accused. The Amended Indictment also drops four of the eleven counts in the Current Indictment and pleads one count (complicity in genocide) as an alternative to another count (genocide). This first category of amendments will not have any major impact on the overall fairness of proceedings.

26. The second and more important category of amendments comprises the several instances in which the Amended Indictment adds specific allegations of fact to the general allegations of the Current Indictment. For example, where the Current Indictment states that "numerous Cabinet meetings were held" to discuss massacres, the Amended Indictment alleges the dates of several of those meetings as well as the specific matters discussed and the consequences of those meetings. Similarly, where the

Current Indictment states that the Accused Nzirorera "gave orders to militiamen to kill members of the Tutsi population," the Amended Indictment lists specific instances where Nzirorera allegedly incited attacks on Tutsi civilians. Some of the expansions on general allegations are quite detailed, such as the new allegations in the Amended Indictment regarding activities in Ruhengeri prefecture and Gikomero commune. The Amended Indictment also expressly states the Prosecution's theory that the Accused participated in a joint criminal enterprise.

27. Compared to the more general allegations in the Current Indictment, the added particulars in the Amended Indictment better reflect the case that the Prosecution will seek to present at trial and provide further notice to the Accused of the nature of the charges against them. Likewise, the specific allegation of a joint criminal enterprise gives the Accused clear notice that the Prosecution intends to argue this theory of commission of crimes. Particularized notice in advance of trial of the Prosecution's theory of the case does not render proceedings unfair; on the contrary, it enhances the ability of the Accused to prepare to meet that case. Granting leave to file the Amended Indictment would therefore enhance the fairness of the actual trial by clarifying the Prosecution's case and eliminating general allegations that the Prosecution does not intend to prove at trial. These amendments will very likely streamline both trial and appeal by eliminating objections that particular events are beyond the scope of the indictment. Of course, the right of the Accused to have adequate time and facilities to prepare their defence against these newly-specified factual allegations will very likely require that the trial be adjourned to permit further investigations and preparation. Even taking this delay into account, it does not appear that the Motion will render the overall proceedings unfair.

28. The final consideration in determining the effect of the Amended Indictment on the fairness of the proceedings is the risk of prejudice to the Accused. The Trial Chamber concluded that proceeding to trial on the Amended Indictment without giving the Accused additional time to prepare their defence to the Amended Indictment would cause prejudice to the Accused. This problem, however, can be addressed by adjourning the trial to permit the Accused to investigate the additional allegations. The Trial Chamber also retains the option of proceeding with the presentation of the Prosecution case without delay; in such circumstances, however, there would be particular need to consider the exercise of the power to adjourn the proceedings in order to permit the Accused to carry out investigations and the power to recall witnesses for cross-examination after the Accused's investigations are complete.

29. It is unclear to what extent the Trial Chamber was influenced by the fact that the Accused are in pretrial detention. The Trial Chamber stated, without explanation, that the prolongation of pretrial detention would affect the right of the Accused to be tried within a reasonable time. As stated above, however, there is no reason to believe that the proposed amendments expanding upon general allegations in the Current Indictment will unduly lengthen the overall proceedings. The length of the pretrial detention of the Accused must be assessed in light of the complexity of the case. Further, this is not a situation in which the amendment is made so late as to prejudice the accused by depriving them of a fair opportunity to answer the amendment in their defence. The trial has now started (as of 27 November 2003) and eight prosecution witnesses have been heard, but the case was still in the pretrial stage when the amendment was sought. Although the failure of the Prosecution to show that its motion was brought in a timely manner might warrant a dismissal in other circumstances, this factor is counterbalanced by the likelihood that proceedings under the Amended Indictment might actually be shorter.

30. As for the factor of "judicial economy," the Appeals Chamber concludes that the Motion is not frivolous or wasteful and will not cause duplication of proceedings.

31. Considering all of the relevant factors together, the Appeals Chamber concludes that the circumstances of this case warrant allowing the Appeal. In light of this conclusion, there is no need to consider the Prosecution's added submission that the Trial Chamber erred in granting only the part of the Motion that dropped four counts of the Current Indictment. Nor will the Appeals Chamber address the challenges raised by the Accused Karemera against the legal sufficiency of the pleadings of the Amended Indictment, which the Trial Chamber did not certify for interlocutory appeal and which may in any event be raised in a motion under Rule 72 of the Rules.

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Disposition

32. For the foregoing reasons, the Appeals Chamber by majority, Judge Fausto Pocar dissenting, finds that the Trial Chamber erred in concluding that the Indictment could not be amended. The Appeals Chamber therefore vacates the Decision of the Trial Chamber. The matter is remitted to the Trial Chamber for consideration of whether, in light of the foregoing observations, the Amended Indictment is otherwise in compliance with Rule 50 and, if so, for entry of an order amending the Current Indictment.

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

_____

Theodor Meron
Presiding Judge of the Appeals Chamber
Done this 19th day of December 2003,
At The Hague,
The Netherlands.
[Seal of the International Tribunal]

AUTHORITIES

8. *Prosecutor v. Karemera, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File Amended Indictment*, Case No. ICTR-98-44-AR73, Appeals Chamber, 19 December 2003.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

UNITED NATIONS
NATIONS UNIES

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 19 December 2003

THE PROSECUTOR
v.

ÉDOUARD KAREMERA
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA
ANDRÉ RWAMAKUBA

Case No. ICTR-98-44-AR73

DECISION ON PROSECUTOR'S INTERLOCUTORY APPEAL AGAINST TRIAL CHAMBER III DECISION OF 8 OCTOBER 2003 DENYING LEAVE TO FILE AN AMENDED INDICTMENT

Counsel for the Prosecution Counsel for the Defence

Mr. Don WebsterMs. Dior FallMs. Ifeoma OjemeniMs. Simone MonasebianMs. Holo MakwaiaMs. Tamara Cummings-John Mr. Didier SkornickiMr. John TraversiMr. Charles RoachMr. Frédéric WeylMr. Peter RobinsonMs. Dior DiagneMr. David HooperMr. Andreas O'Shea

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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 ("Appeals Chamber" and "International Tribunal," respectively) is seised of the "Prosecutor's Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment," filed by the Prosecution on 28 October 2003 ("Appeal"). The Appeals Chamber hereby decides this interlocutory appeal on the basis of the written submissions of the parties.

Procedural History

2. On 29 August 2003, the Prosecution filed a Consolidated Motion ("Motion") in the Trial Chamber. The Motion requested a separate trial for four of the accused in this case, the Accused Karemera, Ngirumpatse, Nzirorera, and Rwamakuba ("Accused"), on the ground that the other indictees remain at large and that postponing the trial until they are apprehended would be prejudicial to the four detained Accused. This request was unopposed and was granted by the Trial Chamber.

3. The Motion also requested leave to file a proposed amended indictment ("Amended Indictment"). The original indictment was filed on 28 August 1998 ("Original Indictment"); a first amended indictment, which is the operative indictment in this case, was filed on 21 November 2001 ("Current Indictment"). The Amended Indictment differs from the Current Indictment not only in that it omits allegations against accused other than the four Accused, but also in that it modifies the allegations against the Accused, most importantly by adding more detailed factual allegations to the general counts charged in the Current Indictment. The Amended Indictment also charges a new theory of commission of some of the alleged crimes, namely that the Accused were part of a joint criminal enterprise to destroy the Tutsi population throughout Rwanda, the natural and foreseeable consequence of which was the commission of numerous alleged crimes within the jurisdiction of the International Tribunal. The Prosecution claimed that the amendments relied on evidence that was not available at the time the Original Indictment was confirmed and that now made it possible to "expand the pleadings in the indictment with additional allegations and enhanced specificity." The Amended Indictment also sought to remove four of the eleven original counts, namely counts charging murder, persecution, inhumane acts as crimes against humanity, and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and Additional Protocol II.

4. The Accused opposed the Prosecution's request on various grounds, arguing inter alia that the Amended Indictment was an entirely new indictment and that the Motion, if granted, would result in delay that would violate right of the Accused to a fair trial within a reasonable time.

5. On 8 October 2003, Trial Chamber III issued its decision on the Motion ("Decision"). The Trial Chamber took notice of the argument of the Accused that, with trial scheduled to begin on 3 November 2003, an amendment to the indictment would leave them with insufficient time to prepare their defence. Any further postponement in the trial date would prolong the time the Accused spent in pretrial detention and, according to the Trial Chamber, would violate their right to be tried without undue delay.

6. In response to the Prosecution's argument that the Amended Indictment sought to charge participation in a joint criminal enterprise and relied on new evidence obtained in investigations subsequent to the confirmation of the Original Indictment, the Trial Chamber found that the Prosecution was submitting a totally new indictment. In the view of the Trial Chamber, a new indictment was unnecessary, since the defects in the Original Indictment had already been corrected by the Current Indictment. The Trial Chamber also found that amending the indictment would be contrary to judicial economy.

7. The Trial Chamber nonetheless approved one of the requested amendments, namely the removal of four of the eleven counts in the Current Indictment, and invited the Prosecution to file an amended indictment consistent with the Decision. The Prosecutor filed such an indictment on 13 October 2003.

8. The Trial Chamber subsequently certified the Decision for interlocutory appeal under Rule 73(B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), and the Prosecution filed this Appeal. The Appeal contends that the Trial Chamber erred in holding that allowing the amendment

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would cause undue delay to the prejudice of the Accused, in holding that the proposed Amended Indictment constituted a "new indictment," and in accepting the Prosecution's request to withdraw four counts from the Current Indictment while refusing the remainder of the amendment. Responses to the Appeal were filed by the Accused Karemera, Ngirumpatse, and Rwamakuba. No response was received from the Accused Nzirorera and no reply was filed by the Prosecution.
Discussion
9. Because the question whether to grant leave to amend the indictment is committed to the discretion of the Trial Chamber by Rule 50 of the Rules, appellate intervention is warranted only in limited circumstances. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") has explained, the party challenging the exercise of a discretion must show "that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion." If the Trial Chamber has properly exercised its discretion, the Appeals Chamber may not intervene solely because it may have exercised the discretion differently. However, if the Trial Chamber has committed an error that has prejudiced the party challenging the decision, the Appeals Chamber "will review the order made and, if appropriate and without fetter, substitute its own exercise of discretion for that of the Trial Chamber."
10. Although the exact grounds of the Decision are unclear, the Trial Chamber cited four considerations in its reasoning: first, that the indictment was effectively a new indictment; second, that errors in the Original Indictment had already been corrected by the filing of the Current Indictment in 2001; third, that an amendment at this stage would prolong the already lengthy pretrial detention of the Accused, thus violating their right to trial within a reasonable time; and fourth, that the amendment would violate judicial economy.
11. Regarding the first point, the difference between an "amended" indictment and a "new" indictment is not useful. It is true that if an amended indictment includes new charges, it will require a further appearance by the accused in order to plead to the new charges under Rule 50(B). (The Appeals Chamber takes no position on whether the Amended Indictment contains new charges requiring a further appearance under Rule 50(B), but observes that the Prosecution appears to assume that it does.) By contrast, it is not obvious what the Trial Chamber means by a "new indictment" or why its "newness" compels denial of the Motion. Nothing in Rule 50 prevents the prosecution, as a general matter, from offering amendments that are substantial.
12. Similarly, with regard to the second point, the fact that errors in the Original Indictment were corrected by the Current Indictment filed on 21 November 2001 is not a valid reason for denying a further motion to amend the indictment. The Prosecution did not submit the Amended Indictment in order to correct errors in the Current Indictment, but rather to streamline the pleadings and, in the Prosecution's words, to "allege the criminal conduct and responsibility of each accused with greater specificity and expand[] the factual allegations for those seven (7) counts pleaded in the [Current Indictment] that are retained in the [Amended Indictment]." The Prosecution is entitled to decide that its theory of the accused's criminal liability would be better expressed by an amended indictment. Even if the trial can proceed on the basis of the Current Indictment, the Prosecution is not thereby precluded from seeking to amend it.
13. The third point considered by the Trial Chamber was delay. This factor arises from Article 20(4)(c) of the Statute of the International Tribunal, which entitles all accused before the International Tribunal to be "tried without undue delay," and is unquestionably an appropriate factor to consider in determining whether to grant leave to amend an indictment. Guidance in interpreting Article 20(4)(c) can be found in the ICTY case of Prosecutor v. Kovacevic, in which the Trial Chamber refused amendment of an indictment on grounds that included undue delay. The ICTY Appeals Chamber framed the question as "whether the additional time which the granting of the motion for leave to amend would occasion is reasonable in light of the right of the accused to a fair and expeditious trial." The ICTY Appeals Chamber noted that the requirement of trial without undue delay, which the Statute of the ICTY

expresses in language identical to Article 20(4)(c) of the Statute of the International Tribunal, "must be interpreted according to the special features of each case." Additionally, the specific guarantee against undue delay is one of several guarantees that make up the general requirement of a fair hearing, which is expressed in Article 20(2) of the Statute of the International Tribunal and Article 21(2) of the ICTY Statute. "[T]he timeliness of the Prosecutor's request for leave to amend the Indictment must thus be measured within the framework of the overall requirement of the fairness of the proceedings."
14. Kovacevic stands for the principle that the right of an accused to an expeditious trial under Article 20(4)(c) turns on the circumstances of the particular case and is a facet of the right to a fair trial. This Appeals Chamber made a similar point recently when it stated, albeit in a different context, that "[s]peed, in the sense of expeditiousness, is an element of an equitable trial." Trial Chambers of the International Tribunal have also used a case-specific analysis similar to that of Kovacevic in determining whether proposed amendments to an indictment will cause "undue delay."
15. In assessing whether delay resulting from the Motion would be "undue," the Trial Chamber correctly considered the course of proceedings to date, including the diligence of the Prosecution in advancing the case and the timeliness of the Motion. As already explained, however, a Trial Chamber must also examine the effect that the Amended Indictment would have on the overall proceedings. Although amending an indictment frequently causes delay in the short term, the Appeals Chamber takes the view that this procedure can also have the overall effect of simplifying proceedings by narrowing the scope of allegations, by improving the Accused's and the Tribunal's understanding of the Prosecution's case, or by averting possible challenges to the indictment or the evidence presented at trial. The Appeals Chamber finds that a clearer and more specific indictment benefits the accused, not only because a streamlined indictment may result in shorter proceedings, but also because the accused can tailor their preparations to an indictment that more accurately reflects the case they will meet, thus resulting in a more effective defence.
16. The Prosecution also urges that the Trial Chamber erred by failing to consider the rights of victims, the mandate of the International Tribunal to adjudicate serious violations of international humanitarian law, and the Prosecutor's responsibility to prosecute suspected criminals and to present all relevant evidence before the International Tribunal. The Appeals Chamber is hesitant to ascribe too much weight to these factors, at least when they are presented at such a level of generality. The mandate of the International Tribunal, the rights of victims, and the obligations of its Prosecutor are present in every case, and mere reference to them without further elaboration does not advance the analysis.
17. Finally, the determination whether proceedings will be rendered unfair by the filing of an amended indictment must consider the risk of prejudice to the accused.
18. The fourth point considered by the Trial Chamber was "judicial economy." Although the Trial Chamber did not elaborate on this factor, the Appeals Chamber agrees that judicial economy may be a basis for rejecting a motion that is frivolous, wasteful, or that will cause duplication of proceedings.
19. In this case, it appears that the Trial Chamber confined its analysis of undue delay to the question whether the filing of the Amended Indictment would result in a postponement of the trial date and a prolongation of the pretrial detention of the Accused. This analysis addresses some, but not all, of the considerations discussed above that inform the question of undue delay. The Trial Chamber failed to assess the overall effect that the Amended Indictment could have on the proceedings by making allegations more specific and averting potential challenges to the indictment at trial and on appeal. In this respect, the Trial Chamber "failed to give weight or sufficient weight to relevant considerations." Likewise, the Trial Chamber "g[ave] weight to extraneous or irrelevant considerations" by considering the "newness" of the Amended Indictment and the fact that prior errors had been corrected by an earlier amendment. Finally, the Trial Chamber's invocation of "judicial economy" did not rest on a finding that the Motion was wasteful, frivolous, or duplicative, and therefore also failed to give weight or sufficient weight to relevant considerations. It is on these bases that the Appeals Chamber will proceed to consider the matter.
20. The Prosecution has provided very little information regarding its diligence in investigating the facts that underlie the Amended Indictment. Its brief on appeal makes repeated references to the acquisition of

"new evidence" acquired "recently" but does not elaborate on the nature of that evidence or specify when it was acquired. This information is relevant, for although Rule 50 does not require the Prosecution to amend the indictment as soon as it discovers evidence supporting the amendment, neither may it delay giving notice of the changes to the Defence without any reason. The Prosecution cannot earn a strategic advantage by holding an amendment in abeyance while the defence spends time and resources investigating allegations that the Prosecution does not intend to present at trial. In this regard, it is worth recalling that a substantial delay will be considered undue "if it occur[s] because of any improper tactical advantage sought by the prosecution." Strategic efforts to undermine the conduct of proceedings cannot be tolerated, especially if designed to disadvantage the ability of the Defence to respond to the Prosecution's case.

21. However, the record on this interlocutory appeal does not disclose any basis for concluding that the Prosecution has sought leave to file the Amended Indictment in order to gain a strategic advantage over the Accused. The Trial Chamber did not base its Decision on any misconduct by the Prosecution, and the Accused do not allege bad faith in their responses to the Appeal. While there is an oblique suggestion that the Prosecution brought this Motion in order to delay the start of trial because it is not ready to proceed, this allegation is not developed.

22. The record is nonetheless silent as to whether the Prosecution acted with diligence in securing the new evidence and in bringing the Motion in the Trial Chamber, information that is solely within the control of the Prosecution. Thus, although the Appeals Chamber will not draw an inference of improper strategic conduct by the Prosecution, neither can it conclude that the Prosecution has shown that the factors of diligence or timeliness support granting its Motion in this case. The Prosecution's failure to show that the amendments were brought forward in a timely manner must be "measured within the framework of the overall requirement of the fairness of the proceedings."

23. Nor is the Appeals Chamber convinced that the rights of victims, the mandate of the International Tribunal to try serious violations of international humanitarian law, and the Prosecutor's obligation to present all relevant evidence are have any particular bearing on this matter. The Prosecutor has not shown that proceeding to trial on the Current Indictment will impair the rights of victims or undermine the mandate of the International Tribunal.

24. The Appeals Chamber next considers the likely effect that allowing the filing of the Amended Indictment will have on the overall proceedings. The Trial Chamber found that granting the Motion would result in a substantial delay in the trial. The Prosecution does not dispute this finding, and the Appeals Chamber sees no reason to depart from it. Neither the Trial Chamber nor the Accused offer an estimate of the delay that filing the Amended Indictment would cause. One may safely assume a delay on the order of months, due to motions challenging the Amended Indictment under Rules 50(C) and 72 and additional time to allow the Accused to prepare to respond to the new allegations in the Amended Indictment. The question is whether this delay may be outweighed by other benefits that might result from amending the indictment. Answering this question requires evaluating the scope of the amendments proposed in the Amended Indictment.

25. The major differences between the Amended Indictment and the Current Indictment fall into two categories. The first category consists of amendments that will not cause any significant delay at all. For instance, the Amended Indictment dispenses with several pages of background material in the Current Indictment, including pages regarding "Historical Context" and "The Power Structure" that do not specifically relate to any charge against the Accused. The Amended Indictment also drops four of the eleven counts in the Current Indictment and pleads one count (complicity in genocide) as an alternative to another count (genocide). This first category of amendments will not have any major impact on the overall fairness of proceedings.

26. The second and more important category of amendments comprises the several instances in which the Amended Indictment adds specific allegations of fact to the general allegations of the Current Indictment. For example, where the Current Indictment states that "numerous Cabinet meetings were held" to discuss massacres, the Amended Indictment alleges the dates of several of those meetings as well as the specific matters discussed and the consequences of those meetings. Similarly, where the

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Current Indictment states that the Accused Nzirorera "gave orders to militiamen to kill members of the Tutsi population," the Amended Indictment lists specific instances where Nzirorera allegedly incited attacks on Tutsi civilians. Some of the expansions on general allegations are quite detailed, such as the new allegations in the Amended Indictment regarding activities in Ruhengeri prefecture and Gikomero commune. The Amended Indictment also expressly states the Prosecution's theory that the Accused participated in a joint criminal enterprise.

27. Compared to the more general allegations in the Current Indictment, the added particulars in the Amended Indictment better reflect the case that the Prosecution will seek to present at trial and provide further notice to the Accused of the nature of the charges against them. Likewise, the specific allegation of a joint criminal enterprise gives the Accused clear notice that the Prosecution intends to argue this theory of commission of crimes. Particularized notice in advance of trial of the Prosecution's theory of the case does not render proceedings unfair; on the contrary, it enhances the ability of the Accused to prepare to meet that case. Granting leave to file the Amended Indictment would therefore enhance the fairness of the actual trial by clarifying the Prosecution's case and eliminating general allegations that the Prosecution does not intend to prove at trial. These amendments will very likely streamline both trial and appeal by eliminating objections that particular events are beyond the scope of the indictment. Of course, the right of the Accused to have adequate time and facilities to prepare their defence against these newly-specified factual allegations will very likely require that the trial be adjourned to permit further investigations and preparation. Even taking this delay into account, it does not appear that the Motion will render the overall proceedings unfair.

28. The final consideration in determining the effect of the Amended Indictment on the fairness of the proceedings is the risk of prejudice to the Accused. The Trial Chamber concluded that proceeding to trial on the Amended Indictment without giving the Accused additional time to prepare their defence to the Amended Indictment would cause prejudice to the Accused. This problem, however, can be addressed by adjourning the trial to permit the Accused to investigate the additional allegations. The Trial Chamber also retains the option of proceeding with the presentation of the Prosecution case without delay; in such circumstances, however, there would be particular need to consider the exercise of the power to adjourn the proceedings in order to permit the Accused to carry out investigations and the power to recall witnesses for cross-examination after the Accused's investigations are complete.

29. It is unclear to what extent the Trial Chamber was influenced by the fact that the Accused are in pretrial detention. The Trial Chamber stated, without explanation, that the prolongation of pretrial detention would affect the right of the Accused to be tried within a reasonable time. As stated above, however, there is no reason to believe that the proposed amendments expanding upon general allegations in the Current Indictment will unduly lengthen the overall proceedings. The length of the pretrial detention of the Accused must be assessed in light of the complexity of the case. Further, this is not a situation in which the amendment is made so late as to prejudice the accused by depriving them of a fair opportunity to answer the amendment in their defence. The trial has now started (as of 27 November 2003) and eight prosecution witnesses have been heard, but the case was still in the pretrial stage when the amendment was sought. Although the failure of the Prosecution to show that its motion was brought in a timely manner might warrant a dismissal in other circumstances, this factor is counterbalanced by the likelihood that proceedings under the Amended Indictment might actually be shorter.

30. As for the factor of "judicial economy," the Appeals Chamber concludes that the Motion is not frivolous or wasteful and will not cause duplication of proceedings.

31. Considering all of the relevant factors together, the Appeals Chamber concludes that the circumstances of this case warrant allowing the Appeal. In light of this conclusion, there is no need to consider the Prosecution's added submission that the Trial Chamber erred in granting only the part of the Motion that dropped four counts of the Current Indictment. Nor will the Appeals Chamber address the challenges raised by the Accused Karemera against the legal sufficiency of the pleadings of the Amended Indictment, which the Trial Chamber did not certify for interlocutory appeal and which may in any event be raised in a motion under Rule 72 of the Rules.

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Disposition

32. For the foregoing reasons, the Appeals Chamber by majority, Judge Fausto Pocar dissenting, finds that the Trial Chamber erred in concluding that the Indictment could not be amended. The Appeals Chamber therefore vacates the Decision of the Trial Chamber. The matter is remitted to the Trial Chamber for consideration of whether, in light of the foregoing observations, the Amended Indictment is otherwise in compliance with Rule 50 and, if so, for entry of an order amending the Current Indictment.

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

_____

Theodor Meron
Presiding Judge of the Appeals Chamber
Done this 19th day of December 2003,
At The Hague,
The Netherlands.
[Seal of the International Tribunal]

AUTHORITIES

9. *Prosecutor v. Tadic, Decision on Motion for Review*, Case No. IT-94-1-R, Appeals Chamber, 30 July 2002.

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Case No. IT-94-1-R

IN THE APPEALS CHAMBER

Before:
Judge Claude Jorda, President

Judge Mehmet Güney

Judge Asoka de Z. Gunawardana

Judge Fausto Pocar

Judge Liu Daqun

Registrar:
Mr. Hans Holthuis

Decision of:
30 July 2002

PROSECUTOR

v.

DUSKO TADIC

DECISION ON MOTION FOR REVIEW

Counsel for the Prosecutor:

Mr. Norman Farrell

Counsel for the Defence:

Mr. William Clegg
Mr. Anthony Abell

I. Background

1. The Appeals Chamber of the International Criminal 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 "Appeals Chamber " and the "International Tribunal" respectively) is seised of the "Request for Review of My Complete Case and Review of the Trial Chamber and Appeals Chamber Proceedings Conducted Before the Hague Tribunal" filed by Dusko Tadic ("Tadic" or

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the "Applicant ") on 18 June 2001[1] (the "Tadic Request for Review") and resubmitted, in a more detailed form, by counsel for Tadic (the "Defence") on 5 October 2001 (the "Motion for Review").[2]

2. On 7 May 1997, Tadic was convicted by Trial Chamber II of crimes against humanity and violations of the laws or customs of war on eleven counts of the Indictment, as set out in its "Opinion and Judgement" (the "Trial Chamber Judgement").[3] On 15 July 1999, Tadic was convicted by the Appeals Chamber of grave breaches of the Geneva Conventions of 1949 on nine further counts of the Indictment, as set out in its "Judgement" (the "Appeals Chamber Judgement" or the "Final Judgement").[4] On 26 January 2000, following the "Judgement in Sentencing Appeals", Tadic was sentenced to twenty years' imprisonment on Counts 1, 29, 30, and 31 of the Indictment, to be served concurrently with various lesser penalties. [5] At present, Tadic is serving sentence in Germany.

3. On 31 January 2000, the Appeals Chamber rendered its "Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin" (the "Contempt Judgement"). The Appeals Chamber found Vujin guilty of contempt in relation to a number of manipulations of witnesses and evidence.[6] The Appeals Chamber (in a different composition) upheld this finding in its Judgement of 27 February 2001.[7] As will be discussed in detail, it is in the light of the findings of the Contempt Judgement and the possibility that his counsel acted against his interests that Tadic is now seeking a review of his entire case.

4. On 18 June 2001, the Applicant filed the Tadic Request for Review with the Appeals Chamber. The Office of the Prosecutor ("Prosecution") responded on 29 June 2001[8] and the Defence replied on 3 July 2001.[9] In its reply, the Defence maintained that, in the interests of justice, a "properly argued application for Review, drafted by Counsel, should be filed," and requested the Appeals Chamber to take no action on the Tadic Request for Review until the filing of a motion for review drafted by counsel.[10]

5. On 5 October 2001, the Defence filed the Motion for Review before the President of the International Tribunal (the "President") pursuant to Article 26 of the Statute of the International Tribunal and Rule 119 of the Rules of Procedure and Evidence of the International Tribunal (the "Rules"). On 29 October 2001, the President assigned the case to a bench of five Judges of the Appeals Chamber and transferred the Motion for Review to that Bench. On 5 November 2001, the Appeals Chamber designated Judge Fausto Pocar as the Pre-Review Judge. In this capacity, Judge Pocar, on 6 November 2001, granted the requests by the Prosecution for extension of time[11] and page limit[12]. On the same day, the Prosecution filed its Response (the "Response").[13] On 14 December 2001, Judge Pocar recognised (in fairness to the Applicant) as validly done the filing of a reply by the Defence (the "Reply")[14] although it was in fact filed later than scheduled.

II. Submissions of the Parties

(a) The Applicant

6. In the Tadic Request for Review, Tadic seeks a review of his entire case. He claims that Milan Vujin ("Vujin"), one of the counsel of his defence team, acted against his interests while conducting investigations during the pre-trial and pre -appeal phases of his case. In particular, Tadic submits that in the Contempt Judgement , the Appeals Chamber found that Vujin wilfully gave to Simo Drljaca ("Drljaca"), chief of the Prijedor Police Station, a list of potential witnesses who could have testified in Tadic's favour, despite knowing that this was against Tadic's interests .[15] He further stresses that Vujin was "found guilty of various manipulations throughout ShisC appeal preparations and the investigation

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conducted at that time with the aim of concealing the real perpetrators...". [16] Lastly, Tadic remarks that the Appeals Chamber itself at paragraph 167 of the Contempt Judgement stated that: "The conduct of [Vujin]... strikes at the very heart of the criminal justice system. The Appeals Chamber has not considered the extent to which the interests of Tadic may in fact have been disadvantaged by the conduct in question. That is a matter which would require substantial investigation, and no such investigation was either suggested or undertaken in these proceedings."[17]

7. In the Motion for Review, the Defence submits that the new facts relied upon are "the findings set out in the Contempt Judgement."[18] In this regard, the Defence points to the following findings of the Contempt Judgement . First, Vujin put before the Appeals Chamber in support of his Rule 115 application ("Rule 115 Application") [19], a case that was known to him to be false in relation to the weight to be given to statements by Mlado Radic ("Radic"). Second, Vujin put before the Appeals Chamber in support of his Rule 115 Application a case that was known to him to be false in relation to the responsibility of Goran Borovnica for the killing of two Muslim policemen of which Tadic had been accused. Third, Vujin manipulated witnesses A and B by seeking to avoid any identification in their statements of persons who may have been responsible for the crimes for which Tadic had been convicted. Fourth, Vujin gave a list of defence witnesses list to Drljaca, who, as Michaïl Wladimiroff (one of the Tadic's counsel during the trial) testified in the contempt proceedings, obstructed the Defence in building its case because "armed with the list, Drljaca would act to make the witnesses impossible to find".[20] Fifth, Vujin "whilst preparing his own defence to the allegations of contempt, had deliberately contacted individuals whom he was forbidden to contact by the terms of a Scheduling Order dated 10th February 1999."[21] Sixth, Vujin's misconduct during both the preparation of the trial and of the appeal, was "not only intended to interfere with the interests of justice, but was also against [Tadic's] interests."[22]

8. Furthermore, the Defence submits that the findings reached in the Contempt Judgement amount to new facts not known to it at the relevant time. According to the Defence , until the Appeals Chamber had made its findings in the Contempt Judgement, Vujin's misconduct was not proven and not known to be true and, therefore, could not constitute a new fact, because it amounted to mere suspicion. [23] The Defence further claims that the new facts could not have been discovered through the exercise of due diligence, since the Contempt Judgement's findings were reached only after a lengthy hearing.[24]

9. The Defence maintains that the new facts could have been a decisive factor for both the Trial Chamber and the Appeals Chamber in reaching their original decisions . In particular, the Defence, with regard to the question whether Goran Borovnica and not Tadic was responsible for the killing of two policemen, submits that this issue goes to the very heart of his conviction for the killings on Count 1 of the Indictment, because the basis upon which the Applicant was convicted on Count 1 of the Indictment is limited to one witness and is thus very tenuous. Indeed, the decision by the Appeals Chamber to uphold Tadic's conviction was made in ignorance of the false case put forward by Vujin and his "witness persuasion".[25]

10. The Defence, with regard to Vujin's manipulation of Radic and Witnesses A and B, recalls that these witnesses all testified in relation to the alleged events in Omarska for which the Applicant was convicted. The Defence remarks that, although the full extent of Vujin's misconduct cannot be known, the nature of the proven misconduct was such as to render both the trial and the appeal of Tadic unfair.[26]

11. In its Reply, the Defence submits as a new fact a legal finding of the Appeals Chamber in its judgement of 23 October 2001 in the *Kupreskic* case (the " *Kupreskic* Judgement"). It recalls that, in that

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judgement, the Appeals Chamber noted that the Indictment did not include an allegation concerning an attack on a house of a Bosnian Muslim, which attack was a material fact of the Prosecution's case, and held that the "allegation pertaining to this event Sthe attack on a Muslim's houseC should not have been taken into account as a basis for finding Zoran and Mirjan Kupreskic criminally liable for the crime of persecution."[27] The Defence suggests that the same approach be adopted in the present case, as the killing of the two policemen by Tadic was not pleaded in the Indictment.

