047

SCSL-2003-05-PT-047
(973-1095)

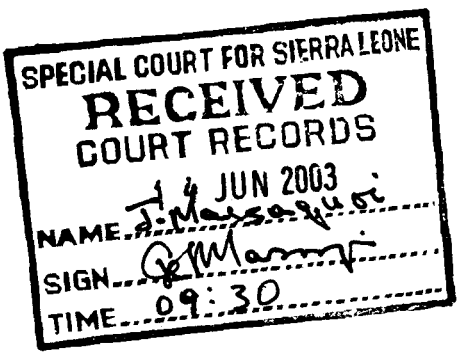
973

IN THE SPECIAL COURT FOR SIERRA LEONE

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

Registrar: Mr. Robin Vincent

Date electronically transmitted to Defence Office for delivery and filing with The Court Management Unit: June 13, 2003



THE PROSECUTOR

Against

ISSA HASSAN SESAY
(Case No. SCSL 2003-05-PT)

DEFENCE REPLY TO PROSECUTION RESPONSE TO:
APPLICATION FOR RECONSIDERATION OF AND/OR LEAVE TO APPEAL REGARDING THE ORDER OF JUDGE BANKOLE THOMPSON (PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS) RENDERED ON THE 23rd MAY 2003

Office of the Prosecutor:

Luc Cote, Chief of the Prosecution

Defence Counsel:

William Hartzog, Lead Counsel
Alexandra Marcil, Co-Counsel

INTRODUCTION

1. The Defence replies that the Prosecution errs in requesting that Defence submissions in the instant Motion be rejected. It is respectfully submitted that both remedies are within the competence of the Trial Chamber and are alternative remedies that may be adressed in one proceeding under the Rules of the Special Court of Sierra Leone ("the **Court**:). Although there are surely instances where this may not be done, the present case is not one of them.

2. It is also submitted that the learned Judge Bankole Thompson also has the power and discretion to proceed alone to reconsider his judgment by the exercise of his inherent powers, where he is convinced that it would be merited.

3. The request for reconsideration should not be rejected formally or materially. The argument raised by the Prosecution concerning the imperative requirement of a decisive and determinate new fact will be addressed in the present reply. With regard to the request to the Trial Chamber for leave to appeal or for a referral to the Appeals Chamber, this will also be addressed in this reply. Summarily however, it is respectfully submitted that if the Motion for reconsideration is not granted, the alternative request for leave to appeal or referral should be received formally and granted materially.

4. The argument of the Prosecution against the practice of adopting the pleadings of another proceeding before the Court, "in lieu of filing such arguments within the pleading itself" is accepted with reservations that counsel believe apply in the instant case and which will be developed in the reply. As a general rule, the procedure described by the Prosecution is accepted as correct.

PRELIMINARY MATTERS

5. As the Defence will show in **Annexe 1**, the Electronic Service to Counsel of the Response was sent by the SCSL Court Management Unit on June 9, 2003 at "08 : 25 : PM", then reached the un hub at "20 : 24 :12 –0400 (EDT)", and finally reached the server for counsel on 9 June 2003 **at 20 : 25 :29 –0400"**. As counsel was and is normally out of the office at 5 pm and the rules for valid service by bailiff in his jurisdiction is 19h00, counsel does not consider that he received the response on the 9th of June, but rather on the 10th of June, when he believes (but does not relay on) that he opened the file and that he argues is irrelevant (time of opening - an argument that is unequivocal because if counsel had received service during business hours but did not open the file for three days he would have to suffer the consequences). In the event therefore, counsel submits that the day of reception was the 10th of June, 2003, and that the first day of the period stipuled by Rule 7 " [reply] within three days" was thus 11 June 2003 and the last day was June 13, 2003 (up to 23h59m59seconds). The Court Management Unit usually accepts service before 4 p.m. Sierra Leone time; which in the instant case would be 12:00 noon Montréal time thus giving counsel only two and a half days rather than three (2/1/2 vs 3) days to reply.

6. It is submitted that the question of the receivability of the instant reply is a question for the Trial Chamber and that it is however a moot and theoretical question if there is no objection from the Prosecution. Furthemore it is respectfully submitted that if the Prosecution objects under Rule 5, the Trial Chamber should not grant relief in the instant circumstances, all the more so as co-counsel Marcil arrived from Freetown via Gatwick, Heathrow and Charles de Gaulle airports on June 10, 2003, exhausted and ill after a seven day medically ordered work restriction due to malaria contracted in Sierra Leone and she continus to suffer from malaria and as counsel Hartzog was fully consumed in the urgent, unforeseeable, unavoidable and highly serious mission to protect his client from being convoked by the TRC in his absence with only 7 days notice: "Request TRC" received on Tues. June 10, 2003 (**ANNEXE 2)** – an

endeavour that consumed more than one day of counsel's time and which involved extensive research and intervention as well as liason with the Registrar Mr. Robin Vincent, an alert to the Chief Prosecutor and a carefully thought out and worded letter to the TRC. The matter was only finally resolved by an alternative proposal in response to counsel's concerns by a fax from the TRC on Friday June 13, 2003 (**ANNEXE 3**).