(b) The Prosecution

12. In response to the Tadic Request for Review, the Prosecution submits that the material contained therein does not constitute new facts within the meaning of Rule 119 of the Rules. It states that the disclosure of the witness list to Drljaca occurred prior to the start of trial but was not brought to the attention of the Trial Chamber, notwithstanding that Tadic and his lead defence counsel, Wladimiroff , were aware of it.[28] The Prosecution also claims that the issue of the "names of people who were directly involved in and responsible for the ... offences" is dealt with in the Contempt Judgement and does not constitute a new fact.[29]

13. The Prosecution contends that the only matters put forward by the Defence that may constitute "new facts" are the findings of the Appeals Chamber that Vujin committed specific acts of misconduct. It claims that the wider allegations in the Motion for Review as to Vujin's pre-trial and pre-appeal misconduct are matters of speculation and cannot be deemed to be new facts. In the Prosecution's view, the new facts introduced by the Appeals Chamber are therefore limited to the following findings in the Contempt Judgement. First, in support of his Rule 115 Application, Vujin put forward to the Appeals Chamber a case which was known to him to be false in relation to the weight to be given to statements made by Radic. Second, in support of his Rule 115 Application, Vujin put forward to the Appeals Chamber a case which was known to him to be false in relation to the responsibility of Goran Borovnica for the killing of two Muslim policemen. Third, Vujin manipulated Witnesses A and B by seeking to avoid any identification by them of persons who may have been responsible for the crimes for which Tadic had been convicted. Fourth, Vujin knowingly acted contrary to the interests of Tadic when he gave the list of defence witnesses to Drljaca, thereby obstructing Defence efforts to interview those witnesses.[30]

14. The Prosecution notes that another finding of the Appeals Chamber in the Contempt Judgement, namely that Vujin's conduct was "against the interests of his client", is limited to the specific acts of misconduct relating to the Contempt Judgement and, therefore, cannot be used to make a more generalised finding that Vujin acted against his client's interests.[31]

15. The Prosecution submits that none of the allegedly new facts could have amounted to a decisive factor in reaching the decision. As to the statements made by Radic , the Prosecution asserts that because Tadic was the person who obtained Radic's first statement, he was a co-perpetrator in this act of misconduct, and therefore cannot allege that this was a new fact not known to him. The Prosecution adds that the Appeals Chamber in its Decision on the Rule 115 Application of 15 October 1998 (the "Rule 115 Decision") rejected Radic's statements because the witness was found to have been available at trial. Thus, since these statements are not part of the trial or appeal records, neither the Appeals Chamber nor the Defence would be entitled to make reference to these statements for the purposes of review.[32] The Prosecution further states that, even if Radic's statement was falsified, this would have had no bearing on Tadic's ability to fulfil the test of unavailability under Rule 115 of the Rules. Lastly, it submits that this particular instance of misconduct cannot be said to have been directed against Tadic's interests, since the Appeals Chamber found that Vujin had tampered with the date of the first statement

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such that that statement could support Tadic's appeal as additional evidence.[33]

16. The Prosecution submits that the Defence has not shown how the mounting of a false case in the Rule 115 Application by Vujin establishing Goran Borovnica's responsibility for the killing of the two policemen, could have been a decisive factor for the Appeals Chamber in its decision to uphold the Trial Chamber's finding that Tadic had killed the two policemen. In particular, the Prosecution recalls, *inter alia*, that at trial Witness W testified that Borovnica and not Tadic had killed the two policemen. During the contempt proceedings, however, evidence was given that during the appeal preparations, Witness W told Vujin that his identification of Borovnica at trial had been false, as Momcilo ("Ciga") Radanovic had killed the two policemen.[34] In this regard, the Prosecution points out that the Appeals Chamber rejected a motion submitted by Clegg and Livingston, counsel for the Applicant, prior to the appeal seeking to admit evidence from Witness W that he had lied at trial.[35] According to the Prosecution, the rejection of this evidence forecloses any argument that this could have been a decisive factor for the Appeals Chamber in reaching its decision.[36]

17. With regard to the manipulation by Vujin of Witnesses A and B, the Prosecution denies that this could have been a decisive factor in the Appeals Chamber's decision to uphold the Trial Chamber's findings concerning the events at Omarska. The Prosecution recalls that, in the Contempt Judgement, it was proven that Vujin instructed Witnesses A and B not to name names. It stressed, however, that Vujin had also attempted to admit other statements offering similar evidence on the existence of a look-alike or *Doppelgänger* of Tadic, known as Danicic, and that these statements were all rejected by the Appeals Chamber. In light of this fact, the Prosecution claims that even if Witnesses A and B had mentioned the name Danicic in their statements as author of the crimes instead of Tadic, it is unlikely that this could have made a difference in the Appeals Chamber's decision to reject their statements.[37]

18. Lastly, the Prosecution, with regard to the fact that Vujin gave the list of defence witnesses to Drljaca, thereby obstructing Defence efforts to interview those witnesses, claims that the Defence has made no submissions on how this could have been a decisive factor. It argues that, even if the Appeals Chamber had been aware of this misconduct, the only remedy available to the Applicant at that stage would have been to "obtain the statements and seek to admit them under Rule 115 on the basis that they were unavailable *as a consequence of Vujin's misconduct*."[38] The Prosecution concludes by observing that this alleged "new fact", without more, is not capable of impacting upon the decision to uphold the conviction.[39]

III. Applicable Law

19. Article 26 of the Statute of the International Tribunal, concerning review proceedings , states that:

> [W]here 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 an application for review of the judgement.

Rule 119 governs requests for review and states:

> Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals 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 for review of the judgement. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place.

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Rule 120 further provides that:

[I]f a majority of Judges of the Chamber constituted pursuant to Rule 119 agree that the new fact, if proved, 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.

20. The combined effect of these provisions of the Statute and the Rules is, as stated by the ICTR Appeals Chamber in *Barayagwiza*[40] and by the ICTY Appeals Chamber in *Delic*[41] and *Jelisic*[42], that in order for the deciding body to proceed to the review of its decision, the moving party must satisfy four preliminary criteria:

1. there must be a new fact;
2. that new fact must not have been known by the moving party at the time of the original proceedings;
3. 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
4. the new fact could have been a decisive factor in reaching the original decision .

IV. Discussion

(i) Preliminary Considerations

21. The Defence seeks the review of the entire *Tadic* case, including the judgement of both the Trial Chamber and the Appeals Chamber. To this effect, it has filed the Motion for Review with the President so that, in the absence of the Chambers who originally heard the case, *ad hoc* Chambers may be constituted .[43] By contrast, the Prosecution submits that since Rule 119 of the Rules provides for a review of the final judgement, only the Appeals Chamber's Judgement would be subject to review.[44] These submissions call for clarification on the part of the Appeals Chamber.

22. As indicated by Rule 119 of the Rules and in *Barayagwiza*,[45] the proper forum for the filing of a request for review is the judicial body which rendered the final judgement. This body may be either the Trial Chamber (when the parties have not lodged an appeal) or the Appeals Chamber, when the judgement has been appealed. In the latter case, it will be then for the Appeals Chamber to determine , as it does pursuant to Rule 122 of the Rules when the judgement sought to be reviewed is under appeal, whether it can deal with the motion for review itself or whether it is necessary to refer the case to a reconstituted (to the extent possible) Trial Chamber, or, should this not be possible, to a new Trial Chamber.

23. The absence, in whole or in part, of the Judges composing the Chamber which rendered the final judgement does not eliminate the competence of that body to deal with a request for review. Thus, in the absence of the Judges who composed the Trial Chamber or the Appeals Chamber which originally rendered the final judgement, a request for review shall still be filed with either of these two bodies and not with the President. Once a request for review is filed with the competent body, it will be for the President to appoint Judges to deal with the request for review as he does in the case of interlocutory appeals and appeals on the merits. Due to the need to have Judges who are familiar with the facts of the case, the President will appoint the Judges who originally heard the case. As set out in Rule 119 of the Rules, should these Judges no longer be at the International Tribunal or be prevented from hearing the requests for review for other reasons, the President will assign new Judges to replace the original ones.

24. In his Order assigning a bench of five Judges of the Appeals Chamber to deal with the Motion for Review, the President indicated that only a final judgement is subject to review.[46] The finality of a

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decision is a pre-requisite to the exercise of review.[47] That is so because the review is an extraordinary way of appealing a decision, and its purpose is precisely that of permitting an accused or the Prosecution to have a case re-examined in the presence of exceptional circumstances, even after a number of years has elapsed. Indeed, no time limit is set in the Rules for the filing of a motion for review by an accused, and a time limit of one year is given to the Prosecution.

25. As indicated above, in order for a Chamber to conduct a review of a judgement , it must be satisfied that all four criteria set out in Rule 119 of the Rules have been met. The first criterion requires the moving party to show the existence of a new fact. As stated in *Jelisic*,[48] a new fact may be defined as "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings". The requirement that the new fact has not been in issue at trial means that it must not have been among the factors that the deciding body could have taken into account in reaching its verdict. To this effect, as noted in *Delic*,[49] it is irrelevant whether the new fact already existed before the original proceedings or during such proceedings. What is relevant is whether the deciding body and the moving party knew about the fact or not.

26. With regard to the second and third criteria of Rule 119 of the Rules, the Appeals Chamber notes that the ICTR Appeals Chamber in *Barayagwiza* conceded that there could be new facts, which, although not known to the Chamber at the time of the decision, may be known to the moving party or could be discovered through the use of ordinary diligence. Thus, it considered that the second and third parts of the four part test under Rule 119 were "[i]n the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice...directory in nature."[50] Hence, *Barayagwiza* established that a Chamber, in order to prevent a miscarriage of justice, may grant a motion for review based solely on the existence of a new fact which could have been a decisive factor in reaching the original decision. However, in the words of the ICTR Appeals Chamber, "wholly exceptional circumstances" must exist for these two criteria to be regarded as merely directory in nature. In *Delic* , the Appeals Chamber observed that: "It is only when the decision made was of such a nature in the circumstances of the case as to have led to a miscarriage of justice that this Chamber will not hold the accused accountable for his counsel's conduct".[51] Further, it noted that if "the accused suggests that the evidence was not put before the Tribunal through lack of due diligence, he must establish that its exclusion would lead to a miscarriage of justice".[52]

27. In light of this case law, the Appeals Chamber, whenever it is presented with a new fact that is of such strength that it would affect the verdict, may, in order to prevent a miscarriage of justice, step in and examine whether or not the new fact is a decisive factor, even though the second and third criteria under Rule 119 of the Rules may not be formally met.

28. With the above in mind, the Appeals Chamber shall now turn to the analysis of the parties' submissions.

(ii) Analysis

29. The Defence submits that certain conclusions reached by the Appeals Chamber in the Contempt Judgement constitute new facts within the meaning of Rule 119 of the Rules warranting a review of the Applicant's entire case. Thus, the first task of the Appeals Chamber is to establish whether the allegedly new facts satisfy the requirements of Rule 119 of the Rules. To this effect, each of these facts will be addressed in turn.

(a) Vujin put forward to the Appeals Chamber in support of the Rule 115 Application a case

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which was known to Vujin to be false in relation to the weight to be given to statements by Mladjo Radic.[53]

30. This finding was reached in the Contempt Judgement of 31 January 2000. By contrast , the Final Judgement in this case was rendered on 15 July 1999. Thus, even though four out of five of the Judges were common to both the Bench of the Appeals Chamber that rendered the Final Judgement and the Bench that rendered the Contempt Judgement , they could have not known the findings of the Contempt Judgement in 1999. Nor could the Judges who rendered the Final Judgement be expected without violation of the principles governing the judicial function, to rely upon the information they were gradually acquiring in the contempt proceedings to decide the merits of the *Tadic* appeal case.

31. For these reasons, the Appeals Chamber agrees with the Defence in holding that , as also conceded by the Prosecution, the above finding of the Contempt Judgement should be regarded as a new fact within the meaning of Rule 119 of the Rules. The question before the Appeals Chamber is therefore whether or not the new fact meets the remaining criteria of Rule 119 of the Rules.

32. At the outset, the Appeals Chamber notes that Radic did not testify at trial , but two statements by him were submitted by Vujin as part of the Rule 115 Application , in support of the Applicant's contention that he had never been to the Omarska camp and the possibility that there existed a Tadic look-alike. In the Contempt Judgement, the Appeals Chamber determined that Radic's first statement had not been made to Vujin in Prijedor on 10 March 1998 as indicated in the Rule 115 Application . In fact, it had been made at the United Nations Detention Centre following Radic's arrest, and to the Applicant himself as a fellow inmate. The Appeals Chamber further determined that the Applicant testified that Vujin had told him to date that statement 10 March 1998 and to indicate that it had been made to the Applicant personally at Prijedor.[54] These facts reveal, in the opinion of the Appeals Chamber, that the false aspect of Radic's first statement was well known to the Applicant at the time of the appellate proceedings, because , as emphasised by the Prosecution, the Applicant had a role in it. The same must be true with regard to the second of the statements given by Radic, in which Radic confirmed that the earlier statement he had given was true despite the fact that both Vujin and as said above, the Applicant knew it was not. On this basis, the Applicant could have deduced the falsity of the case put by Vujin in relation to both statements. For this reason, the Appeals Chamber concludes that this part of the finding of the Contempt Judgement cannot be deemed to be a "new fact not known to the moving party" or that could have not been discovered through the use of the ordinary diligence under Rule 119 of the Rules.

33. Nevertheless, the Appeals Chamber, applying the principles set out above, has inquired whether the new fact would have been a decisive factor in reaching the verdict. The Appeals Chamber observes that the finding that a false case was put forward in connection with Radic's statements (which were originally proffered to support the contention that Tadic was not in Omarska and the existence of a Tadic look-alike) does not assist the Applicant if his goal is to overturn the guilty findings concerning Omarska camp. First, the two statements did not form part of the evidence upon which the Appeals Chamber relied in convicting the Applicant. Secondly, it is unlikely that, had the Appeals Chamber known of the falsity of the case presented by Vujin at an earlier stage, it would have considered this circumstance in favour of the Applicant. In view of the foregoing, the Appeals Chamber finds that the new fact cannot be considered a decisive factor within the meaning of Rule 120 of the Rules.

(b) Vujin put to the Appeals Chamber in support of the Rule 115 Application a case which was known to him to be false in relation to the responsibility of Goran Borovnica for the killing of the two Muslim policemen of which Tadic had been accused.[55]

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34. The legal proof of Vujin's misconduct in relation to the responsibility of Goran Borovnica for the killing of two Muslims policemen came only as a result of the Contempt Judgement. Thus, in the light of the reasoning exposed in the previous section, the Appeals Chamber considers the above finding of the Contempt Judgement to be a new fact within the meaning of Rule 119 of the Rules.

35. With regard to the knowledge of this fact by the moving party, the Appeals Chamber notes that in the Contempt Judgement, the Appeals Chamber found, *inter alia* , that Vujin had known at that time that Witness W had asserted that his evidence at trial naming Borovnica as killer of the two policemen was false and that the same witness was then saying that it was Momcilo ("Ciga") Radanovic (allegedly a Tadic look-alike) who had killed the two policemen.[56] Although it may not be excluded that Vujin told the Applicant about the falsity of the evidence proffered by Witness W, there is no evidence supporting such a hypothesis and thus it remains unlikely that the Applicant knew about it. Similarly, it is unlikely that the Applicant could know about it using ordinary diligence while being in detention in The Hague, far from the place where the "investigations" conducted by Vujin were taking place.

36. With regard to Witness D, co-counsel for the Applicant in the appeal phase, the Appeals Chamber notes that in the Contempt Judgement, the Appeals Chamber found that: "The Respondent [Vujin] accepted that there has been conflict between Witness D and himself in relation to his decision to put forward this part of the case [Witness W's evidence]". On this basis, it appears that, although Witness D may have known about Vujin's misconduct, he did try to minimise its negative impact by questioning the inclusion of Witness W's statement in the Rule 115 Application. It should also be noted that it was Witness D who, by bringing to the attention of the Registry Vujin's misconduct, prompted the decision of the Registry of 19 November 1998 dismissing Vujin as counsel for the Applicant.[57] The Appeals Chamber therefore finds that Witness D did in this case what due diligence required. In view of the foregoing, the Appeals Chamber considers that, although the second criterion of Rule 119 of the Rules with regard to Witness D may not be formally met, it would be unfair to interpret it in a rigid manner. Therefore, given that Witness D displayed due diligence, the Appeals Chamber will discuss whether or not the fourth of the criteria under Rule 120 of the Rules has been met.

37. To determine whether or not the new fact could have been decisive, the Appeals Chamber shall first of all examine the analysis conducted by the Trial Chamber to arrive at the guilty finding concerning the killings of two policemen. As summarised at paragraph 33 of the Contempt Judgement, the Appeals Chamber found that:

> [T]he evidence of Tadic's participation relied upon a sole witness, one Nihad Seferovic , although there was substantial evidence that Tadic had been in the general area over this period. The case put forward by Tadic at the trial was that he was not in Kozarac from 24 to 27 May 1992, and evidence was led from a number of witnesses who were there during that period and who said that they had not seen him. There was also a challenge to the ability of Seferovic, to view these events in the churchyard clearly. The Trial Chamber found beyond reasonable doubt that Tadic killed the two policemen in front of the Serbian Orthodox Church.[58]

38. The Trial Chamber therefore relied upon the evidence of one witness, Seferovic , to find Tadic guilty of the killings of the two policemen. It also found him guilty of numerous other acts which, along with the finding regarding the two policemen , it used to support his conviction under count 1 (persecution as a crime against humanity).

39. Notably, the Trial Chamber did hear the testimony of Witness W, who stated that he was at Kozarac from 26 to 28 May and did not see Tadic there at any time. The Trial Chamber also noted that, during cross examination, Witness W added that he was stationed in the northern part of Kozarac.[59] In its Judgement, however, the Trial Chamber did not discuss Witness W's evidence concerning Borovnica. It was indeed persuaded by the evidence provided by Seferovic . Thus, it is extremely unlikely that, if the

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Trial Chamber had known that Witness W's assertion concerning Borovnica was false, this would have been a decisive factor in reaching its decision. Indeed, it is difficult to imagine that that factor could have played any role in the Trial Chamber's finding that Tadic killed the two policemen , and, more importantly, in its decision to convict Tadic under Count 1 (persecution as a crime against humanity). This view is supported by the finding of the Appeals Chamber that Tadic failed to show that Seferovic's reliability as a witness was suspect, or that his testimony was inherently implausible. The Appeals Chamber further stated:

Since the Appellant did not establish that the Trial Chamber erred in relying on the evidence of Mr. Seferovic for its factual finding that the Appellant killed the two men, the Appeals Chamber sees no reason to overturn the finding.[60]

On this basis, the Appeals Chamber concluded that the Trial Chamber did not err in relying on the uncorroborated evidence of Seferovic.

40. In light of these considerations, the Appeals Chamber finds that the finding in the Contempt Judgement relating to the false case put forward by Witness W, concerning Borovnica's responsibility, can have no role to play in relation to the decision to convict *Tadic* of the killings of the two policemen. This is all the more so since Witness W's credibility is questionable following his admission before the Appeals Chamber that he knowingly gave false testimony at trial.

41. In connection with this finding of the Contempt Judgement, the Defence in the Reply has claimed that, in the light of the *Kupreskic* Judgement, the Appeals Chamber was not entitled to convict Tadic for the killings of the two policemen due the lack of pleading in the Indictment of the facts underpinning the charges against the Applicant. The Appeals Chamber holds that, as held in *Jelisic*, legal developments in the case law cannot be deemed to constitute new facts within the meaning of Rule 119,[61] for the term "new fact" refers primarily to materials of an evidentiary nature rather than legal findings reached in another case. For these reasons, this argument is rejected .

(c) Vujin manipulated Witnesses A and B by seeking to avoid any identification by them in statements of their evidence of persons who may have been responsible for the crimes for which Tadic has been convicted.[62]

42. For the reasons given in previous sections, the Appeals Chamber considers the above finding of the Contempt Judgement to constitute a new fact.

43. In the Contempt Judgement, the Appeals Chamber found that Vujin gave both Witnesses A and B the instruction not to name names.[63] With regard to Witness A, however, the Appeals Chamber in the Contempt Judgement found that Witness D (Tadic's co-counsel) was informed as early as April 1998 by Witness A of Vujin's misconduct during the interviews for prospective witnesses held in March 1998. In view of this, it appears that the Defence already knew of the relevant misconduct as of April 1998. Thus, the second criterion of the criteria of Rule 119 of the Rules is not met.

44. Nonetheless, the Appeals Chamber remarks that it was Witness D who informed the Registry of Vujin's misconduct with regard to the events occurring at Prijedor Police Station in April 1998, thereby prompting the decision of the Registry to replace Vujin as counsel for Tadic. In the light of these peculiar circumstances the Appeals Chamber takes the view that, in this case, fairness requires the adoption of a flexible interpretation with regard to the second and third criteria under Rule 119 of the Rules. In view of the foregoing, the Appeals Chamber shall proceed to inquire as to whether or not the new fact with regard to Witness A is decisive . This will be done in conjunction with the question relating to Witness B.

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45. With regard to Witness B, the Appeals Chamber observes that there is no evidence before it suggesting that either the Applicant or Witness D knew or could have known with certainty that Witness B was being manipulated by Vujin. For this reason, the Appeals Chamber finds that, in this case, the second and third criteria of Rule 119 of the Rules have been met.

46. As to the impact of Vujin's misconduct in relation to both Witness A and B on the Final Judgement, the Defence seems to be contending that, without Vujin's manipulations , Witnesses A and B could have named other individuals such as Danicic as perpetrators of the crimes in Omarska, thus exculpating Tadic.

47. In this regard, the Appeals Chamber notes that, as pointed out by the Prosecution , Vujin's brief on the admission of additional evidence on appeal did list numerous witnesses who could have proffered evidence as to the existence of a Tadic look- alike, namely, Danicic.[64] However, the Appeals Chamber in its Rule 115 Decision (rendered almost a year prior to the final Appeal Judgement) did not admit any of these statements into evidence. Thus , the issue of the Tadic look-alike and therefore the possibility that Danicic could have committed some of the crimes of which Tadic was convicted, was squarely before the Appeals Chamber, which did not consider it a decisive factor warranting the admission of new evidence. Therefore, even if Witnesses A and B were to have mentioned the name of Danicic as perpetrator of the crimes, the Appeals Chamber, already rejecting in its Rule 115 Decision statements to this effect by other witnesses, would logically have also rejected the statements of Witnesses A and B. For these reasons, the Appeals Chamber finds that this fact cannot be regarded as a decisive factor within the meaning of Rule 120 of the Rules.

(d) Vujin had knowingly acted contrary to the interests of Tadic when he gave a list of defence witnesses to Drljaca, the Chief of Prijedor Police, thereby obstructing defence efforts to interview those witnesses. [65]

48. For the reasons given in previous section, the Appeals Chamber agrees with the Defence that this finding constitutes a new fact within the meaning of Rule 119 of the Rules.

49. In the Contempt Judgement, the Appeals Chamber found, on the basis of Wladimiroff's testimony, that in an interview at the Prijedor police station, Wladimiroff had been told by Drljaca that Vujin had provided him with a list of witnesses, and Drljaca's hostility was apparent (he made it clear to Michaïl Wladimiroff that he was meddling in matters of the past and had no right to do so[66]). In addition, entries made by Tadic in his diary in January and February 1996, which were admitted into evidence and corroborate Michaïl Wladimiroff's testimony, show that Tadic knew that Vujin had given the list to Drljaca. In view of this, it appears that the new fact was known to the moving party at the time of the original proceedings . However, it should be noted that, as indicated in his testimony in the contempt proceedings, upon learning of Vujin's misconduct, Michaïl Wladimiroff successfully acted in order to convince Tadic that he was better off without Vujin. For these reasons, the Appeals Chamber considers it fair to inquire whether or not the new fact would have been was decisive factor.

50. In this regard, the Appeals Chamber remarks that the Defence has not put forward any specific argument to show why this new fact would be of such strength as to impact on Tadic's conviction. Nor the Defence has demonstrated how this initial unfortunate circumstance could not be remedied during trial or in appeal. Thus, given the fact that the Defence did have the concrete opportunity to conduct new investigations and, as a result, sought the admission of additional evidence in appeal, the Appeals Chamber considers that the negative influence of the new fact on the fairness of the proceedings was adequately counterbalanced both during trial and in appeal. In view of the foregoing, the Appeals Chamber holds the view that there has been no showing that the new fact was a decisive factor within

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the meaning of Rule 120 of the Rules.

(e) That Vujin whilst preparing his own defence to the allegations of contempt , had deliberately contacted individuals whom he was forbidden to contact by the terms of a Scheduling Order dated 10th February 1999.[67]

51. On 10 February 1999, the Appeals Chamber issued a Scheduling Order by which it initiated the contempt proceedings against Vujin. The Scheduling Order prohibited , *inter alia*, Vujin from contacting certain witnesses. Vujin nevertheless did so, and the Appeals Chamber, in its Contempt Judgement, found that his conduct in contacting two witnesses (Simo Kevic and GY) "was an arrogant action done in deliberate disregard of the prohibition against doing so in the Scheduling Order ."[68] In accordance with the approach followed so far, the Appeals Chamber holds that this is a new fact within the meaning of Rule 119 of the Rules.

52. The Appeals Chamber notes that there is no evidence suggesting that either the Applicant or the Defence knew this fact or that they could have known it through the use of due diligence. Indeed, at the relevant time, the Registry had already withdrawn Vujin (19 November 1998) as counsel for the Applicant, and it is thus highly unlikely that he had any contact with the Applicant or his new counsel such that he could eventually, inform them of his activities.

53. As to whether or not the new fact is decisive, the Appeals Chamber observes that in the Contempt Judgement, the Appeals Chamber made no findings in relation to Simo Kevic[69] (whose evidence has already been proffered before the Appeals Chamber, but was rejected in the Rule 115 Decision). Further, the Appeals Chamber in the Contempt Judgement found that there was reasonable doubt as to whether Vujin had acted with the suggested motive of preventing Witness GY from making a statement.[70] In view of this, Vujin's conduct in relation to these two witnesses could not have played any role in the Appeals Chamber's reaching of the final decision in appeal .

(f) General finding that conduct of Vujin's was "not only intended to interfere with the interests of justice, but was also against [Tadic's] interests."[71]

54. The Appeals Chamber notes that, in the Contempt Judgement, the Appeals Chamber stated that: "in the present case, [Vujin's] conduct has been *against* the interests of his client."[72] In this regard, the Appeals Chamber stresses that this consideration relates only to the cases of misconduct discovered in the Contempt Judgement. It does not constitute a general finding that in the entire *Tadic* case, Vujin acted against Tadic's interests, as the Defence seems to be suggesting. Nonetheless, taken in this narrower form, the statement by the Appeals Chamber may be regarded as a new fact within the meaning of Rule 119 of the Rules, which was not before the Appeals Chamber that rendered the Final Judgement.

55. As to whether the moving party knew of the new fact or could have known of it through the use of ordinary due diligence, the Appeals Chamber recalls, that in his diary, Tadic himself noted that, formally, Vujin was taking part in his defence , but "only to the extent of ensuring that his case SdidC not cause broader consequences which would affect the true participants in the events which took place there in 1992...".[73] Furthermore, and more significantly , the Appeals Chamber observes that, in April 1996, Vujin was sidelined by Tadic .[74] Tadic did so, and during the trial , which started on 7 May 1997, Vujin did not assist Tadic.[75] In view of this, it may be reasonably inferred that the four lawyers (Wladimiroff , Orie, Kay, and De Bertodano) who assisted Tadic during trial could adequately protect his interests and conduct further investigations counter-balancing the initial conduct of Vujin.

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56. However, in April 1997, Tadic re-hired Vujin as Lead Counsel. By contrast, Michaïl Wladimiroff was dismissed, together with the other lawyers composing the Defence team at that time. The Appeals Chamber observes that, by dismissing those lawyers , Tadic *de facto* gave Vujin another chance to act contrary to his interests . Indeed, four of the five new facts discussed in the previous sections took place in 1998 (the fifth occurred in 1999), when Vujin was acting as Lead-Counsel for Tadic. Fortunately, the prompt intervention by Witness D, which led to the replacement of Vujin at the end of 1998, allowed the new counsel to prepare an adequate defence, thus counter-balancing the influence of Vujin. The Appeals Chamber concedes that in choosing to re-hire Vujin, Tadic may have been manipulated by Vujin himself and thus may have not been entirely negligent. Nonetheless, the Appeals Chamber considers that the worries expressed to Tadic by Michaïl Wladimiroff in 1996 were sufficient to put Tadic on notice of the risks involved in his decision of rehiring Vujin.[76]

57. In these circumstances, the Appeals Chamber finds that the second and third criteria of Rule 119 of the Rules have not been met.

V. Disposition

58. For the foregoing reasons, the Motion for Review is dismissed.

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

Judge Claude Jorda

President

Judge Mehmet Güney Judge Asoka de Zoysa Judge Fausto Pocar Judge Liu Daqun Gunawardana

Dated this 30th of July 2002
At The Hague,

The Netherlands.

[Seal of the Tribunal]

1 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-R, "Request for Review of My Complete Case and Review of the Trial Chamber and Appeals Chamber Proceedings Conducted Before the Hague Tribunal", 18 June 2001.
2 - Prosecutor v. Dusko Tadic, Case No.: IT-94-1-R "Motion for Review of the Convictions of *Dusko Tadic* set out in the Judgements of the Trial Chamber (IT-94-1-T) and of the Appeals Chamber (IT-94-1-A)", 5 October 2001.
3 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-T, "Opinion and Judgement", 7 May 1997.
4 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-A, "Judgement", 15 July 1999.
5 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-A and IT-94-1A*bis*, "Judgement in Sentencing Appeals", 26 January 2000.
6 - Prosecutor v. Dusko Tadic, Case No.: IT-94-1-A-R77, "Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin", 31 January 2000, p. 55.
7 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-A-R77, "Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin", 27 February 2001.
8 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-R, "Prosecution's Response to Request for Review filed by Dusko Tadic", 29 June 2001.
9 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-R , "Reply, on Behalf of Dusko Tadic, to Prosecution's Response to Request for Review", 3 July 2001.

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10 - Id. at p. 2.
11 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-R , "Prosecution's Request on Motion for Review", 15 October 2001.
12 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-R , "Motion to Exceed Page Limit of Prosecution's Response to 'Motion for Review of the Convictions of *Dusko Tadic* set out in the Judgements of the Trial Chamber (IT-94-1-T) and of the Appeals Chamber (IT-94-1-A)'", 1 November 2001.
13 - *Prosecutor v Tadic*, Case No.: IT-94-1-R, "Prosecution Response to 'Motion for Review of the Convictions of *Dusko Tadic* set out in the Judgements of the Trial Chamber (IT-94-1-T) and of the Appeals Chamber (IT-94-1-A)'", 6 November 2001.
14 - *Prosecutor v Tadic*, Case No.: IT-94-1-R, "Decision Authorizing Response by the Prosecution and Allowing Further time to File a Reply", 14 December 2001.
15 - *Tadic* Request for Review, p.1
16 - *Ibid.*
17 - *Ibid.* at p. 2.
18 - Motion for Review, para 6.
19 - *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-R, "Appellant Brief in Relation to Admission of Additional Evidence on Appeals Under Rule 115", Defense, 4 February 1998.
20 - Motion for Review, para 17 (citing Contempt Judgement I, para. 104).
21 - Motion for Review, para 18.
22 - Motion for Review, para 20 (emphasis omitted).
23 - Id. at para 27.
24 - Id. at para 38.
25 - Id. at para 45.
26 - Id. at paras 49-54.
27 - *Prosecutor v. Zoran Kupreskic* et al., Case No.: IT-95-16-A, "Judgement", para. 113.
28 - Response, para 11.
29 - Id., para 14.
30 - Id. at para 26.
31 - Id. at para 29.
32 - Id. at para 38.
33 - Id. at para 40.
34 - Id. at para 48.
35 - "Motion (3) to Admit Additional Evidence on Appeal Pursuant to Rule 115 of the rules of Procedure and Evidence ", 19 April 1999. The Appeals Chamber rejected this Motion by an oral decision on 19 April 1999 (T. 20)
36 - Response, para 55.
37 - Id. at paras 63-65.
38 - Id. at para 70.
39 - Id. at para 72.
40 - *Prosecutor v Barayagwiza*, "Decision on Prosecutor's Request for Review or Reconsideration", ICTR-97-19-AR72, 31 March 2000, para 41.
41 - *Prosecutor v Hazim Delic*, Case No.: IT-96-21-R-R119, "Decision on Motion for Review", 25 April 2002, p. 7.
42 - *Prosecutor v Goran Jelisic*, Case No.: IT-95-10-R, "Decision on Motion for Review", 2 May 2002, p. 3.
43 - Motion for Review, para 2.
44 - Response, para 14.
45 - *Supra* n. 40, para 49.
46 - *Prosecutor v Dusko Tadic*, Case No. IT-94-1-R, "Ordonnance du président portant affectation de juges à la chambre d'appel", 5 October 2001, p. 2.
47 - *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Arrêt (Requête en révision de la décision de la Chambre d'appel du 31 mai 2000), 4 May 2001, p. 2.
48 - *Supra* n.42, p. 3.
49 - *Supra* n.41, p. 7.
50 - *Supra* n.40, para 65.
51 - *Supra* n.42, para 15.
52 - Id., para 15.
53 - Contempt Judgement, paras 131-134.
54 - Contempt Judgement, para 44.
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57 - *Prosecutor v. Dusko Tadic*, Case No.: IT-94-1-A, "Decision of Deputy Registrar Regarding the Assignment of Counsel and the Withdrawal of Lead Counsel for the Accused", Registry, 19 November 1998.
58 - Contempt Judgement, para 33.
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60 - Appeal Chamber's Judgement, para 67.
61 - *Supra* n.42, p. 2.
62 - Contempt Judgement, para 160.
63 - Id. at para 160.
64 - *Prosecutor v Dusko Tadic*, "Appellant's Brief In Relation to Admission of Additional Evidence on Appeal Under Rule 115", 2 Feb. 1998.
65 - Contempt Judgement, paras 95-101.
66 - Id., para 96.
67 - Contempt Judgement, paras 125-128.
68 - Id. at para 128.
69 - Id. at para 149.
70 - Id. at para 147.
71 - Motion for Review, para 20.
72 - Id. at para 167.
73 - Id. at para 109.
74 - Contempt Judgement, para 103.
75 - Trial Chamber's Judgement, para 25.
76 - Contempt Judgement, para 108.

AUTHORITIES

10. *Kanyabashi v. Prosecutor, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I; Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia*, Case No. ICTR-96-15-A, Appeals Chamber, 3 June 1999.

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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

Case No: ICTR-96-15-A

Date: 3 June 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: **Mr. Agwu U. Okali**

Decision of: **3 June 1999**

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JOSEPH KANYABASHI

v.

THE PROSECUTOR

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON THE JURISDICTION OF TRIAL CHAMBER I

Counsel for the Appellant:

Mr. Michel Marchand
Mr. Michel Boyer

The Office of the Prosecutor:

Mr. David Spencer
Mr. Ibukunolu Babajide
Mr. Chile Eboe-Osuji
Mr. Robert Petit

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
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NAME / NOM: Mr. MINDUA Kw. M. Antoine
SIGNATURE: ... DATE: 03.06.1999

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 1994 and 31 December 1994 ("the International Tribunal") is seized of an appeal lodged by Joseph Kanyabashi ("the Appellant") against an oral decision rendered by Trial Chamber I composed of Judge Kama (Presiding), Judge Sekule and Judge Pillay on 24 September 1998 ("the Decision"). By the Decision, Trial Chamber I denied the Appellant's motion contesting the jurisdiction of that Trial Chamber to hear the Prosecutor's Request for Leave to File an Amended Indictment ("the Leave Request") in respect of the Appellant and the Prosecutor's Motion for Joinder, which proposed to join the Appellant with five other accused ("the Joinder Motion").

2. The Appellant was arrested in Belgium on 28 June 1995. Judge Ostrovsky confirmed the Indictment against him on 15 July 1996. The initial appearance of the Appellant took place before Trial Chamber II, composed of Judge Khan (Presiding), Judge Aspegren and Judge Pillay on 29 November 1996. The Appellant submits in this appeal that his initial appearance before Trial Chamber II marked the commencement of his trial, and consequently, Trial Chamber II has exclusive jurisdiction over his case. The President of the International Tribunal, acting pursuant to Article 13 of the Statute of the International Tribunal ("the Statute"), assigned Judge Kama (Presiding), Judge Pillay and Judge Sekule to Trial Chamber I, which became seized of the Leave Request and the Joinder Motion, both of which were filed on 18 August 1998. Both motions were set down to be heard on 24 September 1998 before Trial Chamber I. At this hearing, the Appellant contested the Trial Chamber's jurisdiction to preside over the hearing of the Leave Request and the Joinder Motion, on the grounds that his initial appearance had taken place before Trial Chamber II and that the re-composition of Trial Chamber I was unlawful.

3. Subsequent to the oral dismissal by Trial Chamber I of the Appellant's objection, the Appellant filed a Notice of Appeal on 30 September 1998, entitled "Appeal Relating to the

Lack of Jurisdiction, Rules 108(B) and 117 of the Rules of Procedure and Evidence". This Notice of Appeal was followed by the "Prosecutor's Response and Challenge to the Admissibility of the Defendant's Notice of Appeal" and the "Prosecutor's Motion for an Expedited Appeal Procedure Pursuant to Articles 14 and 24(2) of the Statute of the International Tribunal and Rules 117 and 108 of the Rules of Procedure and Evidence as Amended", filed on 15 October 1998.

4. Thereafter, the Appeals Chamber directed the Parties to submit written briefs within the time-limits indicated in the "Scheduling Order" of 18 December 1998 ("the Order"), filed on 21 December 1998. The "Prosecutor's Brief Pursuant to the Scheduling Order of the Appeals Chamber" was filed on 30 December 1998. The English translation of the Appellant's Brief was filed on 17 February 1999 and carries the same title as that of his Notice of Appeal ("Appeal Relating to the Lack of Jurisdiction, Rules 108(B) and 117 of the Rules of Procedure and Evidence").

II. The Appeal

A. The Appellant

5. The Appellant requests that the Appeals Chamber provide appropriate relief by: 1) ordering the re-composed Trial Chamber I to stay the hearing of the Leave Request and the Joinder Motion; 2) ruling that the re-composed Trial Chamber I has no jurisdiction to hear the Leave Request and the Joinder Motion; 3) quashing the Decision; 4) ordering the Leave Request to be referred to Trial Chamber II for disposition; and 5) ordering Trial Chamber II to convene a hearing, as soon as possible, in order to quash the Leave Request.

6. The grounds of appeal invoked by the Appellant in his brief can be summarised as follows. The Appellant argues that Trial Chamber I lacks jurisdiction over his case, and consequently the appeal is from an objection based on lack of jurisdiction within the meaning of Sub-rule 72(D). He contends that under Articles 10, 11 and 13 of the Statute, the

composition of a Trial Chamber cannot be altered once the Accused has made his initial appearance before that Trial Chamber, a stage marking the commencement of trial.[1]

7. As a second ground of appeal, the Appellant contends that even if Trial Chamber I had jurisdiction in its original composition, its re-composition breached Article 13 of the Statute, thereby rendering that Trial Chamber incompetent. According to the Appellant's interpretation of the Statute and the Rules, the re-composition of a Trial Chamber is prohibited except in exceptional cases, a situation not in issue in the present circumstances. The Appellant argues that the Trial Chamber was re-composed only for the purpose of hearing the Joinder Motion, a function not directly relevant to hearing the Leave Request, which was in issue. The re-composition of Trial Chamber I solely to serve that purpose indicates that this Trial Chamber, as re-composed, was not independent and impartial.[2]

8. As a third ground of appeal, the Appellant submits that even if the Prosecutor's contention that the trial commences at the time of hearing the first witness were found to be persuasive, the Appellant's right to be tried by independent and impartial judges was violated. According to the Appellant, the violation resulted from a decision by the President of the International Tribunal, Judge Kama, to re-compose Trial Chamber I, then composed of Judge Kama, Judge Pillay and Judge Aspegren. President Kama substituted Judge Sekule for Judge Aspegren, resulting in Trial Chamber I being composed of Judge Kama, Judge Pillay and Judge Sekule.[3]

9. Finally, the Appellant submits that the right to be heard by an independent and impartial Trial Chamber is fundamental. Therefore, in his view, the enjoyment of this right is directly related to the authority and ability to adjudicate, raising the issue of jurisdiction.[4] The Appellant additionally submits that the change in the composition of Trial Chamber I was not justified by exceptional circumstances, as provided for under Rules 15 and 27 of the

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[1] Prosecutor v. Kanyabashi, *Appeal Relating to the Lack of Jurisdiction, Rules 108(B) and 117 of the Rules of Procedure and Evidence*, Case No. ICTR 96-15-I, 14 October 1998, at paras. 27-29 ("*Appellant's 14 October 1998 Brief*"). In The Prosecutor v. Théoneste Bagosora and 28 Others, *Dismissal of Indictment*, Case No. ICTR-98-37-I, 31 March 1998, Judge Khan ruled that the initial appearance of the accused before a Trial Chamber marks the beginning of his trial (at p. 8).
[2] *Appellant's 14 October 1998 Brief*, at paras. 39-46.
[3] Ibid., at paras. 35-38.
[4] Ibid., at para. 58.

Rules, particularly since the Presiding Judge offered no compelling reason justifying that change. The Appellant argues that "the change in the composition of the Chamber was dictated by factors that prove that the re-composed Trial Chamber I was not independent and impartial"[5] and that such a situation gives rise to serious doubt as to the independence and impartiality of that Chamber.[6]

B. The Prosecutor

10. The Prosecutor contends that the lack of independence and impartiality of which the Appellant complains are not matters of jurisdiction and are, therefore, not the proper subject of an interlocutory appeal.[7] In this regard, the Prosecutor argues that neither the Statute nor the Rules make the assignment of a case to a Trial Chamber or the composition of a Trial Chamber a jurisdictional issue.[8] The Prosecutor submits that the assignment of Judges to the Chambers is an administrative matter falling within the authority of the President and is unrelated to the elements of the Tribunal's jurisdiction. Consistent with this line of argument, the Prosecutor also contends that jurisdiction is not affected by the particular Trial Chamber which happens to exercise the Tribunal's authority over a particular case.[9]

11. The Prosecutor is, further, of the view that even if the question submitted for review were one of jurisdiction, there is nevertheless no merit to the appeal, given that trials before the International Tribunal do not commence at the initial appearance of the accused. Moreover, even if trials were deemed to commence at the time of taking the plea, the rule against variation of the bench would not come into effect until the commencement of the presentation of evidence on the merits of the case.[10] Finally, Article 13(2) of the Statute, on which the Appellant relies in his appeal, contains the very provision, which authorises the President to assign and reassign Judges to the Trial Chambers as the administration of justice requires.

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[5] Ibid., at para. 46.
[6] Ibid., at paras. 104-106.
[7] Prosecutor v. Kanyabashi, *Prosecutor's Brief Pursuant to the Scheduling Order of the Appeals Chamber*, , Case No. ICTR 96-15-I, 30 December 1998, at p. 2.
[8] Prosecutor v. Kanyabashi, *Prosecutor's Motion for an Expedited Appeal Procedure Pursuant to Article 14 and 24(2) of the Statute of the ICTR and Rules 117 and 108 of the Rules of Procedure and Evidence as Amended*, Case No. ICTR 96-15-I, 15 October 1998, at p. 4.
[9] Ibid., at para. 32.

III. Applicable Provisions

12. The relevant parts of the applicable Articles of the Statute and Rules of the Rules are set out below.

A. The Statute

Article 10
Organisation of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

a) The Chambers, comprising three Trial Chambers and an Appeals Chamber;
b) The Prosecutor;
c) A Registry.

Article 11
Composition of the Chambers

Chambers shall be composed of fourteen independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

a) Three judges shall serve in each of the Trial Chambers;
b) Five judges shall serve in the Appeals Chamber.

Article 13
Officers and members of the Chambers

1. The Judges of the International Tribunal for Rwanda shall elect a President.

[10] Ibid., at paras. 52-53.

2. After consultation with the judges of the International Tribunal for Rwanda, the President shall assign the judges to the Trial Chambers. A judge shall serve only in the Chamber to which he or she was assigned.

3. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of that Trial Chamber as a whole.

Article 14
Rules of procedure and evidence

The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the 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 of the International Tribunal for Rwanda with such changes as they deem necessary.

Article 19
Commencement and Conduct of Trial Proceedings

1. [...]

2. [...]

3. The Trial Chamber shall read the Indictment, satisfy itself that the rights of the accsued are respected, confirm that the accused understands the Indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set a date for trial.

4. [...]

Article 24
Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

   a) An error on a question of law invalidating the decision, or
   b) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

B. The Rules

Rule 15
Disqualification of Judges

(A) A Judge may not sit at a trial or appeal in any case, in which he has a personal interest or concerning which he has or has had any association, which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place.

(B) Any party may apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber from a trial or appeal upon the above grounds. After the Presiding Judge has conferred with the Judge in question, the Bureau if necessary, shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

(C) The Judge of a Trial Chamber who reviews an indictment against an accused, pursuant to Article 18 of the Statute and Rules 47 and 61, shall not sit as a member of the Trial Chamber for the trial of that accused.

(D) [...]

(E) If a Judge is, for any reason, unable to continue sitting in a part-heard case, the Presiding Judge may, if that inability seems likely to be of short duration, adjourn the proceedings, otherwise he shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point.

However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused.

(F) In case of illness or an unfilled vacancy or in any other exceptional circumstances, the President may authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more members.

Rule 19
Functions of the President

The President shall preside at all plenary meetings of the Tribunal, co-ordinate the work of the Chambers and supervise the activities of the Registry as well as the exercise of all the other functions conferred on him by the Statute and the Rules.

Rule 27
Rotation of the Judges

(A) Judges shall rotate on a regular basis between the Trial Chambers. Rotation shall take into account the efficient disposal of cases.

(B) The Judges shall take their places in their assigned Chamber as soon as the President thinks it convenient, having regard to the disposal of pending cases.

(C) The President may at any time temporarily assign a member of one Trial Chamber to another Trial Chamber.

Rule 48
Joinder of Accused

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Rule 50
Amendment of Indictment

(A) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by that Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) [...]

(C) [...]

Rule 62
Initial Appearance of Accused

Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber without delay, and shall be formally charged. The Trial Chamber shall:

(i) [...]

(ii) [...]

(iii) [...]

(iv) in the case of a plea of not guilty, instruct the Registrar to set a date for trial;

(v) [...]

(vi) [...]

Rule 72
Preliminary Motions

(A) Preliminary motions by either party shall be brought within sixty days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(I), and in any case before the hearing on the merits.

(B) Preliminary motions by the accused are:

i) objections based on lack of jurisdiction
ii) objections based on defects in the form of the indictment;
iii) applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82(B)
iv) objections based on the denial of request for assignment of counsel.

The Trial Chamber shall dispose of preliminary motions *in limine litis*.

(C) Decisions on preliminary motions are without interlocutory appeal save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as a matter of right.

(D) Notice of appeal envisaged in Sub-rule (D) shall be filed within seven days from the impugned decision.

(E) Failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.

Rule 117
Expedited Appeals Procedure

(A) An appeal under Rule 108(B) shall be heard expeditiously on the basis of the original record of the Trial Chamber and without the necessity of any brief.

(B) All delays and other procedural requirements shall be fixed by an order of the President issued on an application by one of the parties, or *proprio motu* should no such application have been made within fifteen days after the filing of the notice of appeal.

(C) Rules 109 to 114 shall not apply to such appeals.

IV. DISCUSSION

13. In answering the main questions which have been raised by the present appeal, namely, whether a right of appeal lies from the Decision, and if so, whether Trial Chamber II was competent to hear the Leave Request and the Joinder Motion, the members of the Appeals Chamber differ on a number of issues both as to reasoning and as to result. Consequently, the views of each member of the Appeals Chamber on the particular issues are set out in detail in Opinions, which are appended to this decision.

14. The Appeals Chamber, for the reasons set out in the Joint and Separate Opinion of Judge McDonald and Judge Vohrah, and, in part, the Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia and, in part, the Dissenting Opinion of Judge Shahabuddeen, finds that the appeal is admissible since a right of appeal lies from the Decision pursuant to Sub-rule 72(D) of the Rules.

15. The Appeals Chamber, for the reasons set out in the Joint and Separate Opinion of Judge McDonald and Judge Vohrah and the Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia, finds that based on a textual interpretation of Sub-rule 50(A), Trial Chamber II is the only Trial Chamber competent to adjudicate the Leave Request. Judge Shahabuddeen reserves his views, considering that on this point the appeal is not admissible.

16. The Appeals Chamber, for the reasons set out in the Joint and Separate Opinion of Judge McDonald and Judge Vohrah, the Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia and the Dissenting Opinion of Judge Shahabuddeen finds that Trial Chamber I is competent to adjudicate the Joinder Motion.

17. Accordingly, the Appeals Chamber by majority finds that the appeal should be allowed in respect of the Leave Request, and, unanimously, finds that the appeal should be dismissed in respect of the Joinder Motion.

V. DISPOSITION

THE APPEALS CHAMBER, by a majority of four to one, with Judge Shahabuddeen dissenting, **ALLOWS** the Appeal relating to the Leave Request and **REMITS** it to Trial Chamber II. **THE APPEALS CHAMBER UNANIMOUSLY DISMISSES** the appeal relating to the Joinder Motion.

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

Gabrielle Kirk McDonald
Presiding Judge

Judge McDonald and Judge Vohrah append a Joint Separate Opinion.

Judge Wang and Judge Nieto-Navia append a Joint Separate Opinion.

Judge Shahabuddeen appends a Dissenting Opinion.

Dated this third day of June 1999
At Arusha,
Tanzania.

[Seal of the Tribunal]

AUTHORITIES

11. *Prosecutor v. Barayagwiza, Decision*, Case No. ICTR-97-19-A, Appeals Chamber, 3 November 1999.

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IN THE APPEALS CHAMBER

Before:
Judge Gabrielle Kirk McDonald, Presiding
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: Mr. Agwu U. Okali

Decision of: 3 November 1999

JEAN-BOSCO BARAYAGWIZA
v.
THE PROSECUTOR

DECISION

Counsel for the Appellant:
Mr. Justry P. L. Nyaberi

The Office of the Prosecutor:
Mr. Mohamed C. Othman
Mr. N. Sankara Menon
Mr. Mathias Marcussen

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2. Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction

3. The reason for any delay between the request for transfer and the actual transfer

4. The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.

5. The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion

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1. 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 seized of an appeal lodged by Jean-Bosco Barayagwiza ("the Appellant") against the "Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect" of Trial Chamber II of 17 November 1998 ("the Decision"). By Order dated 5 February 1999, the appeal was held admissible. On 19 October 1999, the Appellant filed a Notice of Appeal seeking to disqualify certain Judges of the Trial Chamber from sitting on his case ("19 October 1999 Notice of Appeal"). On 26 October 1999, the Appellant filed an additional Notice of Appeal concerning a request of the Prosecutor to amend the indictment against the Appellant ("26 October 1999 Notice of Appeal").

2. There are several areas of contention between the parties. The primary dispute concerns the arrest and detention of the Appellant during a nineteen-month period between 15 April 1996, when he was initially detained, and 19 November 1997, when he was transferred to the Tribunal's detention unit pursuant to Rule 40*bis* of the Tribunal's Rules of Procedure and Evidence ("the Rules"). The secondary areas of dispute concern: 1) the Appellant's right to be informed promptly of the charges against him; 2) the Appellant's right to challenge the legality of his arrest and detention; 3) the delay between the Tribunal's request for the transfer of the Appellant from Cameroon and his actual transfer; 4) the length of the Appellant's provisional detention; and 5) the delay between the Appellant's arrival at the Tribunal's detention unit and his initial appearance.

3. The accused made his initial appearance before Trial Chamber II on 23 February 1998. On 24 February 1998, the Appellant filed a motion seeking to nullify his arrest and detention. Trial Chamber II heard the oral arguments of the parties on 11 September 1998 and rendered its Decision on 17 November 1998.

4. The dispute between the parties initially concerns the issue of under what authority the accused was detained. Therefore, the sequence of events since the arrest of the accused on 15 April 1996, including the lengthy procedural history of the case, merits detailed recitation. Consequently, we begin with the following chronology.

5. On 15 April 1996, the authorities of Cameroon arrested and detained the Appellant and several other suspects on suspicion of having committed genocide and crimes against humanity in Rwanda in 1994. On 17 April 1996, the Prosecutor requested that provisional measures pursuant to Rule 40 be taken in

relation to the Appellant. On 6 May 1996, the Prosecutor asked Cameroon for a three-week extension of the detention of all the suspects, including the Appellant. However, on 16 May 1996, the Prosecutor informed Cameroon that she only intended to pursue prosecutions against four of the detainees, *excluding* the Appellant.

6. The Appellant asserts that on 31 May 1996, the Court of Appeal of Cameroon adjourned *sine die* consideration of Rwanda's extradition request, pursuant to a request to adjourn by the Deputy Director of Public Prosecution of the Court of Appeal of the Centre Province, Cameroon. The Appellant claims that in making this request, the Deputy Director of Public Prosecution relied on Article 8(2) of the Statute.

7. 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. Shortly thereafter, the Court of Appeal of Cameroon re-commenced the hearing on Rwanda's extradition request for the remaining suspects, including the Appellant. On 21 February 1997, the Court of Appeal of Cameroon rejected the Rwandan extradition request and ordered the release of the suspects, including the Appellant. The same day, the Prosecutor made a request pursuant to Rule 40 for the provisional detention of the Appellant and the Appellant was immediately re-arrested pursuant to this Order. The Prosecutor then requested an Order for arrest and transfer pursuant to Rule 40*bis* on 24 February 1997 and on 3 March 1997, Judge Aspegren signed an Order to that effect. The Appellant was not transferred pursuant to this Order, however, until 19 November 1997.

8. While awaiting transfer, the Appellant filed a *writ of habeas corpus* on 29 September 1997. The Trial Chamber never considered this application.

9. The President of Cameroon issued a Presidential Decree on 21 October 1997, authorising the transfer of the Appellant to the Tribunal's detention unit. On 22 October 1997, the Prosecutor submitted the indictment for confirmation, and on 23 October 1997, Judge Aspegren confirmed the indictment, and issued a Warrant of Arrest and Order for Surrender addressed to the Government of Cameroon. The Appellant was not transferred to the Tribunal's detention unit, however, until 19 November 1997 and his initial appearance did not take place until 23 February 1998.

10. On 24 February 1998, the Appellant filed the Extremely Urgent Motion seeking to have his arrest and detention nullified. The arguments of the parties were heard on 11 September 1998. Trial Chamber II, in its Decision of 17 November 1998, dismissed the Extremely Urgent Motion *in toto*. In rejecting the arguments put forward by the Appellant in the Extremely Urgent Motion, the Trial Chamber made several findings. First, the Trial Chamber held that the Appellant was initially arrested at the behest of Rwanda and Belgium and not at the behest of the Prosecutor. Second, the Trial Chamber found that the period of detention under Rule 40 from 21 February until 3 March 1997 did not violate the Appellant's rights under Rule 40. Third, the Trial Chamber found that the Appellant had failed to show that the Prosecutor had violated the rights of the Appellant with respect to the length of his provisional detention or the delay in transferring the Appellant to the Tribunal's detention unit. Fourth, the Trial Chamber held that Rule 40*bis* does not apply until the actual transfer of the suspect to the Tribunal's detention unit. Fifth, the Trial Chamber concluded that the provisional detention of the Appellant was legally justified. Sixth, the Trial Chamber found that when the Prosecutor opted to proceed against some of the individuals detained with the Appellant, but excluding the Appellant, the Prosecutor was exercising prosecutorial discretion and was not discriminating against the Appellant. Finally, the Trial Chamber held that Rule 40*bis* is valid and does not contradict any provisions of the Statute. On 4 December 1998, the Appellant filed a Notice of Appeal against the Decision and ten days later the Prosecution filed its Response.

11. The Appeals Chamber considered the Appellant's appeal and found that the Decision dismissed an objection based on the lack of personal jurisdiction over the accused and, therefore, an appeal lies as of right under Sub-rule 72(D). Consequently, a Decision and Scheduling Order was issued on 5 February 1999, and the parties submitted additional briefs. Notwithstanding these additional submissions by the parties, however, the Appeals Chamber determined that additional information was required to decide the appeal. Consequently, a Scheduling Order was filed on 3 June 1999, directing the Prosecutor to specifically address the following six questions and provide documentation in support thereof:

1. Whether the Appellant was held in Cameroon for any period between 21 February 1997 and 19 November 1997 at the request of the Tribunal, and if so, what effect did this detention have in relation to personal jurisdiction.

2. Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction.

3. The reason for any delay between the request for transfer and the actual transfer.

4. The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.

5. The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion.

6. The disposition of the *writ of habeas corpus* that the Appellant asserts that he filed on 2 October 1997.

12. The Prosecutor filed her Response to the 3 June 1999 Scheduling Order on 22 June 1999, and the Appellant filed his Reply on 2 July 1999. The submissions of the parties in response to these questions are set forth in section II.C., *infra*.

II. THE APPEAL

A. **The Appellant**

13. As noted *supra*, the Appellant has submitted numerous documents for consideration with respect to his arrest and detention. The main arguments as advanced by the Appellant are consolidated and briefly summarised below.

14. First, the Appellant asserts that the Trial Chamber erred in constructing a "Chronology of Events" without a proper basis or finding. According to the Appellant, the Trial Chamber further erred in dividing the events into arbitrary categories with the consequence that the Trial Chamber considered the events in a fragmented form. This resulted in a failure to perceive the events in their totality.

15. Second, the Appellant claims that the Trial Chamber erred in holding that the Appellant failed to provide evidence supporting his version of the arrest and detention. Thus, the Appellant contends, it was error for the Trial Chamber to conclude that the Appellant was arrested at the behest of the Rwandan and Belgian governments. Further, because the Trial Chamber found that the Appellant was detained at the behest of the Rwandan and Belgian authorities, the Trial Chamber erroneously held that the Defence had failed to show that the Prosecutor was responsible for the Appellant's being held in custody by the

Cameroon authorities from 15 April 1996 until 21 February 1997.

16. Third, the Appellant contends that the Trial Chamber erred in holding that the detention under Rule 40 between 21 February 1997 and 3 March 1997, when the Rule 40*bis* request was approved, does not constitute a violation of the Appellant's rights under Rule 40. Further, the Trial Chamber erred in holding that there is no remedy for a provisionally detained person before the detaining State has transferred him prior to the indictment and warrant for arrest.

17. Fourth, the Appellant argues that the Trial Chamber erred in failing to declare that there was a breach of the Appellant's rights as a result of the Prosecutor's delay in presenting the indictment for confirmation by the Judge. Furthermore, the Appellant contends that the Trial Chamber erred in holding that the Appellant failed to show that the Prosecutor violated his rights due to the length of the detention or delay in transferring the Appellant. Similarly, the Appellant contends that the Trial Chamber erred in holding that the provisional charges and detention of the Appellant were justified under the circumstances.

18. Fifth, with respect to the effect of the detention on the Tribunal's jurisdiction, the Appellant sets forth three arguments. The Appellant's first argument is that the overall length of his detention, which was 22 months, was unreasonable, and therefore, unlawful. Consequently, the Tribunal no longer has personal jurisdiction over the accused. The Appellant next asserts that the pre-transfer detention of the accused was 'very oppressive, torturous and discriminative'. As a result, the Appellant asserts that he is entitled to unconditional release. Finally, the Appellant contends that his detention cannot be justified on the grounds of urgency. In this regard, the length of time the Appellant was provisionally detained without benefit of formal charges amounts to a 'monstrous degree of prosecutorial indiscretion and apathy'.

19. In conclusion, the Appellant requests the Appeals Chamber to quash the Trial Chamber Decision and unconditionally release the Appellant.

B. The Prosecutor

20. In responding to the Appellant's arguments, the Prosecutor relies on three primary counter-arguments, which will be summarised. First, the Prosecutor submits that the Appellant was not in the custody of the Tribunal before his transfer on 19 November 1997, and consequently, no event taking place prior to that date violates the Statute or the Rules. The Prosecutor contends that her request under Rule 40 or Rule 40*bis* for the detention and transfer of the accused has no impact on this conclusion.

21. In support of this argument, the Prosecutor contends that the Appellant was detained on 15 April 1996 at the instance of the Rwandan and Belgian governments. Although the Prosecutor made a request on 17 April 1996 to Cameroon for provisional measures, the Prosecutor asserts that this request was 'only superimposed on the pre-existing request of Rwanda and Belgium' for the detention of the Appellant.

22. The Prosecutor further argues that the Tribunal does not have custody of a person pursuant to Rule 40*bis* until such person has actually been physically transferred to the Tribunal's detention unit. Although an Order pursuant to Rule 40*bis* was filed directing Cameroon to transfer the Appellant on 4 March 1997, the Appellant was not actually transferred until 19 November 1997. Consequently, the responsibility of the Prosecutor for any delay in bringing the Appellant to trial commences only after the Tribunal established custody of the Appellant on 19 November 1997.

23. The Prosecutor argues that custody involves 'care and control' and since the Appellant was not under the 'care and control' of the Tribunal prior to his transfer, the Prosecutor is not responsible for any delay resulting from Cameroon's failure to promptly transfer the Appellant. Furthermore, the Prosecutor asserts that Article 28 of the Statute strikes a delicate balance of distributing obligations between the Tribunal and States. Under this arrangement, 'neither entity is an agent or, *alter ego*, of the other: and the actions of the one may not be imputed on the other just because they were carrying out duties apportioned to them under the Statute'.

24. The Prosecutor acknowledges that although the 'delay in this transfer is indeed long, there is no factual basis to impute the fault of it to the ICTR Prosecutor'. She summarises this line of argument by concluding that since the Appellant was not in the custody of the Tribunal before his transfer to the Tribunal's detention unit on 19 November 1997, it follows that the legality of the detention of the Appellant while in the custody of Cameroon is a matter for the laws of Cameroon, and beyond the competence of the Appeals Chamber.

25. The second principal argument of the Prosecution is that the Prosecutor's failure to request Cameroon to transfer the Appellant on 16 May 1996 does not give the Appellant 'prescriptive claims against the Prosecutor's eventual prosecution'. The thrust of this contention seeks to counter the argument that the Prosecutor is somehow estopped from prosecuting the Appellant as the result of correspondence between the Prosecutor and both Cameroon and the Appellant himself.

26. The Prosecutor asserts that simply because at a certain stage of the investigation she communicated to the Appellant that she was not proceeding against him, this cannot have the effect of creating statutory or other limitations against prosecution for genocide and other serious violations of international humanitarian law. Moreover, the Prosecutor argues that she cannot be barred from proceeding against an accused simply because she did not proceed with the prosecution at the first available opportunity. Finally, the Prosecutor claims that her 'abstention from proceeding against the Appellant-Defendant before 3 March 1997 was due to on-going investigation'.

27. The third central argument of the Prosecutor is that any violations suffered by the Appellant prior to his transfer to the Tribunal's detention unit have been cured by subsequent proceedings before the Tribunal, presumably the confirmation of the Appellant's indictment and his initial appearance.

28. In conclusion, the Prosecution argues that there is no provision within the Statute that provides for the issuance of the order sought by the Appellant, and, in any event, the remedy sought by the Appellant is not warranted in the circumstances. In the event the Appeals Chamber finds a violation of the Appellant's rights, the Prosecutor suggests that the following remedies would be proper: 1) an Order for the expeditious trial of the Appellant; and/or 2) credit for the period of undue delay as part of the sentence, if the Appellant is found guilty, pursuant to Rule 101(D).

C. **Arguments of the Parties Pursuant to the 3 June 1999 Scheduling Order**

29. With respect to the specific questions addressed to the Prosecutor in the 3 June 1999 Scheduling Order, the parties submitted the following answers.

1. **Whether the Appellant was held in Cameroon for any period between 21 February 1997 and 19 November 1997 at the request of the Tribunal, and if so, what effect did this detention have in relation to personal jurisdiction.**

30. On 21 February 1997, following the Decision of the Cameroon Court of Appeal to release the

Appellant, the Prosecutor submitted a Rule 40 Request to detain the Appellant for the benefit of the Tribunal. Further, the Prosecutor submits that following the issuance of the Rule 40*bis* Order on 4 March 1997, Cameroon was obligated, pursuant to Article 28, to implement the Prosecutor's request. However, because the Tribunal did not have custody of the Appellant until his transfer on 19 November 1997, the Prosecutor contends that the Tribunal 'could not regulate the conditions of detention or other matters regarding the confinement of the accused'. Nevertheless, the Prosecutor argues that between 21 February 1997 and 19 November 1997, 'there existed what could be described as joined or concurrent personal jurisdiction over the Appellant, the personal jurisdiction being shared between the Tribunal and Cameroon'.

31. The Appellant contends that Cameroon was holding him at the behest of the Prosecutor during this entire period. Furthermore, the Appellant argues that '[t]he only Cameroonian law applicable to him was the law concerning the extradition'. Consequently, he argues that the issue of concurrent or joint personal jurisdiction by both the Tribunal and Cameroon is 'fallacious, misleading and unacceptable'. In addition, he asserts that, read in conjunction, Articles 19 and 28 of the Statute confer obligations upon the Detaining State only when the appropriate documents are supplied. Since the Warrant of Arrest and Order for Surrender was not signed by Judge Aspegren until 23 October 1997, the Appellant contends that his detention prior to that date was illegal, given that he was being held after 21 February 1997 on the basis of the Prosecutor's Rule 40 request.