REPLY TO ARGUMENTS

I. Procedural matters

7. As the Registrar's records will show and which are therefore not produced as an annexe, Lead Counsel Hartzog was named on May 1, 2003; Co-Counsel Marcil was named on May 19, 2003. The Prosecution's Motion (7 April 2003) was initiated significantly before nomination of counsel for the accused and the deliberations on the Motion by the learned Judge Bankole Thompson (29 April 2003) also began prior to the nomination of counsel.

8. It is respectfully submitted that the Defence Office could have simply responded to the Motion of the Prosecution by stating that the question of the disclosure of the names of the witnesses could (or should be) be dealt with when permanent counsel were assigned with the consequent result that no delays [for the communication of the evidence justifying the indictment and the names of witness and the material relied on] would have began to run - or the D.O. could have asked that consideration of the Motion be suspended without prejudice and agreed that the disclosure obligations be frozen until counsel were named. No significant threats to trial delay would have been engendered and by this measure the full effect of the fundamental rule of *audi alteram partem*, - leading to full and informed representations by the permanent counsel of the accused (counsel instructed by the accused themselves) – would have been enhanced and fully concretized.

9. It is thus respectfully submitted that it is normal that counsel ask for reconsideration, leave or referral for appeal in the light of their instruction after the arguments on the merits and taking into account that it is accuseds' counsel who must be allowed to challenge the decision on protective measures. The *de facto* obligation to accept the results would be incumbent on future replacing counsel however.

10. It is of note that counsel for the accused Gbao, Kallon and Sesay have each raised distinct and different issues or argued the merits of their submissions in a different manner than that put forward by the Defence Office. With the utmost respect for the arguments advanced by the Defence Office which the accused's present counsel endorse, counsel nevertheless submit that the duty of the Prosecution to comply with the obligations under Rule 66 needlessly compelled the Defence Office to act when it was not materially prepared to do so, was not fully staffed, nor did it have any "clients" in the same sense that appointed counsel now have. The "Acting Defence Advisor and Acting Principal Defender", Mr. John Jones, did not assume his duties until April 7, 2003, the very day of the filing of the Prosecution's Motion for Protective Measures. As of the day of this reply (June 13, 2003, no Principal Defender has been announced or taken office.

11. Rule 66 is subject to the limitations of Rules 53, 69 and 73, the first two subordinate the question of non disclosure to the existence of "exceptional circumstances"; Rule 75 requires that non disclosure comport the requirement that the [measures] be "consistent with the rights of the accused".

12. In paragraph 5 of its response the Prosecution argues that no reconsideration is appropriate where "a fact, circumstance or argument [could] have been reasonably expected to [be] raised prior to the rendering of the decision". Counsel reply that before their appointment they would have had no standing or interest to raise any question or to move any argument before the rendering of the decision.

13. Lastly, and in spite of the admirable efforts of the Defence Office in the instant motion, it is also respectfully submitted that the mandate of the Defence Office under Rule 45, while having as its purpose that of "ensuring the rights of suspects and accused" should not normally be interpreted as encompassing the responsibility of the D.O. to represent all the accused in matters that are not urgent in nature. Counsel submit that the disclosure of the materials referred to in Rule 66 (A) (i) could not in the instant case have been disclosed to or used by the Defence Office as the current practice of the D. O. is to recruit and validate the credentials of permanent counsel who may be chosen by the accused, and who thus become the only counsel that the accused instructs; the role of the D.O. and duty counsel being primarily to ensure and preserve the rights of the accused until the appointment of counsel.

II. Reconsideration

14. The Prosecution alleges that the "motion has been fully argued." This is, in counsel's respectful opinion patently impossible to sustain as an argument: counsel were not even appointed or instructed when the motion was argued. It is respectfully submitted that by the very nature of the issue at hand the motion could never be fullly argued other than directly by counsel for the accused, acting when the accused has been fully informed of the charges against him. The principle of *audi alteram partem*, was not raised by the Defence Office. Even subsequent counsel may in certain circumstances argue that subsequent accused persons are entitled to raise independent aguments regarding the question of justifications for non-disclosure; as counsel have mentioned supra, non-disclosure is justified [only] in "exceptional circumstances."

15. The "new facts" issue: Counsel reply that in addition to the *audi alteram partem* rule which is equivalent to a new issue under the Barayagwiza criteria, the test proposed by the Prosecution is overly constricting.

16. In paragraphs 9 to 12 the sense of the counsel's submission is that the dispositive elements of the Decision concerning the 42 day rule should be varied to instruct the Prosecution to disclose the identities of the witnesses 42 days before the start of the trial.

17. Counsel in the Application have developed arguments that are more specific in regard to the question of the need for the Defence to supply the Prosecution and the Chamber with the names of all members of the defence team (see remarks about measure **(h)** , infra. Counsel have argued that from a trial preparation and conduct point of view there are new aspects of the issues in question that are more detailed and more context specific than the arguments presented to the learned judge in the Defence Office Response, for example, concerning the matter of conducting efficient investigations and efficaceous trial proceedings and argue therein that these issues merit being examined in a judicial reconsideration of the arguments (paragraphs 10 and 11 of the Application).

18. In paragraph 16 of the Application counsel have submitted that the effect of measure **(h)** of the Decision is to undermine the independence of the different entities of the Court and raises a "considerable structural problem" in that it "gives the Prosecution an *a priori* power to control the activities of the defence". Counsel submitted that the Trial Chamber may exercise control *a posteriori* over lawyers [even when the breach of the duties is committed by an employee of the lawyer].

19. Counsel submitted in its Application that measure **(k)** was overbroadly stipulated for the reasons argued in paragraph 18.

20. Lastly, counsel requested that the order be varied in light of the submissions put forward in the Application.

III. Adoption of Outside Argument

21. As stated in the **Introduction** supra, counsel wholly agree in principle with this argument. However in regard to the instant Application, (and in passing, counsel also submit that the same applies to the Kallon submission on which they rely and by inference to the Gbao submission) there was an urgent need to request a reconsideration and or leave to appeal as counsel were newly appointed and overwhelmed by the various circumstances of their clients, the need to return to their respective national chambers and to intervene in the debate pertaining to the rapidly developing and precedent setting jurisprudence of the court and therefore respectfully pray that the Trial Chamber will be indulgent under these circumstances and not grant the relief sought by the Prosecution of the rejection of the submission on those grounds.

IV. Leave to Appeal

22. Counsel replies to paragraph 6 of the Prosecution's Response that is is the Trial Chamber rather than the learned Judge which should grant leave to appeal to the Appeals Chamber.

23. Counsel maintain the arguments in their Application and reply that there may be significant difficulties involved in interpreting the "substance" of the witnesses' testimony without identifying characteristices in a sufficiently timely manner; learnig of all the witnessess' identities at the same time and in relation to the date of their testimony arguably will not allow the trial to be conducted in an efficient manner and will impede the conclusion of investigations.

24. With respect to paragraph 9 of the Response, counsel reply that it argues that the Application amply sets out the grounds for justifying leave to appeal to ensure a fair and expeditious trial.

25. Counsel reply to paragraph 11 of the Response by reaffirming the aruments in the Application.

26. Paragraph 12 of the Response is contested because counsel for the accused feel the measure is overbroad for the reasons stated in paragraph 16 of the Application.

V. Conclusion.

The Learned Judge Bankole Thompson or the Trial Chamber should grant the request to reconsider the Decision rendered on May 23, 2003; or alternatively grant leave to appeal or make a referral to the Appeals Chamber.

Montréal, Québec, 13 June 2003
For the accused, Mr. Issa Hassan Sesay

per William Hartzog
Counsel

982

William Hartzog
<whartzog@waxmandorval.com>

06/14/2003 03:12 AM
Please respond to whartzog

To: SCSL-Records <scsl-records@un.org>, SCSL-Defence <scsl-defence@un.org>, Sam Scratch <scratch@un.org>, Alexandra Marcil <alexandra.marcil@videotron.ca>, William Hartzog <whartzog@waxmandorval.com>
cc:
Subject: Electronic filing of defence reply to Prosecutor's Response:SCSL-03-05-045

Please consider this the filing of the defence reply in the case of Mr. Issa Hassan Sesay SCSL-03-05-045, and as counsel's formal request that the Reply be filed with the court Management Unit on Monday, June 16, 2003 or on Saturday, June 14, 2003 if practicable.

Counsel requests that Defence Intern Mr. Sam Scratch, sign per counsel William Hartzog and deliver the instant Reply to the Court Management Unit for filing.

Respectfully submitted,

(s)

William Hartzog
Lead Counsel for Mr. Sesay.



DEFENCE REPLY(DecisiBT.23.5.03) Picture 51 Request .pdf

APPENDIX

1. Electronic Service to Counsel / info sheet from servers and reception computer;

2. Will be attached as pdf file to the electronic service of counsel;

3. Forwarded in a fax to Court Management Unit at same time as the electronic service of reply by counsel;

4. Icdaa Hague Conference Presentation .doc;

5. Council of Europe Recommendation Rec (2000) 21.doc;

6. Barayagwiza 2000 03 31.doc

ANNEXE 1

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Return-Path: <scsl-records@un.org>
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          for <whartzog@waxmandorval.com>; Mon, 9 Jun 2003 20:25:29 -0400
Received: from un-mailhub-01.un.org (un-mailhub-01 [157.150.197.17])
        by mx1.un.org (8.11.0/8.11.0) with ESMTP id h5A00CP10279;
        Mon, 9 Jun 2003 20:24:12 -0400 (EDT)
To: "Alexandra Marcil" <marcil@un.org>, "William Hartzog" <hartzog@un.org>,
   "Luc Cote" <cotel@un.org>, "Tamba Gbekie" <gbekie@un.org>,
   "Gerald Stevens" <stevensg@un.org>, "John Jones" <jonesj@un.org>,
   alexandra.marcil@videotron.ca, "Beatrice Ureche" <ureche@un.org>,
   "Mariana Goetz" <goetz@un.org>, "Simon Meisenberg" <meisenberg@un.org>,
   "Matteo Crippa" <crippa@un.org>, whartzog@waxmandorval.com,
   billhartzog@yahoo.ca, mx49@musica.mcgill.ca,
   "Ibrahim S Yillah" <yillah@un.org>
Cc: "Robin Vincent" <vincentr@un.org>, "Robert Kirkwood" <kirkwoodr@un.org>,
   "Salem H Avan" <avan@un.org>, "Giorgia Tortora" <tortorag@un.org>,
   "Wendy Hart" <hartw@un.org>, "David Hecht" <hecht@un.org>
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Date: Mon, 9 Jun 2003 19:11:20 +0000
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Please find attached the following documents filed today, Monday 9 June
2003,  in the Sesay Case, No. SCSL-03-05-PT:
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ANNEXE 2

Request from TRC: to be sent with electronic filing by counsel as pdf file.