2. **Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction.**

32. The parties are in agreement that the Appellant was transferred to the Tribunal's detention unit on 19 November 1997, and consequently was not held by Cameroon at any period after that date.

3. **The reason for any delay between the request for transfer and the actual transfer.**

33. The Prosecutor fails to give any reason for this delay. Rather, without further comment, the Prosecutor attributes to Cameroon the period of delay between the request for transfer and the actual transfer.

34. The Appellant contends that the Prosecutor 'forgot about the matter and didn't really bother about the actual transfer of the suspect'. He argues that since Cameroon had been holding him pursuant to the Tribunal's Rule 40*bis* Order, Cameroon had no further interest in him, other than to transfer him to the custody of the Tribunal. In support of his contentions in this regard, the Appellant advances several arguments. First, the Prosecutor did not submit the indictment for confirmation before the expiration of the 30-day limit of the provisional detention as requested by Judge Aspegren in the Rule 40*bis* Order. Second, the Appellant asserts that the Prosecutor didn't make any contact with the authorities of Cameroon to provide for the transfer of the Appellant pursuant to the Rule 40*bis* Order. Third, the Prosecutor did not ensure that the Appellant's right to appear promptly before a Judge of the Tribunal was respected. Fourth, following the Rule 40*bis* Order, the Appellant claims, '[t]he Prosecutor didn't make any follow-up and didn't even show any interest'. Fifth, the Appellant contends that the triggering mechanism in prompting his transfer was his filing of a *writ of habeas corpus.* In conclusion, the Appellant rhetorically questions the Prosecutor, 'How can she expect the Cameroonian authorities to be more interested [in his case] than her?' [sic].

4. **The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.**

35. The Prosecutor contends that the Trial Chamber and the Registry have responsibility for scheduling the initial appearance of accused persons.

36. While the Appellant acknowledges that the Registrar bears some responsibility for the delay, he argues that the Prosecutor 'plays a big role in initiating of hearings' and plays a 'key part in the process'. The Appellant contends that the Prosecutor took no action to bring him before the Trial Chamber as quickly as possible. On the contrary, the Appellant asserts that the Prosecutor delayed seeking confirmation of the indictment and 'caused the removal of the Defence's motion for Habeas Corpus from the hearing list on 31 October 1997 thus delaying further the appearance of the suspect before the Judges'.

5. **The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion.**

37. With respect to the delay between the initial appearance and the hearing on the Urgent Motion, the Prosecutor again disclaims any responsibility for scheduling matters, arguing that the Registry, in consultation with the Trial Chambers, maintains the docket. The hearing on the Urgent Motion was originally docketed for 14 May 1998. However, on 12 May 1998, Counsel for the Appellant informed the Registry that he was not able to appear and defend his client at that time, because he had not been assigned co-counsel as he had requested and because the Tribunal had not paid his fees. Consequently, the hearing was re-scheduled for 11 September 1998.

6. **The disposition of the *writ of habeas corpus* that the Appellant asserts that he filed on 2 October 1997.**

38. With respect to the disposition of the *writ of habeas corpus* filed by the Appellant on 2 October 1997, the Prosecutor replied as follows:

> 24. The Prosecutor respectfully submits that following the filing of the *habeas corpus* on 2 October 1997 the President wrote the Appellant by letter of 8 October 1997, informing him that the Office of the Prosecutor had informed him that an indictment would be ready shortly.
>
> 25. The Prosecutor is not aware of any other disposition of the *writ of habeas corpus*.

39. In fact, the letter referred to was written on 8 *September* 1997—prior to the filing of the *writ of habeas corpus*—and the Appellant contends that it was precisely this letter which prompted him to file the *writ of habeas corpus*. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997. However, directly contradicting the claim of the Prosecutor, the Appellant asserts that 'the Registry without the consent of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'. Moreover, the Appellant claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*. The Appellant is of the view that the *writ of habeas corpus* is still pending, since the Trial Chamber has not heard it, notwithstanding the fact that it was filed on 29 September 1997.

III. APPLICABLE AND AUTHORITATIVE PROVISIONS

40. The relevant parts of the applicable Articles of the Statute, Rules of the Tribunal and international human rights treaties are set forth below for ease of reference. The Report of the U.N. Secretary-General

establishes the sources of law for the Tribunal. The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.

A. The Statute

Article 8

Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 17

Investigation and Preparation of Indictment

1. [...]

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. [...]

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an Indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the present Statute. The Indictment shall be transmitted to a Judge of the Trial Chamber.

Article 20

Rights of the accused

1. [...]
2. [...]
3. [...]
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:
   a. To be informed promptly and in detail in a language in which he or she understands of the

nature and cause of the charge against him or her;
b. [...]
c. To be tried without undue delay;
d. [...]
e. [...]
f. [...]
g. [...]

Article 24

Appellate Proceedings

1. [...]

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 28

Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

   a. The identification and location of persons;
   b. [...]
   c. [...]
   d. The arrest or detention of persons;
   e. The surrender or transfer of the accused to the International Tribunal for Rwanda.

B. The Rules

Rule 2
Definitions

[...]

Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47.

[...]

Suspect: A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction.

[...]

Rule 40

Provisional Measures

(A) In case of urgency, the Prosecutor may request any State:

i. to arrest a suspect and place him in custody;
ii. to seize all physical evidence;
iii. to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The state concerned shall comply forthwith, in accordance with Article 28 of the Statute.

(B) Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country of the Tribunal and the Registrar.

(C) In the cases referred to in paragraph B, the suspect shall, from the moment of his transfer, enjoy all the rights provided for in Rule 42, and may apply for review to a Trial Chamber of the Tribunal. The Chamber, after hearing the Prosecutor, shall rule upon the application.

(D) The suspect shall be released if (i) the Chamber so rules, or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer.

Rule 40*bis*

Transfer and Provisional Detention of Suspects

(A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a summary of the material upon which the Prosecutor relies.

(B) The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met:

(i) the Prosecutor has requested a State to arrest the suspect and to place him in custody, in accordance with Rule 40, or the suspect is otherwise detained by a State;

(ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and

(iii) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.

(C) The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal.

(D) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the request made by the Prosecutor under Sub-Rule (A), including the provisional charge, and shall state the Judge's grounds for making the order, having regard to Sub-Rule (B). The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43.

(E) As soon as possible, copies of the order and of the request by the Prosecutor are served upon the suspect and his counsel by the Registrar.

(F) At the end of the period of detention, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the provisional detention for a period not exceeding 30 days.

(G) At the end of that extension, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the detention for a further period not exceeding 30 days.

(H) The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made.

(I) The provisions in Rules 55(B) to 59 shall apply *mutatis mutandis* to the execution of the order for the transfer and provisional detention of the suspect.

(J) After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the initial order, or another Judge of the same Trial Chamber, who shall ensure that his rights are respected.

(K) During detention, the Prosecutor, the suspect or his counsel may submit to the Trial Chamber of which the Judge who made the initial order is a member, all applications relative to the propriety of provisional detention or to the suspect's release.

(L) Without prejudice to Sub-Rules (C) to (H), the Rules relating to the detention on remand of accused persons shall apply *mutatis mutandis* to the provisional detention of persons under this Rule.

Rule 58

National Extradition Provisions

The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

Rule 62

Initial Appearance of Accused

Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber without delay, and shall be formally charged. The Trial Chamber shall:

(i) satisfy itself that the right of the accused to counsel is respected

(ii) read or have the indictment read to the accused in a language he speaks and understands, and satisfy itself that the accused understands the indictment;

(iii) call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;

(iv) in case of a plea of not guilty, instruct the Registrar to set a date for trial.

Rule 72

Preliminary Motions

A. Preliminary motions by either party shall be brought within sixty days following disclosure by the Prosecutor to the Defence of all material envisaged by Rule 66(A)(I), and in any case before the hearing on the merits.

B. Preliminary motions by the accused are:

i. objections based on lack of jurisdiction;
ii. [...]
iii. [...]
iv. [...]

C. The Trial Chamber shall dispose of preliminary motions *in limine litis*.

D. Decisions on preliminary motions are without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as of right.

E. Notice of Appeal envisaged in Sub-Rule (D) shall be filed within seven days from the impugned decision.

F. Failure to comply with the time-limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.

C. International Covenant on Civil and Political Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and

shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 14

1. [...]

2. [...]
3. In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   b. [...]
   c. [...]
   d. [...]
   e. [...]
   f. [...]
   g. [...]
4. [...]
5. [...]
6. [...]
7. [...]

D. European Convention on Human Rights

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

   a. [...]

   b. [...]

   c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

   d. [...]

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e. [...]

f. the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 6

1. [...]

2. [...]

3. Everyone charged with a criminal offence has the following minimum rights:

   a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b. [...]
   c. [...]
   d. [...]
   e. [...]

E. American Convention on Human Rights

Article 7

1. [...]
2. [...]
3. No one shall be subject to arbitrary arrest or detention.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before judge or other law officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his

release if the arrest or detention is unlawful. In states Parties whose law provides that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. [...]

Article 8

1. Every 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, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

   a. [...]
   b. prior notification in detail to the accused of the charges against him;
   c. [...]
   d. [...]
   e. [...]
   f. [...]
   g. [...]
   h. [...]

3. [...]

4. [...]

5. [...]

IV. DISCUSSION

A. Were the rights of the Appellant violated?

1. Status of the Appellant

41. Before discussing the alleged violations of the Appellant's rights, it is important to establish his status following his arrest and during his provisional detention. Rule 2 sets forth definitions of certain terms used in the Rules. The indictment against the Appellant was not confirmed until 23 October 1997. Pursuant to the definitions of 'accused' and 'suspect' set forth in Rule 2, the Appeals Chamber finds that the Appellant was a 'suspect' from his arrest on 15 April 1996 until the indictment was confirmed on 23 October 1997. After 23 October 1997, the Appellant's status changed and he became an 'accused'.

2. The right to be promptly charged under Rule 40*bis*

42. Unlike national systems, which have police forces to effectuate the arrest of suspects, the Tribunal

lacks any such enforcement agency. Consequently, in the absence of the suspect's voluntary surrender, the Tribunal must rely on the international community for the arrest and provisional detention of suspects. The Statute and Rules of the Tribunal establish a system whereby States may provisionally detain suspects at the behest of the Tribunal pending transfer to the Tribunal's detention unit.

43. In the present case, there are two relevant periods of time under which Cameroon was clearly holding the Appellant at the behest of the Tribunal. Cameroon arrested the Appellant pursuant to the Rwandan and Belgian extradition requests on 15 April 1996. Two days later, the Prosecutor made her first Rule 40 request for provisional detention of the Appellant. On 6 May 1996, the nineteenth day of the Appellant's provisional detention pursuant to Rule 40, the Prosecutor requested the Cameroon authorities to extend the Appellant's detention for an additional three weeks. On 16 May 1996, however, the Prosecutor informed Cameroon that she was no longer interested in pursuing a case against the Appellant at 'that stage'. Thus, the first period runs from 17 April 1996 until 16 May 1996—a period of 29 days, or nine days longer than allowed under Rule 40. This first period will be discussed, *infra*, at sub-section IV.B.2.

44. The second period during which Cameroon detained the Appellant for the Tribunal commenced on 4 March 1997 and continued until the Appellant's transfer to the Tribunal's detention unit on 19 November 1997. On 21 February 1997, the Cameroon Court rejected Rwanda's extradition request and ordered the release of the Appellant. However, on the same day, while the Appellant was still in custody, the Prosecutor again made a request pursuant to Rule 40 for the provisional detention of the Appellant. This request was followed by the Rule 40*bis* request, which resulted in the Rule 40*bis* Order of Judge Aspegren dated 3 March 1997, and filed on 4 March 1997. This Order comprised, *inter alia*, four components. First, it ordered the transfer of the Appellant to the Tribunal's detention unit. Second, it ordered the provisional detention in the Tribunal's detention unit of the Appellant for a maximum period of thirty days. Third, it requested the Cameroon authorities to comply with the transfer order and to maintain the Appellant in custody until the actual transfer. Fourth, it requested the Prosecutor to submit the indictment against the Appellant prior to the expiration of the 30-day provisional detention.

45. However, notwithstanding the 4 March 1997 Rule 40*bis* Order, the record reflects that the Tribunal took no further action until 22 October 1997. On that day, the Deputy Prosecutor, Mr. Bernard Muna (who had spent much of his professional career working in the Cameroon legal community prior to joining the Office of the Prosecutor) submitted the indictment against the Appellant for confirmation. Judge Aspegren confirmed the indictment against the Appellant the next day and simultaneously issued a Warrant of Arrest and Order for Surrender addressed to the Government of Cameroon on 23 October 1997. However, the Appellant was not transferred to the Tribunal's detention unit until 19 November 1997. Thus, Cameroon held the Appellant at the behest of the Tribunal from 4 March 1997 until his transfer on 19 November 1997. At the time the indictment was confirmed, the Appellant had been in custody for 233 days, more than 7 months, from the date the Rule 40*bis* Order was filed.

46. It is important that Rule 40 and Rule 40*bis* be read together. It is equally important in interpreting these provisions that the Appeals Chamber follow the principle of 'effective interpretation', a well-established principle under international law. Interpreting Rule 40 and Rule 40*bis* together, we conclude that both Rules must be read restrictively. Rule 40 permits the Prosecutor to request any State, in the event of urgency, to arrest a suspect and place him in custody. The purpose of Rule 40*bis* is to restrict the length of time a suspect may be detained without being indicted. We cannot accept that the Prosecutor, acting alone under Rule 40, has an unlimited power to keep a suspect under provisional detention in a State, when Rule 40*bis* places time limits on such detention if the suspect is detained at the Tribunal's detention unit. Rather, the principle of effective interpretation mandates that these Rules be read together and that they be restrictively interpreted.

47. Although both Rule 40 and Rule 40*bis* apply to the provisional detention of suspects, there are important differences between the two Rules. For example, the time limits under which the Prosecutor must issue an indictment vary depending upon which Rule forms the basis of the provisional detention. Pursuant to Rule 40(D)(ii), the suspect must be released if the Prosecutor fails to issue an indictment within 20 days of the transfer of the suspect to the Tribunal's detention unit, while Rule 40*bis*(H) allows the Prosecutor 90 days to issue an indictment. However, the remedy for failure to issue the indictment in the proscribed period of time is the same under both Rules: *release of the suspect.*

48. The Prosecutor may apply for Rule 40*bis* measures 'in the conduct of an investigation'. Rule 40*bis* applies only if the Prosecutor has previously requested provisional measures pursuant to Rule 40 or if the suspect is otherwise already being detained by the State to whom the Rule 40*bis* request is made. The Rule 40*bis* request, which is made to a Judge assigned pursuant to Rule 28, must include a provisional charge and a summary of the material upon which the Prosecutor relies.

49. The Judge must make two findings before a Rule 40*bis* order is issued. First, there must be a reliable and consistent body of material that tends to show that the suspect may have committed an offence within the Tribunal's jurisdiction. Second, the Judge must find that provisional detention is a necessary measure to 'prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation'.

50. Pursuant to Rule 40*bis*(C), the provisional detention of the suspect may be ordered for an initial period of thirty days. This initial thirty-day period begins to run from the 'day after the transfer of the suspect to the detention unit of the Tribunal'. Two additional thirty-day period extensions are permissible. At the end of the first thirty-day period, the Prosecutor must show that an extension is warranted by the needs of the investigation in order to have the provisional detention extended. At the end of the second thirty-day period, the Prosecutor must demonstrate that special circumstances warrant the continued provisional detention of the suspect for the final thirty-day period to be granted. In no event shall the total period of provisional detention of a suspect exceed ninety days. At the end of this cumulative ninety-day period, the suspect must be released if the indictment has not been confirmed and an arrest warrant signed.

51. The Statute and Rules of the Tribunal envision a system whereby the suspect is provided a copy of the Prosecutor's request, including provisional charges, in conjunction with the Rule 40*bis* Order. He is also served a copy of the confirmed indictment with the Warrant of Arrest, and pursuant to Rule 62(ii) he is to be orally informed of the charges against him at the initial appearance. In the present case, 6 days elapsed between the filing of the Rule *40bis* Order on 4 March 1997 and the date on which the Appellant apparently was shown a copy of the Rule 40*bis* Order. Additionally, 27 days elapsed between the confirmation of the indictment against the Appellant on 23 October 1998 and the service of a copy of the indictment upon the Appellant on 19 November 1998.

52. The Trial Chamber found that the Appellant was initially arrested at the behest of Rwanda and Belgium, a point the Prosecutor reiterates in this appeal, contending that the Prosecutor's request was merely 'superimposed' on the existing requests of those States. However, the Prosecutor fails to acknowledge that on 16 May 1996, she requested a three-week extension of the provisional detention of the Appellant. The Appeals Chamber finds the Appellant was detained at the request of the Prosecutor from 17 April 1996 through 16 May 1996. This detention—for 29 days—violated the 20-day limitation in Rule 40.

53. The Prosecutor also successfully argued before the Trial Chamber that Rule 40*bis* is inapplicable, since its operative provisions do not apply until after the transfer of the suspect to the Tribunal's detention unit. It is clear, however, that the purpose of Rule 40 and Rule 40*bis* is to limit the time that a

suspect may be provisionally detained without the issuance of an indictment. This comports with international human rights standards. Moreover, if the time limits set forth in Rule 40(D) and Rule 40*bis* (H) are not complied with, those rules mandate that the suspect must be released.

54. Although the Appellant was not physically transferred to the Tribunal's detention unit until 19 November 1997, he had been detained since 21 February 1997 solely at the behest of the Prosecutor. The Appeals Chamber considers that if the Appellant were in the constructive custody of the Tribunal after the Rule *40bis* Order was filed on 4 March 1997, the provisions of that Rule would apply. In order to determine if the period of time that the Appellant spent in Cameroon at the behest of the Tribunal is attributable to the Tribunal for purposes of Rule 40*bis*, it is necessary to analyse the relationship between Cameroon and the Tribunal with respect to the detention of the Appellant. In fact, the Prosecutor has acknowledged that between 21 February 1997 and 19 November 1997, 'there existed what could be described as joined or concurrent personal jurisdiction over the Appellant, the personal jurisdiction being shared between the Tribunal and Cameroon'.

55. The Tribunal issued a valid request pursuant to Rule 40 for provisional detention, and shortly thereafter, pursuant to Rule 40*bis*, for the transfer of the Appellant. These requests were honoured by Cameroon, and *but for* those requests, the Appellant would have been released on 21 February 1997, when the Cameroon Court of Appeal denied the Rwandan extradition request and ordered the immediate release of the Appellant.

56. Thus, the Appellant's situation is analogous to the 'detainer' process, whereby a special type of warrant (known as a 'detainer' or 'hold order') is filed against a person *already in custody* to ensure that he will be available to the demanding authority upon completion of the present term of confinement. A 'detainer' is a device whereby the requesting State can obtain the custody of the detainee upon his release from the detaining State. The U.S. Supreme Court has stated that, '[I]n such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State...'. Moreover, that court has held that since the detaining state acts as an agent for the demanding state pursuant to the detainer, the petitioner is in custody for purposes of filing a *writ of habeas corpus* pursuant to U.S. law. Thus, the court reached the conclusion that the accused is in the constructive custody of the requesting State and that the detaining State acts as agent for the requesting state for purposes of *habeas corpus* challenges. In the present case, the relationship between the Tribunal and Cameroon is even stronger, on the basis of the international obligations imposed on States by the Security Council under Article 28 of the Statute.

57. Other cases have held that a defendant sentenced to concurrent terms in separate jurisdictions is in the constructive custody of the second jurisdiction after the first jurisdiction has imposed sentence on him. For example, In the Matter of Eric Grier, Peritioner v. Walter J. Flood, as Warden of the Nassau County Jail, Respondent, the court concluded that '*constructive custody attached before any sentence was imposed.* In Ex p. Hampton M. Newell, the court ruled that although the petitioner was in the physical custody of the federal authorities, he was in the constructive custody of the State of Texas on the basis of a detainer that Texas had filed against him.

58. The Prosecutor relies, in part, on a definition of custody ('care and control') from an oft-cited law dictionary. However, this same law dictionary also defines custody as 'the detainer of a man's person by virtue of lawful process or authority'. Thus, even using the Prosecutor's authority, custody can be taken to mean the detention of an individual pursuant to lawful authority even in the absence of physical control. It would follow, therefore, that notwithstanding a lack of physical control, the Appellant *was* in the Tribunal's custody *if* he were being detained pursuant to 'lawful process or authority' of the Tribunal. Or, as a Singapore court noted in Re Onkar Shrian, '[T]hat the person bailed is in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if

he were in the actual custody of the proper gaoler'.

59. The Prosecutor has also relied on In the Matter of Surrender of Elizaphan Ntakirutimana in support of the proposition that under international law, an order by the Tribunal for the transfer of an individual does not give the Tribunal custody over such a person until the physical transfer has taken place. Reliance on this case is misguided in two respects. First, the U.S. Fifth Circuit Court of Appeals recently upheld a District Court ruling that reversed the Decision of the Magistrate that Ntakirutimana could not be extradited. Second, notwithstanding the reversal, Ntakirutimana had challenged the transfer process and is thus clearly distinguishable from the facts in the present case. There is no evidence here that either the Appellant sought to challenge his transfer to the Tribunal, or that Cameroon was unwilling to transfer him. On the contrary, the Deputy Prosecutor of the Cameroon Centre Province Court of Appeal, appearing at the Rwandan extradition hearing on 31 May 1996, argued that the Tribunal had primacy and, thus, convinced that Court to defer to the Tribunal. Moreover, as noted above, the President of Cameroon signed a decree order to transfer the Appellant prior to the signing of the Warrant of Arrest and Order for Surrender by Judge Aspegren on 23 October 1997. These facts indicate that Cameroon was willing to transfer the Appellant.

60. The co-operation of Cameroon is consistent with its obligation to the Tribunal. The Statute and Rules mandate that States must comply with a request of the Tribunal for the surrender or transfer of the accused to the Tribunal. This obligation on Member States of the United Nations is mandatory, since the Tribunal was established pursuant to Chapter VII of the Charter of the United Nations.

61. Thus, the Appeals Chamber finds that, under the facts of this case, Cameroon was holding the Appellant in constructive custody for the Tribunal by virtue of the Tribunal's lawful process or authority. In the present case, the Prosecutor specifically requested Cameroon to detain and transfer the Appellant. The Statute of the Tribunal obligated Cameroon to detain the Appellant for the benefit of the Prosecutor. The Prosecutor has admitted that it had personal jurisdiction over the Appellant after the Rule 40*bis* Order was issued. That Order also asserts personal and subject matter jurisdiction. This finding does not mean, however, that the Tribunal was responsible for each and every aspect of the Appellant's detention, but only for the decision to place and maintain the Appellant in custody. However, as will be discussed below, this limitation imposed on the Tribunal is consistent with international law. Even if the appellant was not in the constructive custody of the Tribunal, the principles governing the provisional detention of suspects should apply.

62. The Appeals Chamber recognises that international standards view provisional (or pre-trial) detention as an exception, rather than the rule. However, in light of the gravity of the charges faced by accused persons before the Tribunal, provisional detention is often warranted, so long as the provisions of Rule 40 and Rule 40*bis* are adhered to. The issue, therefore, is whether the length of time the Appellant spent in provisional detention, prior to the confirmation of his indictment, violates established international legal norms for provisional detention of suspects.

63. It is well-established under international human rights law that pre-trial detention of suspects is lawful, as long as such pre-trial detention does not extend beyond a reasonable period of time. The U.N. Human Rights Committee, in interpreting Article 9(2) of the ICCPR, has developed considerable jurisprudence with respect to the permissible length of time that a suspect may be detained without being charged. For example, in Glenford Campbell v. Jamaica, the suspect was detained for 45 days without being formally charged. In holding this delay to be a violation of ICCPR Article 9(2), the Committee stated the following:

> [T]he Committee finds that the author was not "promptly" informed of the charges against him:

> one of the most important reasons for the requirement of "prompt" information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority. A delay from 12 December 1984 to 26 January 1985 does not meet the requirement of article 9, paragraph 2.

64. Similar findings have been made in other cases involving alleged violations of ICCPR Article 9(2). For example, in Moriana Hernández Valentini de Bazzano, a period of eight months between the commencement of detention and filing of formal charges was held to violate ICCPR Article 9(2). In Monja Jaona, a period of eight months under which the suspect was placed under house arrest without being formally charged was found to be a violation of ICCPR Article 9(2). In Alba Pietraroia, the petitioner was detained for seven months without being formally charged and the Committee held that this detention violated ICCPR Article 9(2). Finally, in Leopoldo Buffo Carballal, a delay of one year between arrest and formal filing of charges was held to be a violation of ICCPR Article 9(2).

65. The Appeals Chamber also notes that the delay in indicting the Appellant apparently caused concern for President Kama. In a letter sent to the Appellant's Counsel on 8 September 1997, President Kama:

> I have already reminded the Prosecutor of the need to establish as soon as possible an indictment against Mr. Jean Bosco Barayagwiza, if she still intends to prosecute him. Only recently, Mr. Bernard Muna, the Deputy Prosecutor, reassured me that an indictment against Mr. Jean Bosco Barayagwiza should soon be submitted to a Judge for review.

However, even at that point the 90-day period had expired.

66. Additionally, the Trial Chamber, in its Decision dismissing the Extremely Urgent Motion, stated, 'It is regrettable that the Prosecution did not submit an indictment until 22 October 1997'. Moreover, even the Prosecutor acknowledged that the delay in indicting the Appellant was not justified. During the oral argument on the Appellant's Extremely Urgent Motion on 11 September 1998, Mr. James Stewart, appearing for the Prosecutor, acknowledged that the Appellant could or should have been indicted earlier:

> Now, I will say this, and I have to be frank with you, the president of this tribunal – and this is reflected in one of the letters that was sent to the accused –was anxious for the prosecutor to produce an indictment, if we were going to indict this man, and it may have been that *the indictment was, was not produced as early as it could have been or should have been…*

67. In conclusion, we hold that the length of time that the Appellant was detained in Cameroon at the behest of the Tribunal without being indicted violates Rule 40*bis* and established human rights jurisprudence governing detention of suspects. The delay in indicting the Appellant violated the 90-day rule as set forth in Rule 40*bis*. In the present appeal, Judge Aspregren issued the Rule 40*bis* Order with the proviso that the indictment be presented for confirmation within 30 days (the Rule permits for two 30-day extensions). In doing so, he invoked Sub-rule 40*bis*, thereby making an assertion of jurisdiction over the Appellant. The Prosecutor agrees that there was 'joined or concurrent jurisdiction' over the Appellant. Sub-rule 40*bis*(H) provides explicitly that the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made if the indictment is not issued within 90 days. This limitation on the detention of suspects is consistent with established human rights jurisprudence.

3. The delay between the transfer of the Appellant and his initial appearance

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68. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer. At the outset of this analysis the Appeals Chamber rejects the Prosecutor's contention that a 31-day holiday recess, between 15 December 1997 and 15 January 1998, could somehow justify this delay. The Appellant should have had his initial appearance well before the holiday recess even commenced and did not have it until over one month after the end of the recess.

69. The issue, therefore, is whether the 96-day period between the Appellant's transfer and initial appearance violates the statutory requirement that the initial appearance is held without delay. 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. Consequently, it is even more important for the protection of his rights that his initial appearance was held without delay.

70. Rule 62, which is predicated on Articles 19 and 20 of the statute, provides that an accused shall be brought before the assigned Trial Chamber and formally charged *without delay* upon his transfer to the seat of the Tribunal. In determining if the length of time between the Appellant's transfer and his initial appearance was unduly lengthy, we note that the right of the accused to be promptly brought before a judicial authority and formally charged ensures that the accused will have the opportunity to mount an effective defence. The international instruments have not established specific time limits for the initial appearance of detainees, relying rather on a requirement that a person should 'be brought promptly before a Judge' following arrest. The U.N. Human Rights Committee has interpreted 'promptly' within the context of 'more precise' standards found in the criminal procedure codes of most States. Such delays must not, however, exceed a few days. Thus, in Kelly v. Jamaica, the U.N. Human Rights Committee held that a detention of five weeks before being brought before a Judge violated Article 9(3).

71. Based on the plain meaning of the phrase, 'without delay', the Appeals Chamber finds that a 96-day delay between the transfer of the Appellant to the Tribunal's detention unit and his initial appearance to be a violation of his fundamental rights as expressed by Articles 19 and 20, internationally-recognised human rights standards and Rule 62. Moreover, we find that the Appellant's right to be promptly indicted under Rule 40*bis* to have been violated. Although we find that these violations do not result in the Tribunal losing jurisdiction over the Appellant, we nevertheless reaffirm that the issues raised by the Appellant certainly fall within the ambit of Rule 72.

72. In the Tadić Interlocutory Appeal Decision, the Appeals Chamber set forth several policy arguments for why a liberal approach to admitting interlocutory appeals is warranted. The Appeals Chamber there stated:

> Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed—this is by no means conclusive, but interesting nevertheless: *were not those questions to be dealt with in limine litis, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial.* After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of the Appellant's interlocutory appeal is indisputable.

We find that the challenge to jurisdiction raised by the Appellant is consistent with the logic underlying the decision reached in the Tadić case. Given that the Appeals Chamber is of the opinion that to proceed with the trial of the Appellant would amount to an act of injustice, we see no purpose in denying the Appellant's appeal, forcing him to undergo a lengthy and costly trial, only to have him raise, once again the very issues currently pending before this Chamber. Moreover, in the event the Appellant was to be acquitted after trial we can foresee no effective remedy for the violation of his rights. Therefore, on the basis of these findings, the Appeals Chamber will decline to exercise jurisdiction over the Appellant, on the basis of the abuse of process doctrine, as discussed in the following Sub-section.

B. The Abuse of Process Doctrine

1. In general

73. The Appeals Chamber now considers, in light of the abuse of process doctrine, the Appellant's allegations concerning three additional issues: 1) the right to be promptly informed of the charges during the first period of detention; 2) the alleged failure of the Trial Chamber to resolve the *writ of habeas corpus* filed by the Appellant; and 3) the Appellant's assertions that the Prosecutor did not diligently prosecute her case against him. These assertions will be considered. Before addressing these issues, however, several points need to be emphasised in the context of the following analysis. First and foremost, this analysis focuses on the alleged violations of the Appellant's rights and is not primarily concerned with the entity responsible for the alleged violation(s). As will be discussed, it is clear that there are overlapping areas of responsibility between the three organs of the Tribunal and as a result, it is conceivable that more than one organ could be responsible for the violations of the Appellant's rights. However, even if fault is shared between the three organs of the Tribunal—or is the result of the actions of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights. Second, we stress that the circumstances set forth in this analysis must be read as a whole. Third, none of the findings made in this sub-section of the Decision, in isolation, are necessarily dispositive of this issue. That is, it is the combination of these factors—and not any single finding herein—that lead us to the conclusion we reach in this sub-section. In other words, the application of the abuse of process doctrine is case-specific and limited to the egregious circumstances presented by this case. Fourth, because the Prosecutor initiates the proceedings of the Tribunal, her special responsibility in prosecuting cases will be examined in sub-section 4, *infra*.

74. Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process. The House of Lords summarised the abuse of process doctrine as follows:

> [P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.

It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.

75. The application of this doctrine has resulted in dismissal of charges with prejudice in a number of cases, particularly where the court finds that to proceed on the charges in light of egregious violations of the accused's rights would cause serious harm to the integrity of the judicial process. One of the leading cases in which the doctrine of abuse of process was applied is R. v. Horseferry Road Magistrates' Court *ex parte* Bennett. In that case, the House of Lords stayed the prosecution and ordered the release of the accused, stating that:

> [A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) *because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case*.

The abuse of doctrine has been applied in several cases. For example, in Bell v. DPP of Jamaica, the Privy Council held that under the abuse of process doctrine courts have an inherent power to decline to adjudicate a case which would be oppressive as the result of unreasonable delay. In making this determination, the court set forth four guidelines for determining whether a delay would deprive the accused of a fair trial:

1. the length of the delay;
2. the prosecution's reasons to justify the delay;
3. the accused's efforts to assert his rights; and
4. the prejudice caused to the accused.

Regarding the issue of prejudice, in R. v. Oxford City Justices, *ex parte* Smith (D.K.B.), the court applied the abuse of process doctrine in dismissing a case on the grounds that a two-year delay between the commission of the offence and the issuing of a summons was unconscionable, stating:

> In the present case it seems to me that the delay which I have described was not only quite unjustified and quite unnecessary due to inefficiency, but it was a delay of such length that it could rightly be said to be unconscionable. That is by no means the end of the matter. It seems to me also that the delay here was of such a length that it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case.