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Georgia kindly please copy this letter to Matteo (Chambers) for the information of the Trial Chamber. Also copy to John Jones (Defence Office) for circulation to the defence teams involved with a request (from John) for their views. Please also copy to the Cote d'Ivoire OTP. I have already expressed my reservations about this request and mentioned it to the Presiding Judge.

RAV. 2/6/05.

THE TRUTH AND RECONCILIATION COMMISSION

OUR REF: TRC/FBK/20

29th May 2003

Mr. Robin Vincent
Registrar, Special Court
Jomo Kenyatta Road
New England, Freetown.

2/6/03

Dear Sir,

REQUEST FOR ACCESS TO DETAINEES

I thank you very much for our last (Vincent/Kargbo) meeting. It is obvious that regular consultations between our respective institutions will assist in facilitating the resolution of issues that otherwise would be problematic.

* We hope that you have had consultations with your staff as you indicated. We are very eager to know the names and addresses of the Defence Counsel for the detainees as we previously requested so that we could begin the negotiations with them for the appearance of their clients at a hearing of the Commission. For the avoidance of doubt, these detainees are as follows:

1. Chief Hinga Norman
2. Mr. Issa Sesay
3. Mr. Morris Kallon
4. Mr. Augustine Gbao

This letter should therefore constitute formal notice to the Special Court that we request the attendance of the above mentioned at hearings of the Commission. The dates on which they are required to appear are contained in the schedule of our hearings, a copy of which is attached to this letter.

Yours sincerely

Franklyn Bai Kargbo
Executive Secretary

Block A, Brookfields Hotel, Jomo Kenyatta Road, New England, Freetown
,Email, trc-sl@sierratel.sl
Tel: +232-22-235899/904/918/920/922/928. Fax: +232-22-235916

* I indicated that I would consult all the parties concerned when I received a formal request, such as this letter. RAV. 2/6/05.

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THE TRUTH AND RECONCILIATION COMMISSION

SCHEDULE FOR THEMATIC, EVENT-SPECIFIC AND INSTITUTIONAL HEARINGS

THEME	PARTICIPANTS	DATE	LOCATION
GOVERNANCE (including political processes and participation and human rights)	a. Campaign for Good Governance b. National Forum for Human Rights c. Amnesty International d. The Women's Forum e. Mr. Olu Gordon f. Mr. Cleo Hanciles	Monday 5th May 2003.	All sessions for the hearings will be at the YWCA New Hall, Brookfields, Freetown.
	a. The Sierra Leone Bar Association b. National Commission for Democracy and Human Rights c. National Union of Sierra Leone Students d. SLAJ e. SLPP f. PLP	Tuesday 6th May 2003.	-do-
	a. APC b. RUFP c. Other Political Parties d. Government of Sierra Leone e. UNDP f. UNAMSIL	Wednesday 7th May 2003.	-do-
THE ROLE OF CIVIL SOCIETY AND IMMIGRANT COMMUNITIES	a. Bishop George Biguzzi. b. Bishop Ganda c. Forum of Conscience d. Truth and Reconciliation Working Group e. National Forum for Human Rights f. The Women's Forum g. The Civil Society Movement h. Sierra Leone Labour Congress i. Sierra Leone Teacher's Union	Thursday 8th May 2003.	-do-
	a. SLANGO b. The Inter Religious Council		

Block A, Brookfields Hotel, Jomo Kenyatta Road, New England, Freetown
,Email, trc-sl@sierratel.sl
Tel: +232-22-235899/904/918/920/922/928. Fax: +232-22-235916

	c. The Council of Churches of Sierra Leone d. The Islamic Society e. The Indian Community F. The Lebanese Community g. The Nigerian Community h. The Ghanaian Community i. The Chinese Community.	Friday 9th May 2003.	-do-
MANAGEMENT OF MINERAL RESOURCES AND ISSUES OF CORRUPTION	a. The Chamber of Commerce and Industry b. The Business Community c. Partnership Africa Canada d. Network Movement for Justice and Development e. The Anti Corruption Commission f. The Ombudsman f. The Government Gold and Diamond Office	Monday 19th May 2003.	-do-
	a. Diamond Corporation of West Africa b. The Minister of Mineral Resources c. The Minister of Economic Planning and Development d. Mr. Kassim Basma e. Mr. Eric James	Tuesday 20th May 2003.	-do-
	a. SLPP b. APC c. RUFP d. PLP e. Inspector General of Police	Wednesday 21st May 2003.	-do-
WOMEN AND GIRLS	a. Individual testimonies b. Women Parliamentarians c. FAWE d. Women's Forum e. Ms. Louise Taylor f. Maria Stoppes Society g. War Widows Association.	Thursday 22nd May 2003.	-do-

	a. GOAL b. International Rescue Committee c. Centre for the Victims of Torture d. Market Women's Association e. Gender research and Documentation Centre f. 50/50 Group g. Sierra Leone Medical Women's Association	Friday 23rd May 2003.	-do-
	a. Ministry of Social Welfare, Gender and Children's Affairs b. Amnesty International c. Human Rights Watch d. UNIFEM e. UNHCR	Saturday 24th May 2003.	-do-
CHILDREN AND YOUTHS	a. Individual testimonies b. Amnesty International c. PRIDE d. Save the Children, U.K. e. Caritas Makeni f. COOPI g. World Vision	Monday 16th June 2003.	-do-
	a. National Commission for War Affected Children b. Minister for Social Welfare, gender and Children's Affairs. c. UNICEF d. UNHCR e. Centre for the Coordination of Youth Activities f. Sierra Leone Youth Empowerment Organisation g. CAVE	Tuesday 17th June 2003.	-do-
	a. National Union of Sierra Leone Students b. Students Union, University of Sierra Leone. c. National Youth Council d. Minister of Youth and Sports e. Minister of Education f. Political Parties h. Inspector General of Police	Wednesday 18th June 2003.	-do-
MILITIAS AND ARMED GROUPS a. RUF b. CDF	a. Individual testimonies b. Political Parties c. Hon Victor Reider d. Hon. Mrs. Elizabeth Lavally e. Hon. Lagao	Thursday 19th June 2003	-do-

c. West Side Boys	f. Dr. Joe Demby h. Deputy Minister of Defence		
—	a. Capt. Idriss Kamara b. Ag. Minister of Internal Affairs c. Mr. Omrie Golley d. Mr. Gibril Massaquoi e. Mr. Issa Sesay f. Mr. Morris Kallon g. Chief of Defence Staff h. NCDDR i. Force Commander, UNAMSIL	Friday 20th June 2003.	-do-
THE ROLE OF EXTERNAL GROUPINGS AND INTERNATIONAL ACTORS: a. ECOMOG b. The International Community c. Mercenaries	a. Dr. Abbas Bundu b. Political Parities c. International Alert d. ECOWAS Secretariat e. Representative of De Beers f. The Government of Sierra Leone	Monday 30th June 2003.	-do-
	a. Representative of the Government of Liberia b. Representative of the Government of Ghana c. Representative of the Government of Libya d. Representative of the Government of Cote D'Ivoire e. Representative of the Government of Burkina Faso	Tuesday 1st July 2003.	-do-
	a. Representative of the Government of Nigeria b. Representative of the Government of the United Kingdom c. Representative of the Government of the United States d. Representative of the Government of South Africa. e. UNAMSIL	Wednesday 2nd July 2003.	-do-
THE DECEMBER 1992 COUP TRIALS AND EXECUTIONS	a. Individual testimony b. Mr. John Benjamin c. Col. Komba Mondeh d. Brig. Gen Kelly Conteh e. Capt. Tom Nyuma f. Brig. Gen. Maada Bio g. Capt. Valentine Strasser h. The Bar Association i. The Government of Sierra Leone	Thursday 3rd July 2003.	-do-

ANNEXE 3

To be sent by facsimile to Court Management Unit at time of electronic filing bu counsel.

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THE TRUTH AND RECONCILIATION COMMISSION

William Hartzog, Esq.
Waxman, Dorval & Associates
407 Rue McGill, # 300
Montreal, (Quebec) H2Y 2G3
CANADA

Friday 13th June 2003

Dear Mr. Hartzog,

Many thanks for your letter of 11th instant in respect of your mandate to represent Mr. Issa Hassan Sesay in any communication with the Truth and Reconciliation Commission. I propose herein to outline the TRC's intentions, procedures and expectations relating to your client in the hope of engendering henceforth a spirit of positive co-operation.

At the outset please be assured that the TRC harbours no agenda whatsoever with regard to legal proceedings before the Special Court. On the contrary, in pursuit of our mandate and in service of the public interest, we endeavour to retain irreproachable independence and impartiality in all our activities and to gather information from all possible sources without prejudice.

It is fitting at this juncture that I present a summary of the TRC's mandate as follows:

> "to create an impartial historical record of violations of human rights and humanitarian law, to address impunity, to respond to the needs of victims, to promote healing and reconciliation and to prevent a repetition of the abuses and violations."

In fulfilment thereof, the Commission is presently undertaking a broad range of activities throughout the country, *inter alia* convening hearings in public and in private, conducting thematic and event-specific investigations and fielding submissions from individuals and organisations in Sierra Leone and abroad. We do our utmost to ensure that our final report will be authoritative and objective in content and character.

Accordingly, the TRC deems it necessary and important to talk to any and all persons believed to possess vital insights into events in Sierra Leone since 1991. As one such perceived key witness, Mr. Issa Hassan Sesay was in good faith invited, and remains thus, to give us his personal testimony as a valuable contribution towards our establishment of the truth.

Block A, Brookfields Hotel, Jomo Kenyatta Road, New England, Freetown, Sierra Leone,
Tel: 232-22-235899, 235904, 235916, 235918, -235920, 235922, 235928,
Fax: 232-22-235916 Email: secretariat@trc-sl.org

The TRC's original approach to Mr. Sesay was made at the beginning of the year, significantly in advance of his indictment to stand trial before the Special Court. I wish to reiterate that the essence of our request for Mr. Sesay to provide information to us has not changed. Nevertheless, in light of Mr. Sesay's changed circumstances since his initial discussions with the TRC, I acknowledge the practical and legal imperatives you cite for his enhanced protection.