In R. v. Hartley, the Wellington Court of Appeal relied on the abuse of process doctrine in quashing a conviction that rested on an unlawful arrest and the illegally obtained confession that followed.

76. Closely related to the abuse of process doctrine is the notion of supervisory powers. It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice, regardless of a specific violation. The U.S. Supreme Court has stated that courts have a 'duty of establishing and maintaining civilized standards of procedure and evidence' as an inherent function of the court's role in supervising the judicial system and process. As Judge Noonan of the U.S. Ninth Circuit Court of Appeals has stated:

> This court has inherent supervisory powers to dismiss prosecutions in order to deter illegal conduct. The "illegality" deterred by exercise of our supervisory power need not be related to a constitutional or statutory violation.

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The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process.

77. As noted above, the abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct. Considering the lengthy delay in the Appellant's case, 'it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case'. The following discussion, therefore, focuses on whether it would offend the Tribunal's sense of justice to proceed to the trial of the accused.

2. The right to be promptly informed of the charges during the first period of detention

78. In the present case, the Appellant makes several assertions regarding the precise date he was informed of the charges. However, using the earliest date, we conclude that the Appellant was informed of the charges on 10 March 1997 when the Cameroon Deputy Prosecutor showed him a copy of the Rule 40*bis* Order. This was approximately 11 months after he was initially detained pursuant to the *first* Rule 40 request.

79. Rule 40*bis* requires the detaining State to promptly inform the *suspect* of the charges under which he is arrested and detained. Thus, the issue is when does the right to be promptly informed of the charges attach to suspects before the Tribunal. Existing international norms guarantee such a right, and suspects held at the behest of the Tribunal pursuant to Rule 40*bis* are entitled, at a bare minimum, to the protections afforded under these international instruments, as well as under the rule itself. Consequently, we turn our analysis to these international standards.

80. International standards require that a suspect who is arrested be informed promptly of the reasons for his arrest and the charges against him. The right to be promptly informed of the charges serves two functions. First, it counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect. In this respect, the suspect needs to be promptly informed of the charges against him in order to challenge his detention, particularly in situations where the prosecuting authority is relying on the serious nature of the charges in arguing for the continued detention of the suspect. Second, the right to be promptly informed gives the suspect the information he requires in order to prepare his defence. The focus of the analysis in this Sub-section is on the first of these two functions. At the outset of this analysis, it is important to stress that there are two distinct periods when the right to be informed of the charges are applicable. The first period is when the suspect is initially arrested and detained. The second period is at the initial appearance of the accused after the indictment has been confirmed and the accused is in the Tribunal's custody. For purposes of the discussion in this Sub-section, only the first period is relevant.

81. The requirement that a suspect be promptly informed of the charges against him following arrest provides the 'elementary safeguard that any person arrested should know why he is deprived of his liberty'. The right to be promptly informed at this preliminary stage is also important because it affords the arrested suspect the opportunity to deny the offence and obtain his release prior to the initiation of trial proceedings.

82. International human rights jurisprudence has developed norms to ensure that this right is respected. For example, the suspect must be notified 'in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, as he sees fit, to apply to a court to

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challenge its lawfulness...'. However, there is no requirement that the suspect be informed in any particular way. Thus, at this initial stage, there is no requirement that the suspect be given a copy of the arrest warrant or any other document setting forth the charges against him; in fact, there is no requirement at this stage that the suspect be notified in writing at all, so long as the suspect is informed promptly.

83. The European Court of Human Rights has held that the required information need not be given in its entirety by the arresting officer at the 'moment of the arrest', provided that the suspect is informed of the legal grounds of his arrest within a sufficient time after the arrest. Moreover, the information may be divulged to the suspect in stages, as long as the required information is provided promptly. Whether this requirement is complied with requires a factual determination and is, therefore, case-specific. Consequently, we will briefly survey the jurisprudence of the Human Rights Committee and the European Court of Human Rights in interpreting the promptness requirement of Article 9(2) of the ICCPR, Article 5(2) of the ECHR and Article 7 of the ACHR.

84. As pointed out above, the Human Rights Committee held in Glenford Campbell v. Jamaica, that detention without the benefit of being informed of the charges for 45 days constituted a violation of Article 9(2) of the ICCPR. Under the jurisprudence of the European Court of Human Rights, intervals of up to 24 hours between the arrest and providing the information as required pursuant to ECHR Article 5 (2) have been held to be lawful. However, a delay of ten days between the arrest and informing the suspect of the charges has been held to run afoul of Article 5(2).

85. In the present case, the Appellant was detained for a total period of 11 months before he was informed of the general nature of the charges that the Prosecutor was pursuing against him. While we acknowledge that only 35 days out of the 11-month total are clearly attributable to the Tribunal (the periods from 17 April—16 May 1996 and 4—10 March 1997), the fact remains that the Appellant spent an inordinate amount of time in provisional detention without knowledge of the general nature of the charges against him. At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal—and not any other entity—that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated.

86. As noted above, in Bell v. DPP of Jamaica, the abuse of process doctrine was applied where unreasonable delay would have resulted in an oppressive result had the case gone to trial. Applying the guidelines set forth in that case convinces us that the abuse of process doctrine is applicable under the facts of this case. The Appellant was detained for 11 months without being notified of the charges against him. The Prosecutor has offered no satisfactory justifications for this delay. The numerous letters attached to one of the Appellant's submissions point to the fact that the Appellant was in continuous communication with all three organs of the Tribunal in an attempt to assert his rights. Moreover, we find that the effect of the Appellant's pre-trial detention was prejudicial.

3. The failure to resolve the *writ of habeas corpus* in a timely manner

87. The next issue concerns the failure of the Trial Chamber to resolve the Appellant's *writ of habeas corpus* filed on 29 September 1997. The Prosecutor asserts that *after* the Appellant filed the *writ of habeas corpus*, the President of the Tribunal wrote a letter to the Appellant informing the Appellant that the Prosecutor would be submitting an indictment shortly. In fact, the President's letter is dated *8 September 1997*, and the Appellant claims that the *writ* was filed on the basis of this letter from the President. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997. The Appellant asserts that 'the Registry without the consent

of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'. The Appellant also claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*. These assertions by the Appellant are, of course, impossible for him to prove, absent an admission by the Prosecutor. We note, however, that the Prosecutor has not directed the Appeals Chamber to any evidence to the contrary, and that the Appellant was never afforded an opportunity to be heard on the *writ of habeas corpus*.

88. Although neither the Statute nor the Rules specifically address *writs of habeas corpus* as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules. Moreover, this is a fundamental right and is enshrined in international human rights norms, including Article 8 of the Universal Declaration of Human Rights, Article 9(4) of the ICCPR, Article 5(4) of the ECHR and Article 7(6) of the ACHR. The Inter-American Court of Human Rights has defined the *writ of habeas corpus* as:

> [A] judicial remedy designed to protect personal freedom or physical integrity against arbitrary decisions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered.

Thus, this right allows the detainee to have the legality of the detention reviewed by the judiciary.

89. The European Court of Human Rights has held that the detaining State must provide recourse to an independent judiciary in all cases, whether the detention was justified or not. Under the jurisprudence of that Court, therefore, a *writ of habeas corpus* must be heard, even though the detention is eventually found to be lawful under the ECHR. Thus, the right to be heard on the *writ* is an entirely separate issue from the underlying legality of the initial detention. In the present case, the Appellant's right was violated by the Trial Chamber because the *writ* was filed but was not heard.

90. The Appeals Chamber is troubled that the Appellant has not been given a hearing on his *writ of habeas corpus*. The fact that the indictment of the Appellant has been confirmed and that he has had his initial appearance does not excuse the failure to resolve the *writ*. The Appellant submits that as far as he is concerned the *writ of habeas corpus* is still pending. The Appeals Chamber finds that the *writ of habeas corpus* is rendered moot by this Decision. Nevertheless, the failure to provide the Appellant a hearing on this *writ* violated his right to challenge the legality of his continued detention in Cameroon during the two periods when he was held at the behest of the Tribunal and the belated issuance of the indictment did not nullify that violation.

4. The duty of prosecutorial due diligence

91. Article 19(1) of the Statute of the Tribunal provides that the Trial Chambers shall ensure that accused persons appearing before the Tribunal are guaranteed a fair and expeditious trial. However, the Prosecutor, has certain responsibilities in this regard as well. For example, the Prosecutor is responsible for, *inter alia*: conducting investigations, including questioning suspects; seeking provisional measures and the arrest and transfer of suspects; protecting the rights of suspect, by ensuring that the suspect understands those rights; submitting indictments for confirmation; amending indictments prior to confirmation; withdrawing indictments prior to confirmation; and, of course, for actually prosecuting the case against the accused.

92. Because the Prosecutor has the authority to commence the entire legal process, through investigation

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and submission of an indictment for confirmation, the Prosecutor has been likened to the 'engine' driving the work of the Tribunal. Or, as one court has stated, '[T]he ultimate responsibility for bringing a defendant to trial rests on the Government and not on the defendant'. Consequently, once the Prosecutor has set this process in motion, she is under a duty to ensure that, within the scope of her authority, the case proceeds to trial in a way that respects the rights of the accused. In this regard, we note that some courts have stated that 'mere delay' which gives rise to prejudice and unfairness might by itself amount to an abuse of process. For example, in R. Grays Justices ex p. Graham, the Queen's Bench stated in *obiter dicta* that:

> [P]rolonged delay in starting or conducting criminal proceedings may be an abuse of process when the substantial delay was caused by the improper use of procedure or inefficiency on the part of the prosecution and the accused has neither caused nor contributed to the delay.

93. The Prosecutor has asserted that her 'abstention from proceeding against the Appellant-Defendant before 3 March 1997 was due to on-going investigation,. The Prosecutor further argues that she should not be barred from proceeding against the Appellant simply because she did not proceed against the Appellant at the first available opportunity. In putting forth this argument, the Prosecutor relies on Judge Shahabuddeen's Separate Opinion from the Kovačević Decision. In that Separate Opinion, Judge Shahabuddeen referred to United States v. Lovasco, a leading United States case on pre-indictment delay, wherein the Court stated:

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgement as to when to seek an indictment. Judges are not free, in defining 'due process', to impose on law enforcement officers our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function'. ... Our task is more circumscribed. We are to determine only whether the action complained of—here, compelling respondent to stand trial after the Government delayed indictment to investigate further—violates ... "fundamental conceptions of justice..." which "define the community's sense of fair play and decency"...

The Court continued:

> It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.

94. The facts in Lovasco are clearly distinguishable from those of the Appellant's case, and, therefore, we do not find the Supreme Court's reasoning persuasive. In Lovasco, the respondent was subjected to an 18-month delay between the alleged commission of the offences and the filing of the indictment. However, Mr. Lovasco had not been arrested during the 18-month delay and was not in custody during that period when the police were conducting their investigation. We also note that in United States v. Scott, in a dissent filed by four of the Court's nine Justices, (including Justice Marshall, the author of the Lovasco decision), the Lovasco holding regarding pre-indictment delay was characterised as a 'disfavored doctrine'.

95. Moreover, in the Kovačević Decision relied upon by the Prosecutor, the Appeals Chamber held that that the Rules provide a mechanism whereby the Prosecutor may seek to amend the indictment. Pursuant to Rule 50(A), the following scheme for amending indictments is available to the Prosecutor. The Prosecutor may amend an indictment, without prior leave, at any time before the indictment is confirmed. After the indictment is confirmed, but prior to the initial appearance of the accused, the

indictment may be amended only with the leave of the Judge who confirmed it. At or after the initial appearance of the accused, the indictment may be amended only with leave of the Trial Chamber seized of the case. The Prosecutor thus has the ability to amend indictments based on the results of her investigations. Therefore, the Prosecutor's argument that investigatory delay at the pre-indictment stage does not violate the rights of a suspect who is in provisional detention is without merit. Rule 40*bis* clearly requires issuance of the indictment within 90 days and the amendment process is available in situations where additional information becomes available to the Prosecutor.

96. Although a suspect or accused before the Tribunal is transferred, and not extradited, extradition procedures offer analogies that are useful to this analysis. In the context of extradition, several cases from the United States confirm that the prosecuting authority has a due diligence obligation with respect to accused awaiting extradition. For example, in Smith v. Hooey, the Supreme Court found that the Government had a 'constitutional duty to make a diligent, good-faith effort to bring [the defendant] before the court for trial'. In United States v. McConahy, the court held that the Government's obligation to provide a speedy resolution of pending charges is not relieved unless the accused fails to demand that an effort be made to return him and the prosecuting authorities have made a diligent, good faith effort to have him returned and are unsuccessful, or can show that such an effort would prove futile. We note that the Appellant made several inquiries of Tribunal officials regarding his status. 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.

97. Moreover, conventional law and the legislation of many national systems incorporate provisions for the protection of individuals detained pending transfer to the requesting State. We also note in this regard that the European Convention on Extradition provides that provisional detention may be terminated after as few as 18 days if the requesting State has not provided the proper documents to the requested State. In no case may the provisional detention extend beyond 40 days from the date of arrest.

98. Setting aside for the moment the Prosecutor's contention that Cameroon was solely responsible for the delay in transferring the Appellant, the only plausible conclusion is that the Prosecutor failed in her duty to take the steps necessary to have the Appellant transferred in a timely fashion. The Appellant has claimed that the Prosecutor simply forgot about his case, a claim that is, of course, impossible for the Appellant to prove. However, we note that after the Appellant raised this claim, the Prosecutor failed to rebut it in any form, relying solely on the argument that it was Cameroon's failure to transfer the Appellant that resulted in this delay. The Prosecutor provided no evidence that she contacted the authorities in Cameroon in an attempt to get them to comply with the Rule 40*bis* Order. Further, in the 3 June 1999 Scheduling Order, the Appeals Chamber directed the Prosecutor to answer certain questions and provide supporting documentation, including an explanation for the delay between the request for transfer and the actual transfer. Notwithstanding this Order, the Prosecutor provided no evidence that she contacted the Registry or Chambers in an effort to determine what was causing the delay.

99. While it is undoubtedly true, as the Prosecutor submits, that the Registry and Chambers have the primary responsibility for scheduling the initial appearance of the accused, this does not relieve the Prosecutor of some responsibility for ensuring that the accused is brought before a Trial Chamber 'without delay' upon his transfer to the Tribunal. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer, in violation of his right to an initial appearance 'without delay'. There is no evidence that the Prosecutor took any steps to encourage the Registry or Chambers to place the Appellant's initial appearance on the docket. Prudent steps in this regard can be demonstrated

through written requests to the Registry and Chambers to docket the initial appearance. The Prosecutor has made no such showing and the only logical conclusion to be drawn from this failure to provide such evidence is that the Prosecutor failed in her duty to diligently prosecute this case.

C. Conclusions

100. Based on the foregoing analysis, we conclude that the Appellant was in the constructive custody of the Tribunal from 4 March 1997 until his transfer to the Tribunal's detention unit on 19 November 1997. However, international human rights standards comport with the requirements of Rule 40*bis*. Thus, even if he was not in the constructive custody of the Tribunal, the period of provisional detention was impermissibly lengthy. Pursuant to that Rule, the indictment against the Appellant had to be confirmed within 90 days from 4 March 1997. However, the indictment was not confirmed in this case until 23 October 1997. We find, therefore, that the Appellant's right to be promptly charged pursuant to international standards as reflected in Rule 40*bis* was violated. Moreover, we find that the Appellant's right to an initial appearance, without delay upon his transfer to the Tribunal's detention unit under Rule 62, was violated.

101. Moreover, we find that the facts of this case justify the invocation of the abuse of process doctrine. Thus, we find that the violations referred to in paragraph 101 above, the delay in informing the Appellant of the general nature of the charges between the initial Rule 40 request on 17 April 1996 and when he was actually shown a copy of the Rule 40*bis* Order on 10 March 1997 violated his right to be promptly informed. Also, we find that the failure to resolve the Appellant's *writ of habeas corpus* in a timely manner violated his right to challenge the legality of his continued detention. Finally, we find that the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence.

D. The Remedy

102. In light of the above findings, the only remaining issue is to determine the appropriate remedy for the violation of the rights of the Appellant. The Prosecutor has argued that the Appellant is entitled to either an order requiring an expeditious trial or credit for any time provisionally served pursuant to Rule 101(D). The Appellant seeks unconditional immediate release.

103. With respect to the first of the Prosecutor's suggestions, the Appeals Chamber notes that an order for the Appellant to be expeditiously tried would be superfluous as a remedy. The Appellant is already entitled to an expedited trial pursuant to Article 19(1) of the Statute. With respect to the second suggestion, the Appeals Chamber is unconvinced that Rule 101(D) can adequately protect the Appellant and provide an adequate remedy for the violations of his rights. How does Rule 101(D) offer any remedy to the Appellant in the event he is acquitted?

104. We turn, therefore, to the remedy proposed by the Appellant. Article 20(3) states one of the most basic rights of all individuals: the right to be presumed innocent until proven guilty. In the present case, the Appellant has been in provisional detention since 15 April 1996—more than three years. During that time, he spent 11 months in illegal provisional detention at the behest of the Tribunal without the benefits, rights and protections afforded by being formally charged. He submitted a *writ of habeas corpus* seeking to be released from this confinement—and was never afforded an opportunity to be heard on this *writ*. Even after he was formally charged, he spent an additional 3 months awaiting his initial appearance, and several more months before he could be heard on his motion to have his arrest and detention nullified.

105. The Statute of the Tribunal does not include specific provisions akin to speedy trial statutes existing

in some national jurisdictions. However, the underlying premise of the Statute and Rules are that the accused is entitled to a fair and expeditious trial. The importance of a speedy disposition of the case benefits both the accused and society, as has been recognised by national courts:

> The criminal defendant's interest in prompt disposition of his case is apparent and requires little comment. Unnecessary delay may make a fair trial impossible. If the accused is imprisoned awaiting trial, lengthy detention eats at the heart of a system founded on the presumption of innocence. ... Moreover, we cannot emphasize sufficiently that the public has a strong interest in prompt trials. As the vivid experience of a witness fades into the shadow of a distant memory, the reliability of a criminal proceeding may become seriously impaired. This is a substantial price to pay for a society that prides itself on fair trials.

106. The crimes for which the Appellant is charged are very serious. However, in this case 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 available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him. This finding is consistent with Rule 40*bis*(H), which requires release if the suspect is not charged within 90 days of the commencement of the provisional detention and Rule 40(D) which requires release if the Prosecutor fails to issue an indictment within 20 days after the transfer of the suspect. Furthermore, this limitation on the period of provisional detention is consistent with international human rights jurisprudence. Finally, this decision is also consistent with national legislation dealing with due process violations that violate the right of the accused to a prompt resolution of his case.

107. Considering the express provisions of Rule 40*bis*(H), and in light of the Rwandan extradition request for the Appellant and the denial of that request by the court in Cameroon, the Appeals Chamber concludes that it is appropriate for the Appellant to be delivered to the authorities of Cameroon, the State to which the Rule 40*bis* request was initially made.

108. The Appeals Chamber further finds that this dismissal and release must be with prejudice to the Prosecutor. Such a finding is consistent with the jurisprudence of many national systems. Furthermore, violations of the right to a speedy disposition of criminal charges have resulted in dismissals with prejudice in Canada, the Philippines, the United States and Zimbabwe. As troubling as this disposition may be to some, the Appeals Chamber believes that to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process. Moreover, we find that it is the only effective remedy for the cumulative breaches of the accused's rights. Finally, this disposition may very well deter the commission of such serious violations in the future.

109. We reiterate that what makes this case so egregious is the combination of delays that seemed to occur at virtually every stage of the Appellant's case. The failure to hear the *writ of habeas corpus*, the delay in hearing the Extremely Urgent Motion, the prolonged detention of the Appellant without an indictment and the cumulative effect of these violations leave us with no acceptable option but to order the dismissal of the charges with prejudice and the Appellant's immediate release from custody. We fear that if we were to dismiss the charges without prejudice, the Appellant would be subject to immediate re-arrest and his ordeal would begin anew. Were we to dismiss the indictment without prejudice, the strict 90-day limit set forth in Rule 90*bis*(H) could be thwarted by repeated release and re-arrest, thereby giving the Prosecutor a potentially unlimited period of time to prepare and submit an indictment for confirmation. Surely, such a 'revolving door' policy cannot be what was envisioned by Rule 40*bis*. Rather, as pointed out above, the Rules and jurisprudence of the Tribunal permit the Prosecutor to seek

to amend the indictment if additional information becomes available. In light of this possibility, the 90-day rule set forth in Rule 40*bis* must be complied with.

110. Rule 40*bis*(H) states that in the event that the indictment has not been confirmed and an arrest warrant signed within 90 of the provisional detention of the suspect, the 'suspect shall be released'. The word used in this Sub-rule, 'shall', is imperative and it is certainly not intended to permit the Prosecutor to file a new indictment and re-arrest the suspect. Applying the principle of effective interpretation, we conclude that the charges against the Appellant must be dismissed with prejudice to the Prosecutor. Moreover, to order the release of the Appellant without prejudice—particularly in light of what we are certain would be his immediate re-arrest—could be seen as having cured the prior illegal detention. That would open the door for the Prosecutor to argue (assuming *arguendo* the eventual conviction of the Appellant) that the Appellant would not then be entitled to credit for that period of detention pursuant to Rule 101(D), on the grounds that the release was the remedy for the violation of his rights. The net result of this could be to place the Appellant in a worse position than he would have been in had he not raised this appeal. This would effectively result in the Appellant being punished for exercising his right to bring this appeal.

111. The words of the Zimbabwean Court in the Mlambo case are illustrative. In ordering the dismissal of the charges and release of the accused, the Zimbabwean Court held:

> 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. In this case it has been grievously infringed and the unfortunate result is that a hearing cannot be allowed to take place. To find otherwise would render meaningless a right enshrined in the Constitution as the supreme law of the land'.

We find the forceful words of U.S. Supreme Court Justice Brandeis compelling in this case:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself: it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

112. The Tribunal—an institution whose primary purpose is to ensure that justice is done—must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals—including those charged with unthinkable crimes—would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.

V. DISPOSITION

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113. For the foregoing reasons, THE APPEALS CHAMBER hereby:

Unanimously,

1. ALLOWS the Appeal, and in light of this disposition considers it unnecessary to decide the 19 October 1999 Notice of Appeal or the 26 October 1999 Notice of Appeal;

Unanimously,

2. DISMISSES THE INDICTMENT with prejudice to the Prosecutor;

Unanimously,

3. DIRECTS THE IMMEDIATE RELEASE of the Appellant; and

By a vote of four to one, with Judge Shahabuddeen dissenting,

4. DIRECTS the Registrar to make the necessary arrangements for the delivery of the Appellant to the Authorities of Cameroon.

Judge Shahabuddeen appends a Separate Opinion to this Decision.

Judge Nieto-Navia appends a Declaration to this Decision.

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

Gabrielle Kirk McDonald
Presiding

Mohamed Shahabuddeen

Lal Chand Vohrah

Wang Tieya

Rafael Nieto-Navia

Dated this third day of November 1999
At The Hague,
The Netherlands.

[Seal of the Tribunal]

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Appendix A

Chronology of Events

15 April 1996:	Cameroon arrests twelve to fourteen Rwandans on the basis of international arrest warrants. The accused was among those arrested. The parties disagree with respect to the question of under whose authority the accused was detained. The Appellant asserts he was arrested by Cameroon on the basis of a request from the Prosecutor, while the Prosecutor contends that the Appellant was arrested on the basis of international arrest warrants emanating from the Rwandan and Belgian authorities.
17 April 1996:	The Prosecutor requests that provisional measures under Rule 40 be taken in relation to the Appellant.
6 May 1996:	The Prosecutor seeks a three-week extension for the detention of the Appellant in Cameroon.
16 May 1996:	The Prosecutor informs Cameroon that she seeks to transfer and hold in provisional detention under Rule 40*bis* four of the individuals detained by Cameroon, *excluding* the Appellant.
31 May 1996:	The Court of Appeal in Cameroon issues a Decision to adjourn *sine die* consideration of the Rwandan extradition proceedings concerning the Appellant as the result of a request by the Cameroonian Deputy Director of Public Prosecution. In support of his request, the Deputy Director cites Article 8(2) of the ICTR Statute.
15 October 1996:	The Prosecutor sends the Appellant a letter indicating that Cameroon is not holding the Appellant at her behest.
21 February 1997:	The Cameroon court rejects Rwanda's extradition request for the Appellant. The court orders the Appellant's release, but he is immediately re-arrested at the behest of the Prosecutor pursuant to Rule 40. This is the second request under Rule 40 for the provisional detention of the Appellant.
24 February 1997:	Pursuant to Rule 40*bis*, the Prosecutor requests the transfer of the accused to Arusha.
4 March 1997:	An Order pursuant to Rule 40*bis* (signed by Judge Aspegren on 3 March 1997), is filed. This Order requires Cameroon to arrest and transfer the Appellant to the Tribunal's detention unit.
10 March 1997:	The Appellant is shown a copy of the Rule 40*bis* Order, including the general nature of the charges against him.
29 September 1997:	The Appellant files a *writ of habeas corpus*.
21 October 1997:	The President of Cameroon signs a decree ordering the Appellant's transfer to the Tribunal's detention unit.
22 October 1997:	The Prosecutor submits the indictment for confirmation.

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23 October 1997:	Judge Aspegren confirms the indictment against the Appellant and issues a Warrant of Arrest and Order for Surrender to Cameroon.
19 November 1997:	The Appellant is transferred to Arusha.
23 February 1998:	The Appellant makes his initial appearance.
24 February 1998:	The Appellant files the Extremely Urgent Motion seeking to nullify the arrest.
11 September 1998:	The Trial Chamber hears the arguments of the parties on the Motion.
17 November 1998:	The Trial Chamber dismisses the Extremely Urgent Motion *in toto*.
27 November 1998:	The Appellant notified the Appeals Chamber of his intention to appeal, claiming that he did not receive the Decision until 27 November 1998. On that same day, he signs his Notice of Appeal.

AUTHORITIES

12. *Prosecutor v. Naletilic and Martinovic, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment*, Case No. IT-98-34-PT, Trial Chamber, 14 February 2001.

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IN THE TRIAL CHAMBER

Before:
Judge Almiro Rodrigues, Presiding
Judge Fouad Riad
Judge Patricia Wald

Registrar:
Mr. Hans Holthuis

Decision of:
14 February 2001

THE PROSECUTOR

v.

MLADEN NALETILIC aka "TUTA"
and
VINKO MARTINOVIC aka "ŠTELA"

DECISION ON VINKO MARTINOVIC'S OBJECTION TO THE AMENDED INDICTMENT AND MLADEN NALETILIC'S PRELIMINARY MOTION TO THE AMENDED INDICTMENT

The Office of the Prosecutor:

Mr. Kenneth Scott

Counsel for the Accused:

Mr. Kresimir Krsnik, for Mladen NALETILIC
Mr. Branko Seric, for Vinko MARTINOVIC

TRIAL CHAMBER I (hereafter "Chamber") of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereafter "Tribunal") is seised of Vinko Martinovic's Objection to the Amended Indictment, dated 27 December 2000 (hereafter "Martinovic's Objections"), and the Defence's Preliminary Motion, dated 3 January 2001, filed by the accused Mladen Naletilic (hereafter "Naletilic's Objections"). Both Martinovic's Objections, and Naletilic's Objections are timely filed pursuant to Rule 72 of the Rules of Procedure and Evidence of the Tribunal (hereafter "Rules").

The indictment originally filed against Martinovic and Naletilic is dated 18 December 1998 (hereafter "Original Indictment"). By decision dated 28 November 2000 (hereafter "November Decision"),[1] the

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Trial Chamber granted leave for the Prosecution to amend Count 5 of the Original Indictment to add a further charge relating to Article 52 of Geneva Convention III, concerning dangerous or humiliating labour. The original Count 5 referred only to Articles 49 and 50 of Geneva Convention III, and Article 51 of Geneva Convention IV. Accordingly, the Prosecutor filed an amended indictment dated 4 December 2000 (hereafter "Amended Indictment"), and each of the accused entered a plea of "not guilty" to the new charge on 7 December 2000. In accordance with Rule 50 (C), each of the accused had a period of 30 days to file preliminary motions pursuant to Rule 72 in respect of the new charge.

I. Preliminary Objections Made by the Accused

The points raised in Martinovic's Objections, and Naletilic's Objections are as follows:

1. An indictment cannot be amended in the absence of new factual allegations or new evidence, unless it is advantageous for the accused. The quantity of criminal charges facing the accused cannot be increased at this late stage of the proceedings. It is argued that the criminal laws of ex-Yugoslavia, as well as those of Bosnia and Herzegovina and the Republic of Croatia only allow an amendment of the indictment to include a new offence if supported by new evidence adduced in the course of the proceedings. Furthermore, it is argued that the accused cannot properly prepare his defence if the indictment is subject to amendment at any moment. Similar objections were raised by the accused to the Prosecutor's Motion to Amend Count 5.[2]

2. The charges are cumulative, in that multiple charges (including charges under Articles 2, 3 and 5 of the Statute) are levied on the basis of the same conduct.

3. The accused Naletilic also argues that it is not clear which acts in Count 5 are alleged to be violations of Article 49, 50 and 52.

II. Arguments of the Prosecutor

The Prosecutor filed a response to these objections dated 18 January 2001, arguing that:

1. The objections raised merely repeat those raised by each of the accused in their replies to the Prosecutor's motion to amend Count 5. In its November Decision the Trial Chamber found that no prejudice was caused to the accused by allowing the amendment. Therefore, the issue cannot be reconsidered now under the guise of an objection to the form of the indictment.

2. The issue of cumulative charges was raised earlier in the proceedings, and the Trial Chamber held that the matter should be deferred to the end of the trial.

III. Discussion

A. Circumstances in which amendment of the indictment is warranted

Rule 50 of the Rules of Procedure and Evidence governs the amendment of indictments, and provides as follows:

Amendment of Indictment

(A) (i) The Prosecutor may amend an indictment:
(ii) at any time before its confirmation, without leave;

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(iii) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and

(a) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.
(b) After the assignment of the case to a Trial Chamber it shall not be necessary for the amended indictment to be confirmed.
(c) Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.
(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

After the assignment of the case to a Trial Chamber, Rule 50 A (i)(c) simply directs that the indictment can be amended "with the leave of [the] Trial Chamber or a Judge of [the] Chamber, after having heard the parties." Therefore, pursuant to Rule 50, the discretion as to whether to allow an amendment is left to the Judge or Trial Chamber in question.

There is nothing in the Rules to suggest that an indictment can only be amended if new factual allegations are added. Furthermore, while Rules 50 (B) and (C) expressly address the issue of new charges, the rule does not specify that new charges can only be based upon new facts. In contemplating that the accused may require additional time to prepare for trial as a result of an amendment that involves adding a further count, the rule is simply concerned to ensure that the accused is not prejudiced in the conduct of his or her defence.

Although there are no express limits on the exercise of the discretion contained in Rule 50, when viewing the Statute and Rules as a whole, it is obvious that it must be exercised with regard to the right of the accused to a fair trial. In particular, depending on the circumstances of the case, the right of the accused to an expeditious trial, to be promptly informed of the charges against him or her, and to have adequate time and facilities for the preparation of his or her defence, potentially arise when considering objections to an amended indictment.[3]
Virtually every indictment filed by the Prosecutor in matters before the ICTY and the International Criminal Tribunal for Rwanda (ICTR) has been amended at least once. The resulting jurisprudence does not support the limitation on the exercise of the discretion in Rule 50 advocated by the accused in this case. Rather, the question to be decided is whether the amendment results in any prejudice to the accused.[4]

In determining whether any prejudice to the accused will follow from an amendment to the indictment, regard must be had to the circumstances of the case as a whole. For example, in the case of *Prosecutor* v *Kovacevic*, the Appeals Chamber decided that the Prosecutor should be given leave to add 14 new counts to the indictment, (which would turn the eight-page indictment into one of 18 pages), for which the defence would require an additional 7 months to prepare.[5] In its decision, the Appeals Chamber, *inter alia*, emphasised that the delay to the trial of the accused resulting from the amendment was not unreasonable in light of the complexity of the case. The Appeals Chamber also found that, where the accused has been told of the crimes contained in the existing indictment at the time of his arrest, his right to be promptly informed of the charges against him has not been violated. In his separate concurring opinion, Judge Shahabuddeen emphasised that, in light of the complexities inherent in war

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crimes prosecutions, a flexible approach to the question of amending indictments is particularly important.[6]

The addition of new charges in the absence of new factual or evidentiary material has been accepted in other cases before the ICTY and the ICTR. For example, in the case of *Prosecutor* v *Krstic* an amended indictment was filed by the Prosecutor in October 1999 charging the accused for the first time with deportation as a crime against humanity, or in the alternative, inhumane acts (forcible transfer) as a crime against humanity.[7] The original indictment contained facts upon which such a charge could be brought, and no substantive factual allegations were added to the amended indictment to support the new charge of deportation/forcible transfer.[8] In the case of *Prosecutor* v *Niyitegeka*, the Trial Chamber expressly accepted that new charges could be added to an indictment to "allege an additional legal theory of liability with no new acts".[9]

Civil law and common law jurisdictions have different principles governing the amendment of indictments. In civil law systems, indictments are scrutinised by the investigating judge and amendments tend to be less controversial.[10] While some common law jurisdictions take a restrictive approach to permitting amendments,[11] most of the jurisdictions surveyed recognise that the fundamental point of reference in determining whether an amendment will be permitted is whether there is any prejudice to the accused.[12]

The jurisprudence of the ICTY and the ICTR on the exercise of the discretion contained in Rule 50 thus demonstrates that a decision to accept an amendment will normally be forthcoming unless prejudice can be shown to the accused. This recognises the duty of the Prosecutor to prosecute the accused to the full extent of the law.[13] In the present case the amendment made was not substantial in scope,[14] there is no suggestion that the Prosecution has sought an improper tactical advantage,[15] and the amendment has certainly not delayed the trial of the accused, which is not yet scheduled to begin. Given that the facts upon which the new count is based were in the Original Indictment, there has been no need for the accused to conduct any new inquiries, approach new witnesses, or expend any additional resources. Accordingly, the accused have failed to establish that they have been prejudiced in the preparation of their defence following the amendment of Count 5.

B. Cumulative Charging

Objections to the cumulative nature of the charges have been previously raised in the present case. In a decision dated 15 February 2000, the Trial Chamber rejected the objections of Martinovic, based on cumulative charging.[16] The Trial Chamber noted that the Tribunal's jurisprudence on this matter was still evolving. Reference was made to the principles distilled in the Kupreskic Judgement of 14 January 2000,[17] namely that cumulative charges will be permitted where each offence requires proof of an element that the other does not (the "different elements" test), or alternatively, where each offence protects substantially different values (although this would seldom be used as an independent ground for permitting cumulative charges). Ultimately, however, the Trial Chamber saw no reason to depart from the practice of leaving the issue to be determined at the end of trial.

The accused have raised the issue of cumulative charges again as a preliminary objection on the form of Count 5 as amended. The Trial Chamber notes that the objection is framed in very general terms, and is not limited to arguments based on the amendment to Count 5. The issue of cumulative charging is only legitimately raised here as a preliminary objection insofar as it relates to the new charge, and the Trial Chamber will only consider it to that extent.

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The Prosecutor has amended Count 5 of the Original Indictment by adding a charge based on Article 52 (humiliating and dangerous labour) of the Third Geneva Convention to the existing charges based on Article 49 (General Observations) of the Third Geneva Convention, Article 50 (Authorised Work) of the Third Geneva Convention, and Article 51 (Enlistment of Labour) of the Fourth Geneva Convention. The same facts are relied upon to support all of these charges. On the basis of the test set out by the Trial Chamber in the Kupreškic Judgement, Article 52 could be viewed as a genuinely separate offence that can be charged in addition to the existing charges in Count 5 of the Indictment. In particular, each offence requires proof of an element that the other does not. For example, in order to prove a violation of Article 50 of Geneva Convention III, it is necessary to prove that prisoners of war have been engaged in certain prohibited categories of work. It is not necessary to prove that this work is also dangerous or humiliating. By contrast, in order to prove a breach of Article 52 of the Geneva Convention III, it is necessary to prove that the work is dangerous or humiliating. It is not necessary to prove that it falls outside the categories of work specified in Article 50 of Geneva Convention III. Insofar as Article 51 of Geneva Convention IV is concerned, it is necessary to prove, *inter alia*, that the alleged victims of the offence were protected persons within the meaning of Geneva Convention IV, whereas for Article 52, it is necessary to prove, *inter alia*, that the alleged victims were prisoners of war within the meaning of Geneva Convention III. To this extent, each provision could be considered as requiring proof of an element that the other does not and, in addition, seeking to protect a different value: the treatment accorded to civilians in one case, and the treatment accorded to prisoners of war in the other. Article 49 of Geneva Convention III specifies that only prisoners of war who are physically fit may be required to work, and specifies the circumstances in which non-commissioned officers, and officers may work. Consequently, to prove a violation of this article it would be necessary to show that somebody who was not physically fit was compelled to work, or that the rules respecting the work of officers had been breached. None of these things are required to prove a breach of Article 52. Further, at least insofar as Article 49 relates to the work of officers, it seeks to protect quite a different value from Article 52, namely respect for the status of officers.

Nonetheless, the Tribunal's jurisprudence on cumulative charges is still far from clear, and we expect the matter will be considered in detail in the forthcoming judgement by the Appeals Chamber in the *Celebici* case. For instance a distinction may be drawn between cumulative charging on the one hand, and cumulative convictions and penalties on the other. Both of these issues were considered in the Kupreškic Judgement. As regards cumulative charging, the Trial Chamber stated that the Prosecutor:[18]

> (a) may make cumulative charges whenever it contends that the facts charged violate simultaneously two or more provisions of the Statute (in accordance with the criteria discussed by the Trial Chamber in the course of its judgement, and outlined above).
> (b) should charge in the alternative rather than cumulatively whenever an offence appears to be in breach of more than one provision, depending on the elements of the crime the Prosecution is able to prove....
> (c) should refrain, as much as possible, from making charges based on the same facts but under excessive multiple heads, whenever it would not seem warranted to contend...that the same facts are simultaneously in breach of various provisions of the Statute.

However, bearing in mind that the fundamental harm to be guarded against by the prohibition of cumulative charges is to ensure that an accused is not punished more than once in respect of the same criminal act, there may be less reason for refusing to allow cumulative charging, as distinct from cumulative convictions or penalties. A strict prohibition on cumulative charging could impede the work of the Prosecutor. The Prosecutor may not always be in a position to select between charges prior to the evidence being presented during trial, and the crimes over which the Tribunal has jurisdiction are frequently broad and yet to be clarified in the jurisprudence of the Tribunal. This was highlighted in the Kupreškic Judgement where the Trial Chamber stated that "[u]nlike provisions of national criminal

codes...each Article of the Statute does not confine itself to indicating a single category of well defined acts" but instead "embraces broad clusters of offences sharing certain *general* legal ingredients."[19] As the Tribunal's case law develops, and elements of each offence are clarified, it will become easier to identify overlap in particular charges prior to the trial, but at present, and certainly in this case, it is enough that permitting cumulative charging results in no substantial prejudice to an accused.

C. Relationship between the Facts and the Charges

The accused Naletilic has argued that it is not clear which acts in Count 5 are alleged to be violations of Article 49, 50 and 52. In the Amended Indictment the Prosecutor has included 10 paragraphs of factual allegations as the basis for counts 2-8, adopting the usual drafting practice employed throughout the indictments. In many cases it is obvious which factual allegations relate to each individual charge. Where the allegations involve civilians, they go to Article 51 of Geneva Convention IV. Where they relate to prisoners of war, they go the relevant articles of the Geneva Convention III. As between Articles 49, 50 and 52 of Geneva Convention III, there is some overlap. For example, allegations about forcing prisoners of war to march on combat lines carrying fake weapons relate to both Articles 50 (prohibiting work of a military character) and 52 (prohibiting humiliating or dangerous work). However, in accordance with our discussion on cumulative charges, the use of the same facts to support more than one offence charged is permissible under the circumstances, and, in this case, does not prejudice the accused in the preparation of his defence.

IV. DISPOSITION

FOR THE FOREGOING REASONS

TRIAL CHAMBER I

HEREBY REJECTS Martinovic's Objections and Naletilic's Objections.

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

Almiro Rodrigues
Presiding Judge

Dated this 14th day of February 2001,
At The Hague,
The Netherlands

(Seal of the Tribunal)

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1. *Prosecutor* v *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Decision on Prosecution Motion to Amend Count 5 of the Indictment", 28 November 2000.
2. See *Prosecutor* v *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Prosecutor's Motion to Amend Count 5 of the Indictment", 11 October 2000; *Prosecutor* v *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Statement of the Defence of Mladen Naletilic to the Prosecutor's Statement in Respect of Pre-Trial Filings of 11 October 2000", 24 October 2000; and *Prosecutor* v *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Declaration of the Defence for the Accused Vinko

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Martinovic to the Pre-Trial Documents Submitted by the Prosecutor", 23 October 2000.
3. The right of the accused to a fair trial is guaranteed in Article 20 of the Statute of the Tribunal (hereafter "Statute"), which provides that a trial must be "fair and expeditious...". Article 21 (4) (a) of the Statute further provides that the accused must be " informed promptly and in detail in a language which he understands of the nature of and cause of the charge against him"; Article 21 (4)(b) provides that an accused must "have adequate time and facilities for the preparation of his defence"; and Article 21 (4) (c) provides that an accused must be "tried without undue delay". See also Rule 59 *bis* (B) which specifies that, "at the time of being taken into custody, an accused shall be informed immediately, in a language the accused understands, of the charges against him or her." These guarantees are substantially based upon human rights standards enshrined in various international instruments. See for example, Article 9 (2) of the International Covenant on Civil and Political Rights (ICCPR), Article 14 (3) ICCPR, Article 5 (3) European Convention on Human Rights (ECHR), and Article 6 ECRH.
4. See for example, *Prosecutor* v *Musema*, Case No. ICTR096-13-T, "Decision on the Prosecutor's Request for Leave to Amend the Indictment", 6 May 1999, where the Trial Chamber held that:

> ...Rule 50 of the Rules does not explicitly prescribe a time limit within which the Prosecutor may file to amend the Indictment, leaving it open to the Trial Chamber to consider the motion in light of the circumstances of each individual case. A key consideration would be whether or not, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial. In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber.

In *Prosecutor* v *Kabiligi and Ntabakuze*, Case No. ICTR-97-34-I/ICTR-97-30-I, "Decision on the Prosecutor's Motion to Amend the Indictment", 8 October 1999 at para.43, the Trial Chamber noted that Rule 50 "does not lay down any specific standard of proof for the amendment of an indictment. Therefore, on a strict interpretation of this Rule, it is a matter of the discretion of the Trial Chamber whether or not it allows an amendment of an indictment." See generally: *Prosecutor* v *Barayagwiza*, Case No. ICTR-97-19-I, "Decision on the Prosecutor's Request for Leave to File and Amended Indictment", 11 April 2000; *Prosecutor* V *Kajelijeli*, Case No. ICTR-98-44A-T, "Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave To File an Amended Indictment" 25 January 2001; and *Prosecutor* v *Niyitegeka*, Case No. ICTR-96-14-I, "Decision on Prosecutor's Request for Leave to File an Amended Indictment, 21 June 2000 (hereafter "*Niyitegeka* Decision").
5. The Appeals Chamber rendered an oral decision on 29 May 1998, and written reasons were given on 2 July 1998. See *Prosecutor* v *Kovacevic*, Case No. IT-97-24-PT, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", 2 July 1998 (hereafter "*Kovacevic* Appeals Chamber Decision"). The Trial Chamber had refused to permit the amendment. See *Prosecutor* v *Kovacevic*, Case No. IT-97-24-PT, "Decision on Prosecutor's Request to File an Amended Indictment", 5 March 1998 (hereafter "*Kovacevic* Trial Chamber Decision")
6. *Prosecutor* v *Kovacevic*, Case No. IT-97-24-PT, "Separate Opinion of Judge Mohamed Shahabuddeen", 2 July 1998.
7. *Prosecutor* v *Krstic*, Case No. IT-98-33-PT, "Amended Indictment", 27 October 1999.
8. See also *Prosecutor* v *Musema*, Case No. ICTR-96-13-T, "Decision on the Prosecutor's Request for Leave to Amend the Indictment", 18 November 1998, granting leave for the Prosecutor to, *inter alia*, add a new charge of complicity in genocide. No new facts were introduced to support the charge, although the new charge was included as an alternative to the existing charge of genocide, rather than as an additional count.
9. See *Niyitegeka* Decision, *supra* note 4, at para 33 (1) (ii).
10. See the discussion in *Kovacevic* Trial Chamber Decision, *supra* note 5 at para 10. See also, Article 337 of the Yugoslav Law on Criminal Procedure Senacted by the Socialist Federal Republic of Yugoslavia Assembly, 24 December 1976C which stipulates that:

> (1) If during the trial the prosecutor finds that the evidence presented demonstrates a change in the state of the facts from that presented in the indictment or accusation, he may during the trial orally amend the indictment or accusation, and he may file a motion that the trial be adjourned so that a new indictment or accusation be prepared.
> (2) In such case the court may adjourn the trial for purposes of preparation of the defense.
> (3) If the panel allows adjournment of the trial for preparation of a new indictment or accusation, it shall set the date by which the prosecutor must file the indictment or accusation. A copy of the new indictment or accusation shall be served on the accused, but no traverse of that indictment or accusation is allowed. If the Prosecutor does not file the indictment or accusation by the date specified, the panel shall resume the trial on the basis of the previous indictment or accusation.

Article 332 of the Federation of Bosnian Herzegovina Criminal Procedure Code (1998) is in similar terms.

11. For example, US Federal Rule of Criminal Procedure 7 (e) provides that "[t]he court may permit an information to be

amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." The question as to what will constitute an 'additional or different offense" has been controversial in the US. See LaFave and Israel, *Criminal Procedure*, 2nd Ed, at 19.5C

12. See for example, the English Indictments Act of 1915 s 5; New Zealand Crimes Act (1961) s. 335 (which has been interpreted to permit the addition of a new count "that is additional or cumulative with the real issue being whether there was prejudice to the accused." [See *Bristow* [1996] 2 NZLR 252]) The Criminal Procedure (Scotland) Act of 1995, s 96(3) states that amendments that change the "character of the offence charged" are not permitted. However, this provision has been interpreted as specifying that the character of the charge must not be changed "to such a degree as to prejudice the accused's defence on the merits". See *Criminal Procedure (Scotland) Act 1995*, 2nd Ed. Annotated by I. Bradley, and R. Shiels, (1999).

13. See for example, *Niyitegeka* Decision, *supra* note 4, at para. 27.

14. In the *Kovacevic* Appeals Chamber Decision, *supra* note 5, at para. 24, it was held that the size of the amendment may be taken into account but, of itself, is unlikely to afford a basis for refusing to allow an amendment.

15. See *Ibid*, at para.32, recognising that, if the Prosecutor has sought an improper tactical advantage, that is a matter determining whether there has been undue delay in violation of the right of the accused to a fair trial.

16. *Prosecutor v Naletilic and Martinovic*, Case No. IT-98-34-PT, "Decision on Defendant Vinko Martinovic's Objection to the Indictment, 15 February 2000.

17. *Prosecutor v Kupreskic*, Case No. IT-95-16-T, "Judgement" 14 January 2000, at paras. 681-682, 693.

18. *Ibid*, at para. 727

19. *Ibid*, at para 697.

AUTHORITIES

13. *Prosecutor v. Kajelijeli, Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File and Amended Indictment*, Case No. ICTR-98-44A-T, Trial Chamber, 25 January 2001.

OR: ENG

TRIAL CHAMBER II

Before:
Judge Laïty Kama
Judge William H. Sekule
Judge Mehmet Güney

Registrar: Agwu U. Okali

Date: 25 January 2001

The Prosecutor
v.
Juvénal KAJELIJELI

Case No. ICTR-98-44A-T

DECISION ON PROSECUTOR'S MOTION TO CORRECT THE INDICTMENT DATED 22 DECEMBER 2000 AND MOTION FOR LEAVE TO FILE AN AMENDED INDICTMENT

WARNING TO THE PROSECUTOR'S COUNSELS PURSUANT TO RULE 46(A)

The Office of the Prosecutor:
Ken Fleming
Don Webster
Ifeoma Ojemeni

Counsel for the Accused:
Lennox Hinds

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II, composed of Judges Laïty Kama, Presiding, William H. Sekule, and Mehmet Güney;

BEING SEIZED of the Prosecutor's "Urgent Motion for Leave to File an Amended Indictment," and the "Brief in Support of Prosecutor's Motion for Leave to File an Amended Indictment, " and the attached proposed amended Indictment, filed on 4 January 2001, (the "Motion to Amend the Indictment");

BEING SEIZED of the Prosecutor's "Motion to Correct an Indictment dated 22 December 2000, filed pursuant to the Trial Chamber II order of 12 December 2000," and the attached separate Indictment of 22 December 2000 as Annexure A, the Counts against the Accused as enumerated and framed in the Indictment of 29 August 1998 as Annexure B, and the corrections requested to be made in the Indictment of 22 December 2000 as Annexure C, filed on 10 January 2001, (the "Motion to Correct the Indictment");

CONSIDERING the Response of the Defense in "opposition to the Prosecutor's Request for Leave to File an Amended Indictment," filed on 17 January 2001, (the "Defense Response");

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 50;

NOTING that, Juvénal Kajelijeli (the "Accused") was arrested in Cotonou, Benin, on 5 June 1998 and that Judge Navanethem Pillay confirmed the Indictment against the Accused on 29 August 1998;

NOTING that on 22 December 2000 the Prosecutor filed a separate Indictment as ordered in the oral Decision of 12 December 2000 (the "Indictment of 22 December 2000");

HAVING HEARD the Parties on 22 January 2001, the Chamber now considers the Motions;

AFTER HAVING DELIBERATED

1. The Chamber will first layout the History and background of the Motions brought with respect to the Indictment to this date, then review the Motion to Correct the Indictment of 22 December 2000 and then decide upon the Motion to Amend the Indictment.

History and background of the Motions and Decisions pertaining to the Accused's Indictment

2. On 6 July 2000, the Chamber granted a separate trial to the Defence of the Accused Kajelijeli and consequently ordered that the Prosecutor prepare a separate indictment from the August 1998 joint Indictment.

3. The Prosecutor filed the separate Indictment pertaining to Kajelijeli entitled "Amended Indictment" on 15 August 2000.

4. The Prosecutor subsequently filed a Motion to Correct Amended Indictment accompanied with a Supporting Brief on 29 August 2000.

5. On 6 September 2000, the Defence Counsel requested clarifications on whether the Prosecutor should have filed an "Amended Indictment" or a new separate Indictment.

6. On 12 October 2000, Judge Sekule, designated by the Trial Chamber, delivered a Decision on the Prosecutor's Motion to correct the Indictment, granting the Prosecutor leave to correct the Indictment and ordering that the new Indictment, entitled "separate Indictment" or "Indictment" be filed within 15 days.

7. This Indictment was filed on 25 October 2000, but served on 30 October 2000 to the Accused.

8. At a Pre-Trial Conference held on 12 December 2000, the Defence challenged the Indictment of 30 October 2000 in that it was different from that of August 1998, in that the Accused was now facing new charges.

9. The Indictment of 25 October 2000 was indeed found to be in violation of the Chamber's 6 July 2000 Order in an Oral Decision rendered on 12 December 2000 by the Trial Chamber.

10. In this Decision, the Prosecutor was ordered, yet again, to: *"... fully comply with the Decision of 6 July 2000 and ...to file a separate indictment pertaining only to the Accused... from the existing confirmed indictment... in the same order and in the same manner as the original indictment"*;

11. The Prosecutor filed again, on 22 December 2000, the latest version of the separate Indictment, followed by two Motions, one filed on 10 January 2001 seeking leave to correct this Indictment, the other, filed on 3 January 2000, seeking leave to amend the Indictment.

The Motion to Correct the Indictment

12. The Prosecutor seeks leave of the Chamber to correct errors made in the Indictment filed on 22 December 2000 pursuant to the Chamber's orders of 6 July, 12 October and 12 December 2000 in:

(a) adding page 12 of the Indictment, which was omitted,

(b) formulating Counts 4, 8, 10 and 11 in the same manner and the same order as in the August 1998 Indictment;

(c) correcting typographical errors in specific paragraphs referred to under Article 6(1) and 6(3) in all the counts of the Indictment as filed.

The Defence made no objection to this request.

13. The Chamber agrees that the corrections requested by the Prosecutor are necessary, provided that page 12 of the Indictment is not to be replaced with pars. 4.26 to 4.28 at page 24 of the Indictment of August 1998, as suggested by Annexure C to the Request of the Prosecutor, but by the actual page 12 entitled *"2. Territorial, Temporal and Material Jurisdiction"*.

14. After a close scrutiny of the Indictment filed on 22 December 2000, the Chamber further notes that the wording as well as the substance of several paragraphs do not reproduce *verbatim* the paragraphs of the joint Indictment of August 1998 pertaining to the Accused Kajelijeli, as requested in the Chamber's previous three Orders of 6 July 2000, 12 October 2000 and 12 December 2000. *See and compare, inter alia*:

Indictment of 22 December 2000	**Indictment of August 1998**
par. 4.3	par. 4.28
par. 5.24 (French version only)	par. 5.26 (French version only)
par. 5.25	par. 5.27
par. 6.31	par. 6.38
par. 6.43	par. 6.54
par. 6.51	not found
par. 6.58	par. 6.75
Pars. 6.59 and 6.60	par. 6.77 and 6.78
par. 6.68	par. 6.86
par. 69	par. 6.87
par. 6.75	par. 6.96
6.76 and 6.77	Not found
par. 6.81	par. 6.101

15. The examples above are but a few of the discrepancies found between the Indictments of 22 December 2000 and August 1998. The Chamber considers that minor typographical errors are too widespread to be justified, especially considering the fact that, by an Order of 20 December 2000, the Chamber granted the Prosecutor an extension of the deadline for submission of the Indictment until the 22 December 2000. These errors therefore amount to gross negligence on the part of the Prosecutor.

16. Moreover, the Chamber finds that several of the discrepancies found are substantial in that they are in fact adding new charges to the ones Kajelijeli was formerly accused of under the Joint Indictment of August 1998. For instance, the Prosecutor added mention of Kajelijeli's authority over, not only *"the Interahamwe-MRND and the civilian population"* but also *"the members of the Police Communale and Gendarmerie Nationale"* at par. 4.3 of the Indictment of 22 December 2000. It is worth noting in this respect that she also added these allegations at par. 3.6 of the Indictment of 25 October 2000. In yet another instance, the Prosecutor added the name of the Accused to a list of persons accused of having *"participated in the distribution of weapons to the militiamen and certain carefully selected members of the civilian population with the intent to exterminate the Tutsi population and eliminate its accomplices"*, at par 5.25 of the Indictment of 22 December 2000, whereas Kajelijeli's name does not figure at par. 5.27 of the Indictment of August 1998.

17. The Trial Chamber emphasizes that :

(a) The Prosecutor did not comply with three Court Orders (those of 6 July 2000, 12 October 2000 and 12 December 2000) to file a separate Indictment pertaining only to the Accused Kajelijeli without altering the formulation or substance of the relevant paragraphs of the Joint Indictment of August 1998;

(b) In doing so, the Prosecutor in fact tried in two occasions to amend on its own a confirmed Indictment, without requesting prior judicial leave pursuant to Rule 50 of the Rules.

18. With respect to the Prosecutor's attempts to amend the Indictment on her own, the Trial Chamber strongly reminds the Prosecutor that, under Rule 50(A):

(a) Once an Indictment is confirmed, any alteration to its content is subject to a prior judicial leave; and

(b) The Prosecutor, when granted by a Trial Chamber leave to correct or otherwise amend an Indictment, may not "go beyond what was permitted or directed by the Trial Chamber" (International Criminal Tribunal for the Former Yugoslavia (ICTY) Krnojelac Decision on Prosecutor's Response to Decision of 24 February 1999, Decision of 20 May 1999, at par. 9).

19. Further, such a conduct, which is inadmissible as such, is aggravated by the following considerations :

(a) The Prosecutor has on three occasions been in breach of a Trial Chamber Order (when filing three subsequent separate indictments either with delay and/or without fully complying with the Trial Chamber Orders). This conduct is offensive and could amount to an obstruction of justice;

(b) The proposed amended Indictment signed by the Prosecutor attached to the Motion of the Prosecutor for leave to file an amended Indictment (*See*, below) is dated 24 October 2000. This suggests that the Prosecutor could have filed a motion to amend the Indictment more than two months before the Motion was eventually filed on 3 January 2001, thereby avoiding adjournment of the trial scheduled to start on 22 January 2001, a date at which the Office of the Prosecutor had previously confirmed that they would be ready to proceed, thereby obstructing the proceedings (*See*, Transcripts, Status Conference of 30 October 2000, Pre-Trial Conference of 12 December 2000);

(c) At the hearing of 12 December 2000, the Prosecutor seemed to shift the burden of responsibility for its own grossly negligent conduct on the Trial Chamber, arguing that: *"We came before the Court today as a result of a decision [that of 6 July 2000 to sever the Accused from his co-Accused] that this Court made that we did not ask for"*. This conduct of the Prosecutor is unacceptable. The Chamber reminds the Prosecutor that the Judges of the Tribunal are independent in carrying out their mission and sovereign in their deliberations and judgement;

(d) The Prosecutor expressly said at the hearing of 12 December 2000 that the Indictment filed on 22 October 2000 had been knowingly and deliberately amended without seeking any judicial leave, and that, moreover, the amendments were substantive (See, Transcripts of 12 December 2000: *"When we drafted, or submitted, a separate indictment (...) we could not simply go through the old indictment and strike out every paragraph that did not specifically mention the name Juvénal Kajelijeli, because the whole structure of thinking through the charges and pleading the facts was different"*). The Prosecutor thus acted beyond his powers under the Statute and the Rules of the Tribunal.

20. The Chamber finds that the attitude of the Prosecutor's Counsels in the matter, as described above, certainly qualifies as a Misconduct of Counsel pursuant to Rule 46(A) of the Rules. Consequently, in accordance with the provisions of the said Rule, the Chamber hereby warns the Prosecution Counsels that, were their conduct to remain "offensive" or be otherwise considered "abusive", or were they to "obstruct the proceedings" or act "contrary to the interests of justice", the Chamber would impose sanctions pursuant to that Rule.

The Motion to Amend the Indictment

(i) Preliminary matters

21. The Chamber notes that the Prosecutor seeks leave to amend the August 1998 Indictment following the Chamber's Orders. The Chamber reminds the Prosecutor of its orders of 6 July, 12 October and 12 December 2000 to file a separate Indictment pertaining only to the Accused from the confirmed Indictment of 29 August 1998.

22. Following the said orders, the only valid Indictment against the Accused is the Indictment filed on 22 December 2000 and which will be considered by the Chamber in

the Motion to amend, and taking into account the corrections as discussed above with respect to the Indictment of 22 December 2000.

(ii) Legal basis

23. The Prosecutor requests leave to amend the Indictment pursuant to Rule 50 of the Rules, which reads as follows:

Rule 50: Amendment of Indictment

(A) The Prosecutor may amend an Indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an Indictment may only be made by leave granted by that Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 53 *bis* apply *mutatis mutandis* to the amended Indictment.

(B) If the amended Indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges.

24. The Chamber recalls its Decision in *Prosecutor v. Niyitegeka,* Case No. ICTR-96-14-I, (21 June 2000) (Decision on Prosecutor's Request for Leave to file an Amended Indictment) which stated, at par. 33 that, "[...] in general, an amendment to a confirmed existing Indictment is sought for the following reasons: to add new charges to a confirmed Indictment, to expand and elaborate upon the factual allegations adduced in support of existing confirmed counts, or to make minor changes to the Indictment."

25. The Prosecutor contends that she seeks leave to amend the Indictment in order to expand and elaborate upon the factual allegations adduced in support of the existing counts in the said Indictment and to amend the accusatory instrument to make it consistent with the jurisprudence of the Tribunal by pleading Genocide as the lead count, complicity in Genocide as an alternative count to the lead count and impliedly pleading Conspiracy to Commit Genocide.

26. The Chamber, therefore, agrees with the Prosecutor that the amendment she seeks is properly brought pursuant to Rule 50. Furthermore, the Chamber, agrees with the jurisprudence of the Tribunal in *Prosecutor v. Musema*, at par. 2, Case No. ICTR-96-13-I, (18 November 1998) (Decision on the Prosecutor's Request for Leave to Amend the Indictment) wherein it quoted a Decision of 30 September 1998 which held that, "[...] in considering the Prosecutor's motions for leave to amend the Indictment under Rule 50, the onus is on the Prosecutor to set out the factual basis and legal motivation in support of these motions and it is for the Defense to respond to these argument."

(iii) The scope of the amendment sought by the Prosecutor

27. The Prosecutor submits that the proposed amended Indictment does not include any new charges against the Accused as all the new expanded factual allegations are in support of the same counts of the Indictment. The major differences between the proposed amended Indictment and the Indictment are, according to her:

(a) The proposed amended Indictment individually charges the Accused with crimes against the Statute relying on direct evidence gathered from ongoing investigations obtained after the confirmation of the Indictment of 29 August 1998.

(b) The proposed amended Indictment provides specificity with regard to the Accused leadership role in events in Ruhengeri, in particular as investigations concerning sexual violence against Tutsi women have enabled the Prosecutor to amplify and further substantiate the allegations of rape and other crimes of sexual violence in the Indictment.

(c) The proposed amended Indictment provides further particulars and greater factual specificity to substantiate the eleven counts of the Indictment and the Accused's direct participation in the crimes more sharply focusing on issues of fact for trial of a single defendant and relying less on allegations of vicarious liability of accused persons acting in concert.

28. The Defense argues on the contrary that the proposed amended Indictment contains new charges.

29. The Chamber notes that, contrary to the Prosecutor's arguments, the ICTY's above-mentioned *Krnojelac* Decision of 20 May 1999 she alludes to in her Motion clearly states at par. 20 that, when "entirely new factual situations in support of existing counts" are added, "even though the count remains pleaded in the same terms of the Statute, these substitutions may nevertheless amount effectively to new charges".

30. The Chamber therefore carefully analyzed the content of the proposed amended Indictment with that of the Indictment, and notes that the so-called "expanded factual allegations" in the proposed amended Indictment do in fact amount to new charges with respect to:

(a) Par. 4.16 of the proposed amended Indictment, wherein the Accused's name appears, with others, in a list of persons alleged to have distributed weapons to militiamen. His name did not appear in the same list in the Indictment;

(b) Par. 4.16 of the proposed amended Indictment, wherein the Accused is alleged to have distributed lists of Tutsi to be eliminated. These allegations do not figure in the Indictment, at pars. 5.34 to 5.38;

(c) Par. 4.18 of the proposed amended Indictment wherein the Accused is named, with others, as having publicly incited the people to exterminate the Tutsi population and its 'accomplices'. This allegation was not specifically laid out against the Accused in the Indictment (*See* par. 5.11);

(d) Par. 4.3 of the proposed amended Indictment, wherein the Accused is alleged to have had authority over the members of the Police Communale and the Gendarmerie Nationale. The Indictment simply alleged at par. 3.5 that the Accused, as a *Bourgmestre*, had authority over the civil servants posted in his *commune* and the civilian population;

(e) Par. 5.4 of the proposed amended Indictment, wherein the Accused is alleged to have witnessed the raping and other sexual assaults on Tutsi females. Such specific allegations are not to be found in the Indictment.

31. The Chamber is thus convinced that the factual allegations as set out above are not only "expansions" of former factual allegations but in fact amount to new charges. Some of the other modifications in the proposed amended Indictment however compare closely to the Indictment of 22 December 2000.

(iv) On whether the proposed amended Indictment will prejudice the Accused or infringe upon his right to a fair trial without undue delay

32. The Chamber recalls the following provisions of Article 19(1) and 20(4)(C) of the Statue laid out below:

Article 19: Commencement and conduct of trial proceedings

(1) The Trial Chamber 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 20: 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:

[...]

(c) To be tried without undue delay

33. The Chamber notes the Prosecutor's argument that although the August 1998 Indictment was drafted and confirmed almost two and a half years ago, trial has not commenced. The Prosecutor also contends that the proposed amended Indictment contains the same counts found in the August 1998 Indictment with further particulars concerning allegations in support of those counts as a result of fresh evidence obtained through ongoing investigations particularly in Ruhengeri. The Prosecutor, therefore, argues that the Defense will now be afforded a clearer forecast of the evidence that will

be adduced at trial. In fact, the Prosecutor argues that the only legal challenge to the propriety of the timing of the amendment to an Indictment is the prospect of unreasonable or undue delay.

34. It is likewise noted that the Defense responds by stating that it is unjust and unfair that the Prosecutor be granted leave to file an amended Indictment containing new charges, two and a half years after the Accused was originally indicted and on the eve of trial. The Defense argues that the Prosecutor should not have waited all these years to charge the Accused afresh and expect him to defend himself against those new charges, find witnesses and exculpatory evidence to use in his defense, days before the commencement of trial.