With the above in mind, I concede that Mr. Sesay's envisaged appearance before the Commission for hearing on Friday 20th June 2003 is neither realistic nor appropriate. I am prepared hereby to disregard such eventuality and concentrate on an alternative, mutually agreeable course of action that accommodates your schedule and is more conducive to our respective objectives.

Specifically, I wish to propose that two of the TRC's International Research Officers, Gavin Simpson and Maureen Fitzmahan, be allowed to interview Mr. Sesay during private meeting or meetings in the presence of Mr. Sesay's appointed counsel. The testimony thus procured will be used as a source in our compilation of an impartial historical record, but the source will be treated in strict confidence and in no way connected to Mr. Sesay's name.

Towards this end, I wish to extend an invitation to you in your capacity as Mr. Issa Hassan Sesay's lead counsel and to Ms. Alexandra Marcil, as his co-counsel, to participate in preliminary discussions with Gavin Simpson and Maureen Fitzmahan in Freetown on Friday 27th June 2003 at a time and place of your choosing.

I should be grateful if you would contact me to confirm your availability in Freetown on the suggested date, or to propose an alternative arrangement, at your earliest possible convenience.

Yours sincerely

Franklyn Bai Kargbo
Executive Secretary

cc. Mr. Issa Hassan Sesay, Ms. Alexandra Marcil, Mr. Robin Vincent, Mr. John Jones, M. Luc Côté.

ANNEXE 4

HAGUE CONFERENCE PRESENTATION

The position of the Defence at the International Criminal Court and the Role of The Netherlands as Host State

The Hague, Netherlands
November 3rd and 4th 2000

The Defence Pillar:

Making the Defence a Full Partner in the International Criminal Justice System

Elise Groulx

President of the International Criminal Defence Attorneys Association

Attorney at law

The Hague
November 3rd 2000

I would like to thank the government of the Netherlands, in particular the officials of the Ministry of Justice, the Minister Mr Korthals and Mr. Holthuis, who is with us today. Their support has made it possible for us to be gathered here in The Hague today. A special word of thanks to Mr. Strijards and Mr. Bevers for their constant support. I am very glad to acknowledge the support of the Dutch Bar Association, in particular Mr. van de Putte, Mr. Wladimiroff and Mr. Sjöcrona for their formidable efforts in helping set up this conference in such a short time. Last but not least I would like to extend a very special thanks to Ms. Chantal Joubert, Ms. Martine Hallers, Ms. Caroline Buisman, Ms. Elies Van Sliedregt and Ms. Margaret Ross to whom I have the deepest gratitude. Without their extraordinary efforts there would be no conference today. The conference team's work, efforts, generosity and good will have been a great source of inspiration for me. I also want to thank the representatives of the Quebec Bar, the Paris Bar and the Bar of Draguignan for their generous support of this conference.

We are here to talk about the position of the defence in the emerging international criminal justice system and the role of the Netherlands as host state in establishing the upcoming International Criminal Court (ICC).

Ten years ago, just after the fall of the Berlin Wall, the very idea of ending impunity for war crimes and genocide seemed like a distant if not impossible dream. Today, the community of nations is in the process of replacing old Cold War ground rules with the international rule of law. An international criminal justice system is being built faster than seemed possible during the 45-year-period beginning with the Nuremberg trials and the creation of the United Nations, and finishing with the end of the Cold War.

The two ad hoc tribunals, for the former Yugoslavia and Rwanda, have been operating for about five years and today are handling more than 80 active cases. The International Criminal Court (ICC) is moving from theory to reality (115 countries have signed the treaty and about 25 have ratified it; 60 ratifications are required for the treaty to come into force.) The new ICC has had a set of detailed Rules of Procedure and Evidence since last June. The Financial Regulations and Rules on Privileges and Immunities should be finalized in the next year and a half. A relationship agreement between the ICC and the UN, as well as a Host Country agreement with The Netherlands, will also be negotiated.

Other tribunals are being created to deal with alleged crimes against humanity in East Timor, Sierra Leone and Cambodia. Kosovo is designing a court system that combines domestic and international systems to deal with ethnic cleansing and war crimes. And South Africa has conducted a large-scale experiment in truth and reconciliation.

The construction of an international criminal justice system is a landmark event. This historic achievement is a first step by the international community to end impunity for war crimes and genocide. Understandably, public and political attention has focused on the vigorous prosecution of alleged war criminals. However, it is becoming evident that the international rule of law involves more than achieving high arrest and conviction

rates. It also depends on the process used to arrest, investigate and conduct trials. To win legitimacy, the new courts must demonstrate that they are not just conviction machines. They must also give accused persons a fair trial.

Telling the Story of the Accused – Part I: Fair Trial Rights and the Role of Defence Lawyers

Many people quickly express agreement with this principle. But their resolve weakens when they begin to consider the expense, headaches and controversy embedded in the words "fair trial procedure." Not to mention the chances of acquittal.

A true commitment to "fair trial procedure" means giving the accused the opportunity to present a full, fair and vigorous defence. In simple terms, it means spending public money and time to give the accused person a forum to tell his or her story. And it means carefully listening to the story of the accused, however deeply the majority of people may disagree with it.