35. As to the propriety of the timing of the Prosecutor's Motion, the Chamber concurs with the jurisprudence of the Tribunal in *Prosecutor v. Musema*, ICTR-96-13-T (6 May 1999) (Decision on the Prosecutor's Request for Leave to Amend the Indictment), which held, at par. 17 that, "[...] Rule 50 of the Rules does not explicitly prescribe a time limit within which the Prosecutor may file to amend the Indictment, leaving it open to the Trial Chamber to consider the motion in light of the circumstances of each individual case. A key consideration would be whether or not, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial. In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber."

36. The Chamber will consider the issue whether the proposed amendments, if granted, will cause an "undue" delay in the commencement of the trial of the Accused, to his prejudice. The Chamber recalls that the trial date in the instant case has been set for the 22 January 2001, which was also the date of the hearing of the Prosecutor's Motions.

37. Furthermore, the Chamber is mindful that, in considering whether a delay in the criminal proceedings against an Accused is "undue," it is essential to take into consideration the length of the delay, the gravity, nature and complexity of the case against the Accused and the prejudice that may be suffered by the latter. The Defense argues that the Prosecutor's Motion for leave to amend, which was filed two and a half years after the Accused was originally indicted and arrested and days before trial is to commence, is unfair and unjust on the Accused. The Chamber, taking into account the circumstances of the case, and the fact that the trial was adjourned at the hearing of this motion, is not convinced by this contention. The Chamber finds merit in the Prosecutor's argument that, in setting out the Accused individual criminal responsibility to the 11 counts, the Defense is afforded a clearer forecast of the case against him, on the basis of which he can effectively prepare his defense. This will be in the interest of justice.

38. Moreover, whatever prejudice might occur for the Defense can be cured by relief provided by the Rules, particularly Rule 50(C), which affords the Defense thirty days within which to file preliminary motions pursuant to Rule 72 in respect of the new charges.

39. The Chamber, therefore, finds that the Accused will not suffer undue delay and it is in the interest of justice to grant the proposed amendment.

(v) On whether to allow the amendment to the Indictment

40. In light of the Chamber's finding that the proposed amended indictment does indeed contain new charges, and that this Motion is properly brought pursuant to Rule 50, the Chamber finds sufficient factual and legal basis in the Prosecutor's oral and written arguments to support the present motion to amend, and therefore grants leave to the Prosecutor to file the amended Indictment.

41. As a result of these amendments, the Accused will have a further appearance to plead on the new charges, pursuant to Rule 50(B) of the Rules and his Defense has thirty days within which to file any preliminary motions under Rule 72, if they so wish, pursuant to Rule 50(C) of the Rules.

FOR THESE REASONS, THE TRIBUNAL,

I. WARNS the Prosecutor's Counsels in the matter that, were their conduct to remain "offensive", or otherwise "abusive", or were they to "obstruct the proceedings", or otherwise act "contrary to the interests of justice", the Chamber would impose sanctions pursuant to Rule 46 of the Rules;

II. GRANTS the Prosecutor's Motion to amend the 22 December 2000 Indictment and to file the proposed amended Indictment;

III. ORDERS the Prosecutor to file the Amended Indictment in both French and English by Thursday 25 January 2001 before close of business;

IV. INSTRUCTS the Registry to organize as soon as practicable the further appearance of the Accused on the new charges, possibly on Friday 26 January 2001.

Arusha, 25 January 2001,

Laïty Kama	William H. Sekule	Mehmet Güney
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

Case: IT-02-54-AR73.6

IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Inés Mónica Weinberg de Roca

Registrar:
Mr. Hans Holthuis

Decision of:
20 January 2004

THE PROSECUTOR

v.

SLOBODAN MILOSEVIC

DECISION ON THE INTERLOCUTORY APPEAL BY THE *AMICI CURIAE* AGAINST THE TRIAL CHAMBER ORDER CONCERNING THE PRESENTATION AND PREPARATION OF THE DEFENCE CASE

Counsel for the Prosecutor:

Ms. Carla Del Ponte
Mr. Geoffrey Nice
Mr. Dermot Groome

The Accused:

Slobodan Milosevic

Amici Curiae:

Mr. Steven Kay, QC
Mr. Branislav Tapuskovic
Mr. Timothy L.H. McCormack

1. This appeal concerns the Trial Chamber's order granting the Accused three months to prepare his defence and requiring him to file, within six weeks of the adjournment, a list of witnesses and exhibits he intends to present.

Procedural Background

2. The Accused, Slobodan Milosevic, was indicted on 24 May 1999 and transferred to the custody of the Tribunal on 28 June 2001.[1] The Accused pleaded not guilty, and his trial commenced on 12 February 2002.

3. On 2 September 2003, the Trial Chamber held a Status Conference to discuss the anticipated conclusion of the Prosecution's case and the necessary preparations for the presentation of the Defence case.[2] The Accused requested a continuance of over two years to prepare his defence, pointing to the fact that he is conducting his own defence, the complexity of the case, a large number of witnesses he anticipated to present, and the extensive material disclosed by the Prosecution which he must examine. Stressing the same considerations, the *amici* seconded the Accused's request for an adjournment of considerable duration, though they did not suggest a specific period. On 17 September 2003, the Trial Chamber issued its ruling, granting the Accused an adjournment of three months to prepare his defence and requiring him to file, within six weeks of the adjournment, a list of witnesses and evidentiary exhibits he intends to present.[3] Upon a request by the *amici*, the Trial Chamber certified its decision for an interlocutory appeal.[4] The Chamber noted that the request fell within the scope of the Trial Chamber's instructions that the *amici* act in any way they consider appropriate to secure a fair trial to the Accused and that it could be construed as a request for certification from the Accused's application for a two-year continuance.[5]

Admissibility of Appeal

4. Rule 73 of the Rules of Procedure and Evidence, pursuant to which this appeal is brought, entitles "a party" to appeal a decision of the Trial Chamber after having requested and obtained certification. The rule does not confer such a right upon an *amicus curiae* appointed by a Trial Chamber pursuant to Rule 74. The *amici* do not act as representatives of the Accused at trial, but solely as assistants to the Trial Chamber.[6] Not being a party to the proceedings, the *amici* are not entitled to use Rule 73 to bring an interlocutory appeal. The fact that the *amici* were instructed by the Trial Chamber to take all steps they consider appropriate to safeguard a fair trial for the Accused does not alter this conclusion.

5. However, as the Trial Chamber observed, there is an identity of interests between the *amici* and the Accused with respect to the issue presented in this appeal. After the Trial Chamber announced its decision to set the adjournment at three months, the Accused stated that he "categorically protest[s] against this ruling."[7] The Accused added: "Every decision or ruling can be re-examined and abolished, and that is my request and demand,

that it be rethought."[8] These statements by the Accused, considered in context of his prior request for a continuance in excess of two years, indicate that the *amici's* present request is aligned with that of the Accused, and that the Appeals Chamber's consideration of this appeal would not infringe his interests. Nor is there a danger of unfairness to the Prosecution. The Prosecution does not oppose the consideration of the appeal; in fact, the Prosecution represented to the Trial Chamber its willingness to accept the *amici* as a party for these purposes.[9] It is also to be noted that in this case the consideration of the appeal serves the interests of justice. In these circumstances, the Appeals Chamber decides to consider the appeal.

Discussion

6. The *amici* argue that both periods set out by the Trial Chamber are unreasonably short for the Accused to prepare a meaningful defence, and ask the Appeals Chamber to replace them with "such longer period[s] that [are] both adequate and sufficient for the preparation of the Accused's case."[10] The *amici* argue that in reaching its decision the Trial Chamber failed to consider, or gave insufficient thought to, the following factors: (a) the relatively short period of time in which the case came to trial; (b) the considerable time available to the Prosecution to prepare its case; (c) the voluminous Prosecution disclosure; (d) the scope and number of issues raised in the indictment; (e) the ill health of the Accused; (f) the fact that the Accused represents himself and lacks resources comparable to the Prosecution; (g) the fact that the Prosecution has not yet completed its case; and (h) the fact that Prosecution intends to submit new witnesses.[11] As the *amici* point out, the Prosecution disclosed to the Accused a total of 350,000 pages, with extensive disclosure taking place during the last few months of the trial.[12] To support a showing of the Accused's ill health, the *amici* attach reports from examining physicians, who concluded that the Accused is suffering from high blood pressure exacerbated by fatigue.[13] The *amici* also argue that the Trial Chamber erred in relying on the fact that the Accused is assisted by two legal assistants, because it did not consider any evidence as to the nature and extent of that support.[14]

7. As the decisions of the Tribunal hold, and as the *amici* acknowledge, the Trial Chamber's order may be overturned only if the Chamber has erred in the exercise of its discretion in setting the time limits.[15] The *amici* must demonstrate that the Trial Chamber "has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion."[16] In examining whether the Trial Chamber has considered appropriate factors in sufficient measure, the Appeals Chamber is not limited to the text of the order issued by the Trial Chamber. While a Trial Chamber has an obligation to provide reasons for its decision, it is not required to articulate the reasoning in detail.[17] The fact that the Trial Chamber did not mention a particular fact in its written order does not by itself establish that the Chamber has not taken that circumstance into its consideration.[18] The verbal commentary by the Presiding Judge which accompanied the announcement of the ruling and the colloquy which took place during the preceding Status Conference are also relevant to the question of whether the Trial Chamber gave the issues involved due consideration.

8. The Trial Chamber's order expressly referred to the facts that the Accused is representing himself and that, being in detention, he has limited resources at his disposal.[19] In announcing the ruling, the Presiding Judge of the Trial Chamber, Judge May, also stated that the Trial Chamber has considered the duration of the trial and the time the Accused has already spent in detention.[20] With respect to the latter factor, Judge May noted that during this time (2 years and 3 months), the Accused "had the opportunity to consider and make preparations for his defence."[21] Judge May reiterated that the Chamber has considered the fact that the Accused "has elected to represent himself " and underscored that "the Tribunal should provide appropriate logistical assistance to enable the accused to prepare his defence whilst in detention."[22] In general, Judge May explained, in designing the order, the Trial Chamber has " balance[d] the need for the accused to have adequate time for the preparation of his case and the need for an expeditious trial."[23]

9. During the 2 September Status Conference, convened to discuss the preparation of the Defence case, the Trial Chamber mentioned similar considerations. Judge May noted that the Trial Chamber will consider how the applicable Rules of Procedure and Evidence of the Tribunal can be adapted "to take account of the fact that the accused is appearing in person."[24] He also indicated the Chamber will consider that "the accused must make the preparations for his defence while he is in custody," and "the resources which the Prosecution have as against the resources which he [the Accused] has."[25] Judge May added that the Chamber "will consider what is a reasonable amount of time for the accused to have to prepare his case" and "what practical arrangements can be made in order for him to prepare witnesses and to prepare exhibits and generally to prepare his case."[26]

10. The lead counsel for the *amici*, Steven Kay, was asked to express his views on the time the Accused would need to prepare his case. He expressly identified many of the factors he now argues the Trial Chamber has failed to consider. First, he referred to the quick pace in which the case was brought to trial subsequent to the arrest of the Accused: "If we start from the date of his [the Accused's] arrest, which was in June 2001, he was very quickly at the trial stage by February 2002."[27] Mr. Kay argued that during that period the Accused could not have engaged in a "meaningful preparation of any defence because of the scale of the papers and the issues that had to be dealt with pre-trial."[28] Nor, in Mr. Kay's view, could the Accused have undertaken this preparation subsequent to the trial's commencement, because he was "continuously involved in dealing with the many issues that the case has provided."[29]

11. Mr. Kay also reminded the Chamber that the Accused "has very limited resources available to him and limited support."[30] The only "direct team" the Accused has had were "the services of two associates and whatever support they can muster."[31] Mr. Kay then asked the Chamber to bear in mind the disparity in resources between the Accused and the Prosecution as well as the complexity of the case confronting the Accused.[32] Mr. Kay also called upon the Chamber to "reflect as to the length of the time the Prosecutor has had for the preparation of their cases," and contrasted it with the fact that for the

Accused, "it is a fresh case, and it is a case that he has to present with no previous history of litigation to draw upon."[33]

12. The colloquy between the bench and the lead *amici* counsel then turned to such factors as the convenience of the Trial Chamber or of the Tribunal. In arguing for a lengthy recess, Mr. Kay acknowledged that such a prolonged break " may be inconvenient for the system, and [] may be inconvenient for the life of this Tribunal."[34] Judge May responded: "You refer to the convenience of the Tribunal or the Court. Those, of course, are totally irrelevant matters."[35] Instead, Judge May emphasized, the relevant considerations are, on one hand, the need for the criminal trial of the Accused to proceed and, on the other, the need "to ensure that there is a fair trial, and that does involve the accused in having an adequate time, which must be a matter of judgement, in order to present his case."[36]

13. During the Status Conference the Trial Chamber also ascertained, and the *amici* confirmed, that the Accused was able to obtain material relevant to the preparation of his defence, as evidenced by the detailed questions posed by the Accused on cross-examination.[37] Mr. Kay expressly acknowledged, in response to a query from Judge Robinson, that an adequate preparation of the defence case depends not only on the time the Accused is given to prepare but also on the facilities made available to him.[38] Mr. Kay stated that, where a defendant is given a period of time less than two years but is provided with significant facilities and resources, that may be sufficient to ensure adequate preparation.[39]

14. The Trial Chamber also addressed the matter of having the Accused prepare and present a list of witnesses he intends to call. As a part of the colloquy on this issue, Mr. Kay reminded the Chamber that the Accused may have difficulty in estimating how many witnesses he would wish to call.[40] The difficulty, in Mr. Kay's view, stemmed from the fact that "[t]he Prosecution case is still open, [and] we still have a large number of witnesses to come to court to be heard, and we know that that list is still not closed as far as they [the Prosecution] are concerned; there are new witnesses being added every week."[41]

15. Both the colloquy which took place during the Status Conference and the oral commentary on the order given by Judge May on 17 September show that the Trial Chamber was aware of every single one of the factors the *amici* now contend the Chamber failed to consider properly: (a) the short period of time in which the case came to trial; (b) the time the Prosecution had to prepare its case; (c) the amount of Prosecution disclosure; (d) the size and complexity of the indictment; (e) the health of the Accused; (f) the decision of the Accused to represent himself and the limited nature of his legal resources; (g) the fact that the Prosecution case was not yet complete; (h) the fact that the Prosecution intended to present new witnesses. The Chamber either explicitly referenced these factors in the order itself and in the accompanying commentary or was informed about them by the *amici* during the Status Conference.

16. Given that the Trial Chamber has considered all the relevant factors, the issue becomes whether its analysis of these factors was so deficient as to constitute an error in the exercise of discretion. It must be noted that a Trial Chamber has discretion with respect to the scheduling of a trial and, in particular, with respect to the determination of the time required for a trial.[42]

17. The Trial Chamber here has solicited from the Accused, the *amici* and the Prosecution a sizeable body of information as to how long the Accused would need to prepare his case and at what point he may be in a position to produce a list of witnesses. On the basis of this information, the Trial Chamber concluded the required time to be three months. In reaching this decision, the Trial Chamber explicitly stated that it was considering both the necessity to safeguard a fair trial for the Accused and the need to ensure an expeditious trial proceeding.[43] The Trial Chamber also made clear that it was not guided by inappropriate considerations, such as the desirability, for the convenience of the Tribunal, of a rapidly progressing trial.[44]

18. The authority best placed to determine what time is sufficient for the Accused to finish preparing his defence in this admittedly complex case is the Trial Chamber which has been conducting his trial for over two years. The Trial Chamber's decision was informed both by sufficient factual information and by the appropriate legal principles, and did not take into account any impermissible factor. The Chamber has made that determination with proper regard to the importance of ensuring a fair trial for the Accused and with an explicit disclaimer of such inappropriate considerations as the completion target for the Tribunal's work. The *amici*, who bear the burden of demonstrating that the Trial Chamber has erred in the exercise of its discretion, have not presented evidence sufficient to substantiate their claim.

19. There is no doubt that, by choosing to conduct his own defence, the Accused deprived himself of resources a well-equipped legal defence team could have provided. A defendant who decides to represent himself relinquishes many of the benefits associated with representation by counsel. The legal system's respect for a defendant's decision to forgo assistance of counsel must be reciprocated by the acceptance of responsibility for the disadvantages this choice may bring.[45] Where an accused elects self-representation, the concerns about the fairness of the proceedings are, of course, heightened, and a Trial Chamber must be particularly attentive to its duty of ensuring that the trial be fair.

20. In this case, the Trial Chamber indicated that it will ensure that the Accused be provided with resources sufficient to prepare his defence.[46] The Trial Chamber, moreover, expressed willingness to consider additional ways to provide the Accused with time to prepare, such as decreasing the hours of court time. [47] The Trial Chamber acted with proper sensitivity to the concerns of a self-representing defendant, and there is no violation of the Accused's right to a fair trial by the time limits imposed.[48] The Trial Chamber has, of course, a continuing obligation to ensure a fair trial to the Accused. As a part of that obligation, the Trial Chamber may consider allowing additional adjournments in the future if a showing is made that the Accused lacks sufficient time or resources for the preparation of his defence.

Disposition

21. The appeal is dismissed.

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

_____
Judge Theodor Meron
Presiding

Dated this 20th day of January 2004,
At The Hague,
The Netherlands.

Judge Shahabuddeen appends a separate opinion.

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

Preliminary

1. I agree with the decision of the Appeals Chamber to dismiss this interlocutory appeal. The dismissal has been ordered on the ground that there has been a failure to demonstrate that there is any basis for appellate interference with the way in which the Trial Chamber has exercised its discretion. I agree that there has been a failure to make out such a case. But I do not consider that the Appeals Chamber was called upon to go so far; there is a preliminary reason for the dismissal.
2. The dismissal involves an exertion of appellate supervision over the work of the Trial Chamber. In principle, the work of the Trial Chamber should not be deprived of the benefit of that supervision. But that supervision is not exercised by superior magisterial authority acting *sua sponte.* It is exercisable only at the request of a party. The question in this case is whether the supervision of the Appeals Chamber is sought to be exercised at the request of a party.
3. It is proposed to consider the question in relation to (a) the *amici curiae*, (b) the accused acting by himself, and (c) the accused acting through the *amici curiae* as counsel.

(a) Whether the amici curiae *are a party*

4. The name of the interlocutory appeal, as given on the cover page of the appeal, is "Interlocutory Appeal by the *Amici Curiae...* ". Nothing to the contrary appearing in the text, the interlocutory appeal is an appeal brought by the *amici curiae.*

5. The question, therefore, is whether an *amicus* is a party and so competent to bring the appeal. There could be argument as to what is a party;[49] but it is not necessary to debate that point. However wide may be that term, it clearly does not include an *amicus.* Paragraph 4 of today's decision correctly recognises that, "[n]ot being a party to the proceedings, the *amici* are not entitled to use Rule 73 to bring an interlocutory appeal." That paragraph rightly adds that the "fact that the *amici* were instructed by the Trial Chamber to take all steps they consider appropriate to safeguard a fair trial for the Accused does not alter this conclusion."
6. Paragraph 5 of today's decision notes that "the Prosecution represented to the Trial Chamber its willingness to accept the *amici* as a party ...". It suffices to observe that the Tribunal is a criminal court. The jurisdiction of the Appeals Chamber cannot be expanded by consent. The Prosecution cannot by consent make the *amici* a party. Despite the Prosecution's concession, the *amici* remain a non-party.

(b) Whether the appeal was brought by the accused acting by himself

7. While the decision of the Appeals Chamber is clear that the *amici* are not a party and thus could not bring the appeal, the decision does not present any other satisfactory basis for bringing the appeal. So, the matter has to be pursued by asking other questions.
8. One question is whether the appeal can be said to have been brought by the accused acting by himself, he being of course qualified to be a party. There is a suggestion that the bringing of the appeal is linked to him, but the suggestion falls short of saying that he has brought it.
9. Paragraph 3 of the Appeals Chamber's decision notes that the Trial Chamber stated that the request for certification "could be construed as a request for certification from the Accused's application for a two-year continuance". There could be argument that that interpretation might show that the accused could be treated as having authorised the bringing of the appeal and that he was therefore the substantive appellant. But the argument would not correspond to what the Trial Chamber said.
10. What the Trial Chamber said in the third paragraph on page 3 of its certification decision of 25 September 2003 was "that the Request may properly be construed as a request for certification of an interlocutory appeal from the application of the Accused" for a continuance of two years. The second paragraph on page 2 of that decision defined "Request" as the "*Amici Curiae* Request ...". Thus, the request for certification remained that of the *amici.* So far as the accused was concerned, his request, made before the Trial Chamber, was for continuance; he did not request certification of an interlocutory appeal to the Appeals Chamber. That the object of the *amici's* request for certification related to the accused's request for continuance did not make the accused the author of the request for certification.
11. The accused restated his position in the oral proceedings before the Trial Chamber on 2 September 2003. He then said to the Trial Chamber: "I have already told you that I do not recognise this Court, so this is not a trial. It is you who have said that I have the right -."[50] In my opinion, whatever might be the position of the accused

on recognition of the Tribunal, that remark is consistent with the view that he himself has not brought the appeal, which, though later, related to those proceedings.

(c) Whether the appeal was brought by the accused acting through the amici curiae *as his counsel*

12. Has the appeal been brought by the *amici curiae* acting as counsel for the accused? This question may be examined under these two heads:

(i) Were the *amici* capable in law of acting as counsel for the accused?

(ii) If they were capable in law of acting as counsel for the accused, did he authorise them to act as his counsel?

13. As to (i), it does not appear that the *amici curiae* were capable in law of acting as counsel for the accused. This is shown by Rule 74 of the Rules of Procedure and Evidence of the Tribunal, under which the *amici curiae* were appointed. This Rule provides that a "Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber." Clearly, where counsel appears, he is not acting as counsel for the accused.
14. To the extent that *amici curiae* could historically be appointed to "represent the unrepresented,"[51] that aspect of the character of an *amicus* has now been overtaken by separate provisions and a separate procedure under which the Tribunal can assign counsel to give legal assistance to an indigent accused, if he desires it. The difference was acknowledged in the first *amicus curiae* order, made by the Trial Chamber on 30 August 2001, which stated that the Chamber considered it desirable to appoint *amici curiae* "not to represent the accused but to assist in the proper determination of the case, and pursuant to Rule 74." In my view, the principle of that prohibition has been retained in subsequent orders – including an order of 11 January 2002 - made by the Trial Chamber on the subject.
15. In sum, although the institution of *amicus curiae* has broadened out in some jurisdictions,[52] shifting from its traditional role as friend of the court to advocate for an interested body other than an existing party, in my opinion, in the Tribunal, an *amicus curiae* is limited to his essential function as a friend of the court, as distinguished from being a friend of the accused. More pertinently, under the system of the Tribunal, he is not legally competent to act as counsel for the accused, and he certainly is not an intervener.[53]
16. As to (ii), assuming, contrary to the above, that the *amici curiae* were capable in law of acting as counsel for the accused, did he authorise them to act as his counsel? There does not appear to be any evidence that he did.
17. The Trial Chamber's order of 6 October 2003, entitled "Order of Further Instruction to the *Amici Curiae*", considered "the desirability of the *amici curiae* giving greater assistance to the Accused" and therefore authorised them "to

receive such communications as the Accused may make to them and to act in any way to protect and further the interests of his Defence." It may be argued that, in making any communications to the *amici curiae*, the accused is authorising them to act. But it is not necessary to pursue inquiry into such an argument because it has not been suggested that the accused has made any communications to the *amici* for the purposes of this appeal.

18. This is aside from the fact that the Trial Chamber's "Order of Further Instruction to the *Amici Curiae*," made on 6 October 2003, was made after the filing of the interlocutory appeal on 1 October 2003. Thus, it cannot in any event be relied on.
19. Paragraph 5 of today's decision notes that "there is an identity of interests between the *amici* and the Accused" and that "the Appeals Chamber's consideration of this appeal would not infringe his interests", he having also expressed his discontent with the ruling of the Trial Chamber. However, the question is not one of identity of interests but one of authority to act. There is no need to argue that identity of interests is not the same thing as authority to act.
20. Finally, it is necessary to refer to the statements by the accused before the Trial Chamber, made immediately after its ruling, that he "categorically protest[s] against this ruling" and that "[e]very decision or ruling can be re-examined and abolished, and that is my request and demand, that it be rethought". These statements, which are referred to in paragraph 5 of the Appeals Chamber's decision, were not an indication of his intent to seek the decision of another judicial body, namely, that of the Appeals Chamber. They were a demand for reconsideration by the original judicial body, namely, the Trial Chamber. They do not support a view that the accused was himself appealing to the Appeals Chamber or that he was authorising the *amici curiae* to do so on his behalf. Accordingly, the statements of the accused, as quoted in that paragraph of the Appeals Chamber's decision, do not provide a basis for entertaining the appeal.

Conclusion

21. For these reasons, while I support the dismissal, I consider that it should have rested on the more fundamental fact that the interlocutory appeal has not been brought by a "party" within the meaning of Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal.

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

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Mohamed Shahabuddeen

Dated 20 January 2004
At The Hague
The Netherlands.

[Seal of the Tribunal]

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1 - Additional indictments against the Accused were filed on 8 October 2001 and 22 November 2001.
2 - See *Prosecutor v. Milosevic*, IT-02-54-T, Scheduling Order for a Status Conference, 2 July 2003; Transcript of the 2 September 2003 Status Conference.
3 - *Prosecutor v. Milosevic*, IT-02-54-T, Order Concerning the Preparation and Presentation of the Defence Case, 17 September 2003 ("Order Concerning Preparation").
4 - *Prosecutor v. Milosevic*, IT-02-54-T, Decision Granting Request by the *Amici Curiae* for Certification of Appeal Against a Decision of the Trial Chamber, 25 September 2003.
5 - *Ibid.*, at 3 (citing *Prosecutor v. Milosevic*, IT-02-54-T, Order Inviting Designation of *Amicus Curiae*, 30 August 2001). For the Trial Chamber's additional instructions to the *amici*, see *Prosecutor v. Milosevic*, IT-02-54-T, Order Concerning *Amici Curiae*, 11 January 2002; *Prosecutor v. Milosevic*, IT-02-54-T, Order of Further Instruction to the *Amici Curiae*, 6 October 2003. The *amici* filed their appeal on 1 October 2003. *Prosecutor v. Milosevic*, IT-02-54-T, Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case Dated 17 September 2003, filed on 1 October 2003 ("Appeal"). The Prosecution responded on 10 October 2003. *Prosecutor v. Milosevic*, IT-02-54-T, Response to Interlocutory Appeal Filed by the *Amici Curiae* on 1 October 2003 Against the Trial Chamber's Order Concerning the Presentation and Preparation of the Defence Case Dated 17 September 2003, filed on 10 October 2003. On 22 October 2003 the Appeals Chamber, on its own initiative, invited the Accused, if he so wishes, to file a brief in this appeal. *See Prosecutor v. Milosevic*, IT-02-54-T, Order on the Schedule of Briefing, 22 October 2003. The Accused has not done so.
6 - See *Prosecutor v. Milosevic*, IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, 4 April 2003, para. 3 ("the role of the *Amicus Curiae* would not be to represent the Accused, but to assist the court"); Transcript of the 30 August 2001 Status Conference, at 6–7.
7 - Transcript of the 17 September 2003 Hearing, at 4.
8 - *Ibid.*
9 - *Prosecutor v. Milosevic*, IT-02-54-T, Prosecution Response to the Request by the Amici Curiae Dated 18 September 2003 for a Certificate Pursuant to Rule 73(B), 24 September 2003, para. 2.
10 - Appeal, paras 2, 5, 19.
11 - *Ibid.*, para. 7.
12 - *Ibid.*, paras 12-15 and accompanying tables.
13 - *Ibid.*, para. 16 and confidential Annex A.
14 - *Ibid.*, para. 8.
15 - *Prosecutor v. Delalic*, IT-96-21-A, Judgment, 20 February 2001 ("*Celebici* Appeal Judgment"), paras 292-293; Appeal, para. 6.
16 - *Prosecutor v. Milosevic*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5 (citations omitted).
17 - *Prosecutor v. Kunarac*, IT-96-23, Judgment, 12 June 2002, para. 41 ("the Trial Chamber has an obligation to set out a reasoned opinion"); *Celebici* Appeal Judgment, para. 481 ("A Trial Chamber is not required to articulate in its judgement every step of its reasoning in reaching particular findings."); *Prosecutor v. Kupreskic*, IT-95-16-A, Appeal Judgment, 23 October 2001 ("*Kupreskic* Appeal Judgment"), para. 458 (same).
18 - *Kupreskic* Appeal Judgment, para. 458 ("failure to list in the Trial Judgement, each and every circumstance placed before [the Trial Chamber] and considered, does not necessarily mean that the Trial Chamber either ignored or failed to evaluate the factor in question").
19 - Order Concerning Preparation, at 2.
20 - Transcript of the 17 September 2003 Hearing, at 1 ("The Trial Chamber has [] taken into consideration the fact that the trial has already taken 19 months. The accused has been in detention for two years and three months....").
21 - *Ibid.*
22 - *Ibid.*
23 - *Ibid.*
24 - Transcript of the 2 September 2003 Status Conference, at 1–2.

25 - *Ibid.*, at 6.
26 - *Ibid.*
27 - *Ibid.*, at 7.
28 - *Ibid.*
29 - *Ibid.*, at 7–8. The Accused similarly emphasized that, since the filing of the first indictment against him, the Tribunal had "all sorts of witnesses coming forward, depositions, statements, and so on, and some of them even go back to 1993, 1994, and 1995." *Ibid.*, at 3–4.
30 - *Ibid.*, at 8.
31 - *Ibid.*
32 - *Ibid.*, at 8–9.
33 - *Ibid.*, at 9.
34 - *Ibid.*, at 10.
35 - *Ibid.*, at 11.
36 - *Ibid.*
37 - *Ibid.*, at 12.
38 - *Ibid.*
39 - *Ibid.*, at 12–13.
40 - *Ibid.*, at 14.
41 - *Ibid.*
42 - *Celebici* Appeal Judgment, paras 291-293.
43 - See the above discussion of the statement made by Judge May during the Status Conference. Note 10, *supra* (discussing Transcript of the 2 September 2003 Status Conference, at 11).
44 - See the above discussion of the statement made by Judge May during the Status Conference. *Ibid*
45 - This principle is firmly enshrined in jurisdictions which recognize a defendant's right to self-representation. See, e.g., *Regina v. Walton*, [2001] E.W.C.A. Crim. 1771 (C.A.), para. 50 ("[T]he right to defend oneself is acknowledged by the E[uropean] C[onvention] on H[uman] R[ights] Article 6(3)C. The exercise of that right may bring advantages and disadvantages. If a man chooses to exercise that right, whilst he may benefit from the advantages, he cannot pray in aid the ordinary and anticipated disadvantages of his choice in support of the argument that there was inequality of arms[.]"); *Martinez v. Court of Appeal*, 528 U.S. 152, 162 (2000) ("the trial judge is under no duty... to perform any legal 'chores' for the [self-representing] defendant that counsel would normally carry out") (citation omitted); *Regina v. Fabrikant*, (1995) 67 Q.A.C. 268 (C.A. Que.), para. 80 ("[A]n unrepresented accused enjoys no particular privilege."); *Regina v. Peepetch*, 2003 SKCA 76, para 66 ("[A defendant] cannot demand the right to represent himself and at the same time demand the right to effective assistance of counsel. Having decided to represent himself he must live with the consequences and cannot later complain that his conduct of the trial did not reach the level of a competent lawyer.").
46 - Order Concerning Preparation, at 2.
47 - *See* Transcript of the 2 September 2003 Status Conference, at 11. In fact, subsequent to the issuance of the Order Concerning Preparation, the Trial Chamber, in light of the health of the accused, has limited its sittings to three days per week. *See Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution's Request for Variation of the Trial Chamber's Order Regarding the Trial Schedule, 2 October 2003.
48 - *See, e.g., Prosecutor v. Tadic*, IT-94-1-A, Appeal Judgment, 15 July 1999, para. 47 ("as a minimum, a fair trial must entitle the accused to adequate time and facilities for his defence").
49 - It includes a witness who is challenging a subpoena. See *Prosecutor v. Radoslav Brdjanin and another (the "Randall" case)*, IT-99-36-AR73.9, of 11 December 2002. There, of course, it was not suggested that the appeal had not been authorised by Mr Randall.
50 - Transcript of the Trial Chamber, 2 September 2003, p. 22.
51 - See para. 35 of the leading judgment of Seaton J.A. in *Attorney General of Canada v. Aluminum Company of Canada Limited*, (1987) 35 D.L.R. (4th) 495.
52 - See *ibid.*, para. 39, citing David Scriven and Paul Muldoon, "Intervention as a Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure," in (1985) 6 *Advocates' Quarterly* 448, at pp. 453-455.
53 - For useful remarks on the subject of intervention as amicus curiae, see *Borowski v. Minister of Justice of Canada et al*, (1983) 144 D.L.R. (3d) 657, and *Clark v. Attorney General of Canada*, (1977) 81 D.L.R. (3d) 33.