To tell that story of in the modern justice system, the accused person needs the advice and assistance of a defence lawyer. The lawyer can play a variety of roles ... telling the story on behalf of an accused ... or helping the accused tell the story himself ... or perhaps advising the accused about whether to remain silent. Whatever the precise role played, defence counsel is mandated to act as the advocate of the accused – to present his or her story as effectively as possible, within the limits of the facts and the law.

For centuries, individuals were obliged to tell their stories to the court without help (and sometimes without the right to be heard in a public hearing). With the development of modern criminal procedure, the accused won the right to legal counsel. This basic right that is now recognized in many countries and entrenched as a basic principle of international human rights law.

Professional defence attorneys know from first-hand experience, however, that the effective right to counsel is still far from accepted. It all depends on the popularity of the story your client has to tell. For example, the right to counsel is passionately urged for political prisoners in oppressive regimes – they have a heroic story to tell. But it is not a serious issue for other types of defendants whose stories are less appealing. I am thinking about people such as ... alleged rapists ... child abusers ... wife beaters ... brutal gang leaders ... drug lords ... and war criminals. Frankly, if these people are inadequately represented by counsel and summarily convicted, most voters and politicians will rise up and cheer, "You got what you deserved."

This attitude may be understandable. But it seriously undermines the presumption of innocence. It means that the "right to counsel" and the "right to a fair trial" are viewed as formalities, as rights temporarily given to criminals to preserve the appearance of justice. The role of the professional defence lawyer to ensure that the presumption of innocence is more than a formality – in other words, to make sure that judges decide about guilt

(and degrees of responsibility) after listening to the story of the accused in a fair hearing, not before. This is what we mean by "equality before the law" and "justice for all."

War crimes test the will of the international community to ensure that all accused persons benefit consistently from the presumption of innocence, the right to counsel and the right to be heard in full. The natural tendency in such cases is to become prosecution-minded. Emotions run high – and the desire not to listen to the accused is strong. For example, how many people would really accord the presumption of innocence to leaders such as Hermann Goering or Slobodan Milosovic? Why give such criminals a forum? Why spend money and time to hear their stories? There is a strong desire to censor the accused – restricting his ability to tell his story. These emotions and attitudes can accurately be compared to those involved in religious intolerance in which the opposing faction is seen to be an instrument of the devil. They test the very fabric of our civilization and the strength of our democratic values.

It is at this point of resistance that defence lawyers play a moral role as well as a strictly legal role. They must often assume the difficult role of spoiler – looking for flaws and weaknesses in the prosecution case, finding new interpretations of the law, challenging conventional wisdom about the case, challenging the authority of the court when necessary and generally arousing controversy.

Defence lawyers do more than represent the individual accused person. They also test the system – in particular, the ability of the system to treat the accused fairly and give him a full hearing. In a phrase, defence counsel act as fair trial watchdogs, acting both for their clients and for the system.

Very often, the will and strength of the defence lawyer is put to the test when playing the watchdog role. They need not only personal strength and determination. They need to work from a position of institutional strength. In this regard, it is more and more widely recognized that, in order to mount a meaningful defence, defence counsel must:

- Have access to adequate resources;
- Be well organized and professional;
- Be independent of both the prosecuting and judging authorities.

These are the key elements that permit equality of arms between the prosecution and the defence. The primary focus of this presentation is on the third element, defence independence, since this has proved to be a problem area at the two ad hoc tribunals and a key issue in designing the International Criminal Court.

Telling the Story of the Accused – Part II: the Independence of Defence Lawyers

In simple terms, institutional independence is key to the ability of the defence lawyer to "tell the story of the accused" effectively, in the way described above. The accused

person will often have a different perspective from that of the judge or prosecutor. An entirely different set of facts may be presented by the two sides. And there may be passionate controversy over several points – for example, whether the alleged war criminal intended to wage a defensive war to protect his country's territory or rather to conduct an offensive operation against helpless civilians.

In the context of the controversy that lies at the heart of a criminal case, we need to ask, "Who is in the best position to tell the story of the accused person? The judge? The public prosecutor? Or the defence lawyer?"

The answers to these questions are obvious. No matter which legal system we are talking about, inquisitorial or adversarial, neither a judge nor a prosecutor should claim to present the story of accused persons. This is the appropriate role of the defence attorney. And it seems obvious that the defence attorney must be institutionally independent in order to play this role effectively. Otherwise, he or she may well come under pressure to shade, edit or otherwise "spin" the story to avoid displeasing the judges or prosecutors.

This commonsense point is supported by international experts concerned with the independence of legal profession. The Council of Europe, for example, has recently issued guidelines concerning the legal profession that underline the "the fundamental role that lawyers and professional associations of lawyers play in ensuring the protection of human rights and fundamental freedoms" and linking this role strongly to their independence from government and other external influences[1[1]].

The ICC, as global institution, needs to set the highest standards in all areas, since it will be viewed as a model by many nations. These standards need to apply to the rights of the criminal suspect to fair treatment, the right of any person to protection against arbitrary arrest and detention, the right to a fair trial, effective equality of arms and defence independence.

Criminal procedure is the barometer of the health of a democracy, and of the legitimacy of any court system. This is true of national governments, and must also be true of world governmental institutions.