AUTHORITIES

14. Report of the United Nations High Commissioner for Human Rights, *Systematic rape, sexual slavery and slavery-like practices, during armed conflicts* (UN Doc. E/CN.4/Sub.2/2004/35), 8 June 2004.

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Fifty-sixth session
Item 6 of the provisional agenda

SPECIFIC HUMAN RIGHTS ISSUES

Systematic rape, sexual slavery and slavery-like practices during armed conflicts

Report of the United Nations High Commissioner for Human Rights

GE.04-14478 (E) 290604

Summary

The present report refers to new developments in the activities of treaty monitoring bodies and of human rights mechanisms and in international criminal, human rights and humanitarian law on the issue of systematic rape, sexual slavery and slavery-like practices in situations of armed conflict.

During situations of armed conflict, attacks are often directed against women and girls in the form of sexual violence, including rape, and are used as a weapon of war to humiliate and dominate the local population. In this regard, the international community through the United Nations has undertaken various steps which demonstrate that the impact of armed conflict on women is such that women must play a key role in peace-building and conflict resolution which could lead to international peace and security.

In taking measures with a view to reduce women's vulnerability during armed conflicts, it is important to consider the vulnerability and inequality of women during times of peace. It is clear that the position of women will not be improved as long as the underlying causes of men's violence against women in the domestic sphere, trafficking and forced labour, including forced sex labour and general discrimination against women are not effectively addressed. Hence, measures must be adopted through concrete and effective policies and programmes addressing prevailing gender relations and the persistence of gender-based stereotypes towards a real acceleration toward de facto equality between men and women.

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CONTENTS

Introduction

1. At its fifty-first session, the Sub-Commission on the Promotion and Protection of Human Rights, in its resolution 1999/16, called upon the High Commissioner for Human Rights to submit a report to the Sub-Commission at its fifty-second session on the issue of systematic rape, sexual slavery and slavery-like practices in situations of ongoing conflict, including information on the status of the recommendations made by the Special Rapporteur of the Sub-Commission on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict. She was also requested to submit an updated report to the Sub-Commission at its fifty-second session.

2. In compliance with those requests, the Special Rapporteur submitted her updated and final report (E/CN.4/Sub.2/2000/21) and the High Commissioner submitted her first report (E/CN.4/Sub.2/2000/20), which was based on the activities of treaty monitoring bodies, special rapporteurs and the Commission on Human Rights and provided information on specific conflict situations available from those sources. The High Commissioner submitted further reports in 2001 (E/CN.4/Sub.2/2001/29), 2002 (E/CN.4/Sub.2/2002/28) and 2003 (E/CN.4/Sub.2/2003/27).

3. At its fifty-fifth session, the Sub-Commission, in its resolution 2003/26, called upon the High Commissioner to submit a report to the Sub-Commission at its fifty-sixth session on the issue of systematic rape, sexual slavery and slavery-like practices during armed conflicts.

4. The present report is submitted in accordance with that request and supplements the information contained in the High Commissioner's previous reports. The present report therefore refers to new developments in the activities of treaty monitoring bodies and of human rights mechanisms and in international criminal, human rights and humanitarian law on the issue of systematic rape, sexual slavery and slavery-like practices in situations of armed conflict.

Violence against women, systematic rape and sexual slavery as a weapon of war

5. As mentioned in last year's report (E/CN.4/Sub.2/2003/27, para. 5), the Vienna Declaration and Programme of Action and the proclamation by the General Assembly in its resolution 48/104 of the Declaration on the Elimination of Violence against Women, provide a backdrop against which it is possible to assess progress achieved since their adoption. In paragraph 28 of the Vienna Declaration, the World Conference on Human Rights strongly condemned the "abhorrent" practice of systematic rape of women in war situations. Discrimination and violence against women are aggravated in situations of armed conflict regardless of whether they are of an internal or international nature. Attacks directed against women and girls in the form of sexual violence including rape are often used as a weapon of war to humiliate and dominate the local population. Sexual violence is also used as part of widespread and systematic attacks against the civilian population not only to punish and dominate but also as a means to gain access to scarce resources.

6. It is well established under international law that rape and other forms of sexual violence may constitute forms of torture and cruel, inhuman and degrading treatment. The commission of such acts in situations of armed conflict amounts to outrages upon personal dignity and are prohibited under common article 3 of the Geneva Conventions, as they are considered war crimes. Rape, sexual slavery, enforced prostitution, and

forced pregnancy may constitute crimes against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[i]

7. As armed conflicts continue to cause severe human rights and humanitarian crises in various regions of the world, women continue to be the main victims of practices of rape and other forms of sexual violence. In particular armed conflicts, rape and sexual abuse directed to women and young girls are used as a weapon of war and are conducted in a widespread and systematic manner. Information received through interviews of victims indicate that such rapes are usually carried out by more than one man, while victims are restrained, often at gunpoint and are associated with additional severe violence including beating with guns and whipping. The destructive impact of systematic rape is not limited to the victims but expands to family members who often are forced to watch.

8. In some specific armed conflict situations, rape and other forms of sexual abuse are also used in furtherance of a State or organizational policy to intimidate and humiliate the female population and to prevent them from leaving the vicinity of their camps. Women caught in the midst of armed conflicts have reported that if they were to venture any further than 1½ kilometres away from their camps to collect wood or to tend their vegetable gardens in their home village, they would be kidnapped and raped.

9. In other armed conflicts involving several countries in one given region, rape is used extensively as a weapon of war against civilian women, men, girls and boys to subdue, punish, or take revenge upon entire communities. Acts of sexual and gender-based violence are manifested in random and systematic attacks involving individual rapes, sexual abuse, gang rapes, mutilation of genitalia, and rape-shooting or rape-stabbing combinations. These acts are committed with impunity by members of armies, militias and gangs implicated in the conflicts, including local bands and police forces that attack their own communities. The effects of the brutality which accompanies the rapes and mutilations contribute directly to the disintegration of the moral and social fabric in many localities.

10. The presence of the United Nations peacekeeping missions in regions with armed conflicts has served to bring concrete improvement to the security situation. Various humanitarian and development organizations also deploy much effort to provide support and address some of the problems associated with insecurity, displacement, and sexual violence. Despite these efforts, in particular armed conflict situations, the local population continues to experience attacks of sexual terrorism and pillaging.

11. The prevention of sexual terrorism depends on successful national political transitions. Engaging all warring parties in the participation of processes of disarmament, demobilization and reintegration promises to improve security, support regional governance and offer to communities some means with which to reduce the violence. While the repercussions of sexual violence can be addressed through initiatives aimed at providing medical, psychosocial, judicial, and socio-economic support to victims, the primary tool for the prevention of sexual violence can only be durable peace.

12. Security Council resolution 1325 (2000) on women, peace and security not only acknowledges the vulnerability of women and girls during armed conflicts, but also the role they can play in peace-building and conflict resolution. This positive step shows that the assessment of the impact of armed conflict on women is key to international peace

and security. This resolution demonstrates the recognition on the part of the international community of the need to address the issue seriously and carefully. Pursuant to the resolution, the Secretary-General submitted a report to the Security Council (S/2002/1154) which provides a study on the impact of armed conflict on women and girls. The implementation of the recommendations included in the report of the Secretary-General will serve to improve the protection of women and girls during and after armed conflicts and represents a key challenge for the coming years.

13. In furtherance of Security Council resolution 1325, the United Nations Development Fund for Women (UNIFEM) (2002) commissioned an expert study on women, war and peace.[ii] According to the UNIFEM expert study on women, war and peace, violence against women during conflict should be considered as "one of history's great silences". The report notably described the massive scale of violations against women during armed conflict. During the 1994 Rwanda genocide at least 250,000 - perhaps as many as 500,000 - women were raped. Sexual violence, including rape, torture and sexual slavery as linked to various conflicts were also described in the report. The independent experts also noted the inextricable link between, on the one hand, armed conflict and on the other hand increased levels of men's violence against women in the domestic sphere, trafficking and forced labour, including forced sex labour. It is expected that the implementation of the recommendations contained in this report will be conducted in conjunction with those of the Secretary-General's report.

14. In recalling Security Council resolution 1325 during its forty-eighth session (1-12 March 2004), the Commission on the Status of Women stressed the importance of women's equal participation in conflict prevention, conflict management and conflict resolution and in post-conflict peace-building. The Commission noted that women continue to be underrepresented in the processes, institutions and mechanisms dealing with these subjects. Consistent with this conclusion, the Commission stressed that the achievement of sustainable and durable peace demands the full and equal participation of women and girls and the integration of gender perspectives in all aspects of conflict prevention, management and conflict resolution and in post-conflict peace-building. According to the Commission, further efforts and adequate resources are needed to build and consolidate the capacity of women and women's groups to participate fully in conflict resolution and peace-building and also in electoral processes in post-conflict situations. The Commission stressed that the development of gender-sensitive constitutional and legal frameworks is crucial and that gender equality has to be the normative basis for all such processes.

I. HUMAN RIGHTS TREATY BODIES

15. This section updates information included in previous reports. In reviewing country reports, treaty monitoring bodies are attentive as to whether the country concerned is facing a conflict; in such a case, treaty-monitoring bodies examine the impact of the conflict on the civilian population.

Human Rights Committee

16. In considering State party reports, the Human Rights Committee relies on the normative content of its general comment No. 28 (on article 3 of the International Covenant on Civil and Political Rights (ICCPR)) entitled "equality of rights between men and women"; and its general comment No. 29 (on article 4 of the ICCPR) entitled "states

of emergency".[iii] General comment No. 28 provides for the removal of obstacles through the adoption of positive measures toward achieving equal enjoyment by women of certain specified rights. Pursuant to this comment, the human rights of women are to be protected during a state of emergency and during times of internal and international armed conflict particularly in light of the vulnerability of women. Under general comment No. 29, the Committee provides some guidelines as regards the protection of the human rights of women during a state of emergency amounting to a threat to the life of the nation justifying derogable measures, as strictly required by the exigencies of the situation. The Committee considers that, although the principle of non-discrimination is not listed under article 4 as a non-derogable right, the Committee is of the view that this right contains elements from which there can be no derogation in any circumstances. Consequently, gender-based violations cannot be invoked as a necessary and legitimate measure required during a state of emergency threatening the life of the nation.

Committee on the Elimination of Discrimination against Women

17. The work of the Committee is guided by the content of its general recommendation No. 19, on violence against women, which serves as its basic document of reference.[iv]

18. During its thirtieth session (12-30 January 2004) the Committee issued its general recommendation No. 25, on temporary special measures (article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women). This general comment is guided by the consideration that since women and men do not enjoy equal status in any society, and that violence and discrimination against women are exacerbated during armed conflicts, efforts to reduce the vulnerability of women should begin prior to the armed conflict stage by establishing special measures designed to increase the role of women in decision-making.

19. The interpretation of special measures under general recommendation No. 25 provides clarification to the substantive content of article 4, paragraph 1, in order to facilitate and ensure its application at the national level by States parties. In meeting the obligations that are central to States parties' efforts to eliminate discrimination against women, the Committee expresses the view that States must extend their efforts beyond a purely formal legal obligation of equal treatment of women with men, as such an approach is not sufficient to achieve women's de facto equality with men. Instead, women must be given an equal start and thereby be empowered by an enabling environment to achieve equality of results. It is within this context that temporary special measures can serve as an effective strategy to overcome underrepresentation of women and a redistribution of resources and power between men and women.

20. Since the position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed, measures must be adopted towards a real transformation. Hence, temporary special measures establish the legal framework for accelerating de facto equality between men and women and shall not be considered discriminatory as they are to be discontinued when the objectives of equality of

opportunity and treatment have been achieved. Such results are to be measured through statistical data concerning the situation of women which reveal the achievement of progress towards women's de facto or substantive equality and the effectiveness of temporary special measures.

21. As regards the forthcoming activities of the Committee, the latter will be considering Angola's report at its thirty-first session (6 to 23 July 2004). In Angola's combined initial, second and third periodic report to the Committee (CEDAW/C/AGO/1), the State party described how women were victimized during the prolonged armed conflict. In the report it is noted that during the war, which lasted until the cessation of hostilities in March 2002, women were raped by soldiers, forced to do manual labour (including domestic work and farm work), identified as "witches" and then burned at the stake, and also used as wartime "couriers".

Committee against Torture

22. In reviewing the third periodic report of Colombia during its thirty-first session (CAT/C/CR/31/1, paras. 9-10), the Committee against Torture expressed concern over inadequate protection against rape and other forms of sexual violence, which are allegedly frequently used as forms of torture or ill-treatment and also about the fact that the new Military Penal Code of Colombia does not expressly exclude sexual offences from the jurisdiction of the military courts. The Committee recommended that the State party investigate, prosecute and punish those responsible for rape and other forms of sexual violence that occur within the framework of operations against illegal armed groups.

II. THE COMMISSION ON HUMAN RIGHTS AND ITS MECHANISMS AND PROCEDURES

23. At its sixtieth session, the Commission on Human Rights considered the issues of systematic rape, sexual slavery and slavery-like practices during armed conflicts in its resolutions on the elimination of violence against women (2004/46), on the abduction of children in Africa (2004/47) and on the rights of the child (2004/48).

24. In resolution 2004/46 (paras. 16 and 18-19), the Commission strongly condemned violence against women committed in situations of armed conflict, such as murder, rape, systematic rape, sexual slavery and forced pregnancy, and called for effective responses to these violations of international human rights and humanitarian law. The Commission also stressed the importance of efforts to eliminate impunity for violence against women and girls in situations of armed conflict, including by prosecuting gender-related crimes and crimes of sexual violence by providing protective measures, counselling and other appropriate assistance, to victims and witnesses in international and internationally-supported courts and tribunals, by integrating a gender perspective into all efforts to eliminate impunity, including into commissions of inquiry and commissions for achieving truth and reconciliation. Furthermore, the Commission acknowledged the listing of gender-related crimes under the Rome Statute of the International Criminal Court as they amount to the most serious crimes of concern to the international community as a whole.

25. In resolution 2004/47 (paras. 1-2), the Commission condemned the practice of abduction of children for various purposes, such as soldiers or workers, for purposes of sexual exploitation and/or paedophilia, and for the purposes of trade in human organs.

The Commission also condemned the abduction of children from camps of refugees and internally displaced persons by armed groups, and their subjection of children to forced conscription, torture, killing and rape.

26. In resolution 2004/48 (paras. 6 and 32), the Commission called upon States parties to end impunity for perpetrators of crimes committed against children, recognizing in this regard the contribution of the establishment of the International Criminal Court as a way to prevent violations of human rights and international humanitarian law, in particular when children are victims of serious crimes, including the crime of genocide, crimes against humanity and war crimes, and to bring perpetrators of such crimes to justice, and not grant amnesties for these crimes. The Commission also called upon States parties to protect refugee, asylum-seeking and internally displaced children, in particular those who are unaccompanied, who are particularly exposed to risks in connection with armed conflict, such as recruitment, sexual violence and exploitation.

27. Information on gender-based violence examined by special rapporteurs is summarized thematically below.

28. In her report on violence against women (E/CN.4/2004/66 and Add.1-2), the Special Rapporteur on violence against women, its causes and consequences, emphasized the *universality* of violence against women, the *multiplicity* of its forms and the *intersectionality* of diverse kinds of discrimination against women and its linkage to a system of patriarchal domination that is based on gender inequality and on the subordination of women by men. The Special Rapporteur also expanded the concept of violence against women to capture the wide spectrum of violence ranging "from the domicile to the transnational arena". The Special Rapporteur noted that transnational corporations have responsibilities for promoting and securing human rights, established under the "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights", adopted in 2003 by the Sub-Commission on the Promotion and Protection of Human Rights.

29. The Special Rapporteur identified the interconnection between HIV/AIDS and women's human rights as a major area of concern. HIV/AIDS and other sexually transmitted diseases, early pregnancies, community rejection of raped women and women forced into prostitution are only a few of the consequences of rape and of men's sexual violence against women and girls during conflicts.

30. In her report, the Special Rapporteur also paid particular attention to the human rights situation in Afghanistan. She urged the Government to take steps to tackle impunity for perpetrators of violence against women, while at the same time establishing the rule of law throughout the country. In this regard, the Special Rapporteur emphasized the need for legal and judicial reform, in line with international standards, in order to promote and protect the rights of women and girls. She noted that the drafting of a new constitution provides a valuable opportunity to guarantee the principle of equality of rights for women and men and to prohibit all forms of discrimination against women.

Armed conflicts, internal displacement and sexual violence

31. Armed conflict often results in the internal displacement of civilian populations. Living in camps as internally displaced or as refugees, women's vulnerability to violence,

especially sexual violence, increases. The Special Rapporteur on violence against women and the Representative of the Secretary-General on internally displaced persons have reported allegations of rape and other sexual violence, perpetrated either during a conflict or in its aftermath, against internally displaced and refugee women and girls.

32. The independent expert on the situation of human rights in Liberia noted in this year's report (E/CN.4/2004/113, paras. 7-8) that the intensification of the conflict in 2003 was accompanied by increased human rights abuses, including all forms of violence against women and rape. The independent expert also took note of several reports of women and girls who have been raped, gang-raped and subjected to other forms of sexual violence by the Anti-Terrorist Unit (ATU) and other former Government-allied militia. There have been reports of alleged abduction and rape of women and girls within IDP camps in Montserrado County by the then Government-allied militia. There have also been alleged cases of abduction and rape of young girls and women at checkpoints by rebels.

33. In his report to the Commission on Human Rights on the situation of human rights in Colombia (E/CN.4/2004/13, para. 94) the High Commissioner for Human Rights noted that the diverse forms of violence perpetrated against women, in the context of the armed conflict, continue to affect their rights. The office in Colombia received complaints of rapes by paramilitary groups and members of the security forces, as well as complaints of sexual enslavement on the part of the guerrilla groups. Of special concern are the rape cases currently under the jurisdiction of the military/criminal justice system.

34. In referring to the UNICEF report, *From Perception to Reality: A Study on Child Protection in Somalia*, the independent expert on the situation of human rights in Somalia (E/CN.4/2004/103, para. 24) noted that gender-based violence is a problem of concern in Somalia, despite a widespread culture of denial. Women and girls in IDP camps are especially vulnerable - the study notes that "nearly a third of all displaced children (31 per cent) reported rape as a problem within their family, compared to 17 per cent of children in the general population".

35. In the addendum to his report (E/CN.4/2004/77/Add.1, paras. 25, 27, 33, 42 and 57) the Representative of the Secretary-General on internally displaced persons noted that during his mission to Uganda he was made aware of the vulnerability of the country's internally displaced population. The Representative called upon the Government of Uganda to ensure the physical protection of the displaced hosted in camps, who remained vulnerable to rebel attacks and abductions, as well as to provide adequate protection and assistance to the so-called "night commuters", approximately 25,000 persons - mostly children - who came to sleep in the urban centres in the north of the country out of fear of attacks and abduction by armed rebel groups, especially the so-called Lord's Resistance Army (LRA). The Representative noted a number of cases of forced recruitment, abduction of children and the use of children as sex slaves by the rebel LRA movement.

III. DEVELOPMENTS IN INTERNATIONAL CRIMINAL, HUMAN RIGHTS AND HUMANITARIAN LAW

36. The relevance of the statutes and jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and of the International Criminal Tribunal for Rwanda (ICTR), as well as the Rome Statute of the International Criminal Court (ICC), to preventing and prosecuting gender-based sexual violence during armed conflicts was

considered in the previous reports of the High Commissioner. They contribute not only to the international recognition and consideration of women as victims of conflicts, but also to ensuring social survival and promoting reconciliation and reconstruction.

37. Rape in time of war is specifically prohibited by treaty law: the Geneva Conventions of 1949, Additional Protocols I and II of 1977. Other serious sexual assaults are expressly or implicitly prohibited in various provisions of the same treaties. The prosecution of rape is explicitly provided for under the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Rome Statute. The crime of rape may be prosecuted accordingly under these statutes as a crime against humanity, a grave breach of the Geneva Conventions, a violation of the laws or customs of war or an act of genocide, if the requisite elements are proven.

38. On 11 March 2004, the ICTY rendered its Sentencing Judgement in the case *Prosecutor v. Ranko Cesic* (IT-95-10/1 "Brcko"). The Accused pleaded guilty to all 12 counts with which he was charged, including that of sexual assault as a crime against humanity, in the form of rape. Being satisfied that the plea was voluntary, informed, unequivocal and that there was a sufficient factual basis for the crime and for Ranko Cesic's participation in it, the Trial Chamber, entered a finding of guilt on the same day.

39. Ranko Cesic admitted that, he intentionally forced, at gunpoint, two Muslim brothers detained at Luka Camp to perform fellatio on each other in the presence of others. The Trial Chamber found in this case that the family relationship and the fact that they were watched by others make the offence of humiliating and degrading treatment particularly serious. The violation of the moral and physical integrity of the victims justifies that the rape be considered particularly serious as well. On this basis, the Trial Chamber convicted Ranko Cesic of inter alia one count of sexual assault, constituting the crime against humanity of rape. Ranko Cesic was sentenced to a single sentence of 18 years of imprisonment.

40. As regards the ICTR, on 22 January 2004, the Tribunal rendered its judgement in the case *Prosecutor v. Jean de Dieu Kamuhanda* (ICTR-99-54) charged with, inter alia, rape as a crime against humanity. Having analysed all the evidence presented, the Chamber finds that although the testimonies of the relevant witnesses are credible, the hearsay nature of the evidence adduced is insufficient to sustain a rape charge against the accused. However, the accused was convicted of genocide or extermination as a Crime against Humanity.

41. The Special Court for Sierra Leone (SCSL) was established jointly by the Government of Sierra Leone and the United Nations and mandated to prosecute under international humanitarian law and national law, persons charged with serious violations committed in the territory of Sierra Leone since 30 November 1996. Such crimes include crimes against humanity, war crimes and other serious violations of international humanitarian law. Eleven persons associated with all three of the country's former warring factions stand indicted by SCSL. They are charged with crimes against humanity, war crimes and other serious violations of international humanitarian law. Specifically, the charges include murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force, and attacks on United Nations peacekeepers and humanitarian workers, among others.

Indictments against two other persons were withdrawn in December 2003 due to the deaths of the accused.

42. In 10 of the SCSL cases, indictments include allegations of rape; sexual slavery and any other forms of sexual violence; conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities; and enslavement.

43. On 7 May 2004 the Trial Chamber of SCSL approved a motion by prosecutors to add the new count of "forced marriage" under the category of "sexual violence", to indictments against six defendants. The approval by the Trial Chamber of this count under the indictments marks an important achievement as regards the prosecution of forced marriage as a crime against humanity under international humanitarian law.

IV. CONCLUSIONS

44. **Despite legal achievements at the international level, exemplified by the latest judgements from ICTY and ICTR, the work of SCSL and the provisions of the Rome Statute of the International Criminal Court, acknowledging that rape and sexual enslavement, committed as part of a widespread or systematic attack directed against any civilian population, constitute crimes against humanity, and that perpetrators should be held accountable and punished for such crimes, sexual gender-based violence, systematic rape and various forms of enslavement are still widespread during armed conflicts.**

45. **Armed conflicts exacerbate violence against women and illustrate its linkage to a system of patriarchal domination, based on gender inequality and on the subordination of women by men. Recent reports from the United Nations human rights mechanisms reveal that in armed conflict women and girls face widespread sexual gender-based violations in the form of, but not limited to, rape, sexual violence, sexual slavery and forced marriage. Related violations range from the enslavement of civilian populations, especially of women and girls, to the abduction of children for use as child soldiers or workers. In post-conflict situations women and girls often continue to be targeted because of an ongoing increased vulnerability, either in refugee camps, at home or on the road back to their homes. Moreover, even if women are increasingly becoming combatants, they continue to be underrepresented or altogether absent from the negotiating table and in the peace process.**

46. **As a landmark document, Security Council resolution 1325 (2000) on women, peace and security retains a vital role in the efforts to strengthen the protection of the human rights of women and girls during and after armed conflicts and in acknowledging that sexual violence against women during armed conflicts has a major negative impact on international peace and security.**

47. **Moreover, the scope covered by Security Council resolution 1325 is not limited to the connection between peace and security and human rights of women. In addition, it provides clearly that women have a vital role to play in the prevention and resolution of conflicts and in peace-building which can only be put into practice if women's full and equal participation in all decision-making forums is ensured and**

gender perspectives are integrated into all aspects and at all stages of conflict prevention and conflict resolution.

48. **Hence, considerable efforts have been deployed by relevant parts of the United Nations system, to implement Security Council resolution 1325. This approach includes a focus on achieving gender balance in peace-building, demobilization, disarmament, and reintegration processes, peacekeeping operations, humanitarian activities and reconstruction and rehabilitation programmes. It is within this context that the Department of Political Affairs has developed an action plan for the implementation of Council resolution 1325. Moreover, the Division for the Advancement of Women is exploring methods and means through which Council resolution 1325 can be implemented with regard to the structure and design of peace agreements.**

49. **Despite these achievements a number of constraints to the effective participation of women remain to be addressed. These include women's poor representation at the decision-making levels where they could make the most impact; the persistence of violence against women, which hinders many women from reaching their full potential; lack of access to resources, including finances and information; and persistent stereotypes on the roles and expected behaviour of women, including in government institutions and society in general.**

50. **It is in light of these hindrances that CEDAW general recommendation 25 is important as it establishes guidelines on the adoption of "temporary special measures" as a means of addressing the under-representation of women in all areas of the work of the United Nations, including on peace and security. Security Council resolution 1325 and recommendation 25 are clearly complementary and of utmost importance, as they set the necessary standards to achieve gender equality.**

51. **In considering grave violations, especially of the human rights of women and girls during armed conflict, a key challenge today is the enhanced de facto implementation of Security Council resolution 1325 and of CEDAW general recommendation 25. The situation of women can only be improved through concrete and effective policies and programmes addressing prevailing gender relations and the persistence of gender-based stereotypes.**

52. **In order to bring an end to the cycle of violence and prevent armed conflicts, the equal rights of women to fully participate in all aspects of social, political, economic and cultural life must be promoted and protected. Only with the full equality and participation of women will measures taken to prevent systematic rape, sexual violence and enslavement of women during armed conflicts be truly successful.**

Notes

[i] Article 7.1 of the Rome Statute of the International Criminal Court.

[ii] "Women, War and Peace, The Independent Experts' Assessment", by Elisabeth Rehn and Ellen Johnson Sirleaf, *Progress of the World's Women 2002, Volume 1.*

[iii] While general comment No. 29 does not specifically address the protection of women against gender-based abuse in armed conflicts, it contains references to the need for respect for the general principle of non-discrimination in a state of emergency, and gender-based abuse against women would be an example of such discrimination. In adopting this general comment, the Human Rights Committee has clarified the content of article 4 of ICCPR, clarifying the necessity of respecting the principle of non-discrimination in a state of emergency, including on the basis of gender. Any derogation from the provisions of the Covenant by States parties in internal crisis situations would be subject to scrutiny by the Committee to ensure that the conditions for lawful derogation are fulfilled.

[iv] CEDAW acknowledged that wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures (para. 16).

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United Nations S/RES/1325 (2000)

Security Council

Distr.: General
31 October 2000

Resolution 1325 (2000)

Adopted by the Security Council at its 4213th meeting, on 31 October 2000

The Security Council,

Recalling its resolutions 1261 (1999) of 25 August 1999, 1265 (1999) of 17 September 1999, 1296 (2000) of 19 April 2000 and 1314 (2000) of 11 August 2000, as well as relevant statements of its President, and *recalling also* the statement of its President to the press on the occasion of the United Nations Day for Women's Rights and International Peace (International Women's Day) of 8 March 2000 (SC/6816),

Recalling also the commitments of the Beijing Declaration and Platform for Action (A/52/231) as well as those contained in the outcome document of the twenty-third Special Session of the United Nations General Assembly entitled "Women 2000: Gender Equality, Development and Peace for the Twenty-First Century" (A/S-23/10/Rev.1), in particular those concerning women and armed conflict,

Bearing in mind the purposes and principles of the Charter of the United Nations and the primary responsibility of the Security Council under the Charter for the maintenance of international peace and security,

Expressing concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and increasingly are targeted by combatants and armed elements, and *recognizing* the consequent impact this has on durable peace and reconciliation,

Reaffirming the important role of women in the prevention and resolution of conflicts and in peace-building, and *stressing* the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution,

Reaffirming also the need to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts,

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Emphasizing the need for all parties to ensure that mine clearance and mine awareness programmes take into account the special needs of women and girls,

Recognizing the urgent need to mainstream a gender perspective into peacekeeping operations, and in this regard *noting* the Windhoek Declaration and the Namibia Plan of Action on Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations (S/2000/693),

Recognizing also the importance of the recommendation contained in the statement of its President to the press of 8 March 2000 for specialized training for all peacekeeping personnel on the protection, special needs and human rights of women and children in conflict situations,

Recognizing that an understanding of the impact of armed conflict on women and girls, effective institutional arrangements to guarantee their protection and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security,

Noting the need to consolidate data on the impact of armed conflict on women and girls,

1. *Urges* Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict;

2. *Encourages* the Secretary-General to implement his strategic plan of action (A/49/587) calling for an increase in the participation of women at decision-making levels in conflict resolution and peace processes;

3. *Urges* the Secretary-General to appoint more women as special representatives and envoys to pursue good offices on his behalf, and in this regard *calls on* Member States to provide candidates to the Secretary-General, for inclusion in a regularly updated centralized roster;

4. *Further urges* the Secretary-General to seek to expand the role and contribution of women in United Nations field-based operations, and especially among military observers, civilian police, human rights and humanitarian personnel;

5. *Expresses* its willingness to incorporate a gender perspective into peacekeeping operations, and *urges* the Secretary-General to ensure that, where appropriate, field operations include a gender component;

6. *Requests* the Secretary-General to provide to Member States training guidelines and materials on the protection, rights and the particular needs of women, as well as on the importance of involving women in all peacekeeping and peace-building measures, *invites* Member States to incorporate these elements as well as HIV/AIDS awareness training into their national training programmes for military and civilian police personnel in preparation for deployment, and *further requests* the Secretary-General to ensure that civilian personnel of peacekeeping operations receive similar training;

7. *Urges* Member States to increase their voluntary financial, technical and logistical support for gender-sensitive training efforts, including those undertaken by relevant funds and programmes, inter alia, the United Nations Fund for Women and United Nations Children's Fund, and by the Office of the United Nations High Commissioner for Refugees and other relevant bodies;

8. *Calls on* all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia:

(a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction;

(b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements;

(c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary;

9. *Calls upon* all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, the Refugee Convention of 1951 and the Protocol thereto of 1967, the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the Optional Protocol thereto of 1999 and the United Nations Convention on the Rights of the Child of 1989 and the two Optional Protocols thereto of 25 May 2000, and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court;

10. *Calls on* all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict;

11. *Emphasizes* the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard *stresses* the need to exclude these crimes, where feasible from amnesty provisions;

12. *Calls upon* all parties to armed conflict to respect the civilian and humanitarian character of refugee camps and settlements, and to take into account the particular needs of women and girls, including in their design, and recalls its resolutions 1208 (1998) of 19 November 1998 and 1296 (2000) of 19 April 2000;

13. *Encourages* all those involved in the planning for disarmament, demobilization and reintegration to consider the different needs of female and male ex-combatants and to take into account the needs of their dependants;

14. *Reaffirms* its readiness, whenever measures are adopted under Article 41 of the Charter of the United Nations, to give consideration to their potential impact on the civilian population, bearing in mind the special needs of women and girls, in order to consider appropriate humanitarian exemptions;

15. *Expresses* its willingness to ensure that Security Council missions take into account gender considerations and the rights of women, including through consultation with local and international women's groups;

16. *Invites* the Secretary-General to carry out a study on the impact of armed conflict on women and girls, the role of women in peace-building and the gender dimensions of peace processes and conflict resolution, and *further invites* him to

submit a report to the Security Council on the results of this study and to make this available to all Member States of the United Nations;

17. *Requests* the Secretary-General, where appropriate, to include in his reporting to the Security Council progress on gender mainstreaming throughout peacekeeping missions and all other aspects relating to women and girls;

18. *Decides* to remain actively seized of the matter.