Vision of a Defence Pillar

We need a vision to help organize and enable the rights of the defence. We can inspire ourselves from the words of an authority in the field , Professor Cherif Bassiouni, who says:

[1[1]] Council of Europe Committee of Ministers, Recommendation Rec(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer. Adopted by the Committee of Ministers on 25th October 2000. http://cm.coe.int/ta/rec/2000/2000r21.htm. See www.coe.int.

> The three main pillars of the criminal justice system are: an independent judiciary, a prosecuting authority which guards public interests, and *independent and effective defence counsel. (emphasis added)*[2[2]]

The importance of an independent judiciary is well-understood in terms of the democratic separation of powers, the need for impartial judges and the protection of individual human rights. In many countries, the importance of prosecutorial independence – meaning freedom from political meddling – is increasingly accepted as a public policy goal. Certainly, both judicial and prosecutorial independence were highly visible issues in the discussions leading to the design of the International Criminal Court (ICC). Generally, their independence was viewed as essential to effective prosecutions and convictions, free from political and diplomatic considerations.

However, the issue of protecting the independence of the legal profession, and of criminal defence lawyers in particular, does not draw much attention in most countries – it is often taken for granted, or ignored. This was true of the discussions around the creation of the ICC and the ad hoc tribunals. Yet, the independence and professional competence of lawyers is key to the protection of human rights. In the words of an international Committee of Experts of the *Association Internationale de Droit Pénal* in 1982 :

> "A fair and equitable system of administration of justice and the effective protection of human rights and fundamental freedoms *depend as much on the independence of lawyers as on the independence and impartiality of the judiciary.* The independence of lawyers and the judiciary mutually complement and support each other as integral parts of the same system of justice." *(emphasis added)*[3[3]]

The Committee of Experts went on to say:

> "Adequate protection of human rights and fundamental freedoms ... requires that all persons have effective access to legal services provided by an independent legal profession."[4[4]]

That basic principle was just reasserted by the Council of Europe in a Recommendation, adopted by the Committee of Ministers on October 25th 2000. It points to the importance of guaranteeing "the *independence of lawyers* in the discharge of their professional duties

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[2[2]] Stephen Thaman, General Report: The Planning of the Conference, 63 Revue Internationale de Droit Penal 505, 516 (1992).

[3[3]] Draft principles on the independence of the judiciary and on the independence the legal profession, prepared by a Committee of Experts at the International Institute of Higher Studies in Criminal Sciences, Siracusa and Noto Italy, in 1981 and 1982. Association Internationale de Droit Pénal- ERES, 1982. Page 68.

[4[4]] Ibid. Page 69

without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason." (emphasis added)[5[5]]

In a background information document supporting the ministerial Recommendation, a group of experts explain that defence independence plays a key role both in protecting the individual human rights and the integrity of the justice system as a whole.

> "A fair and equitable system of administration of justice and the effective protection of human rights and fundamental freedoms, depend both on the independence and impartiality of the judiciary ... and on the independence of lawyers. The independence of the judiciary and of lawyers are essential elements of any system of justice."[6[6]]

"Independence" is defined by these and other authorities in a variety of ways – including the independence of a self-governing legal profession (and individual lawyers) from supervision by judges, court officials, prosecutors and members of the executive branch of government.

Historically, it is bar associations that have guaranteed the independence of the legal profession. To earn that independence, bar associations hold individual lawyers accountable for meeting professional standards of competence, knowledge and ethical conduct. The bar association itself can be held accountable to the law as well as to the public. But the legal profession is generally not held accountable to the executive and legislative branches of government. In some countries, the profession may be governed by judges, but only with carefully constructed safeguards. A basic principle: it is imperative that lawyers not be disciplined or supervised by judges, court officials or prosecutors with whom they deal regularly in the conduct of individual cases.

The tradition of an independent self-governing legal profession is shared by the civil and the common law countries. It forms the foundation of the Defence Pillar in those countries. It helps to ensure that the defence is treated like an equal partner in the criminal justice system. The judiciary and prosecution are each backed by two powerful state hierarchies, while the defence lawyers are supported by independent bar associations (and various other non-government institutions making up the Defence Pillar).

At the moment, the international criminal justice system presents a quite different profile. There is no international bar association, or any other institution resembling a defence pillar. The defence does not have institutional independence and is not yet being treated like a full partner of the ad hoc tribunals and the ICC.

[5[5]] Council of Europe, Committee of Ministers, Recommendation Rec(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer. http://cm.coe.int/ta/rec/2000/2000r21.htm

[6[6]] Council of Europe, European Committee on Legal Co-operation, CM(2000)56 Addendum, Recommendation of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer"Explanatory memorandum. http://cm.coe.int/reports/cmdocs/2000/2000cm56addd.htm Paragraph 20. See www.cor.int.

The Defence Pillar:
Four Basic Questions

It was to correct this fundamental imbalance that the ICDAA was created in 1997. When the Association appeared on the scene there had been very little advocacy on defence issues and we tried to bring those issues onto the agenda of international law-makers by reaching out to bar associations and individual practitioners in the field. We have made some of those issues visible and we are starting to have a voice that is considered credible. We operate as an open global professional association that brings international defence practitioners – and other interested partners – together in a structured forum

One of our initiatives has been to work with our partners in the Netherlands to organize this conference on defence issues for two years running. This time, it is clear that we must focus on practical steps that can be taken to build the Defence Pillar of the ICC and, hopefully, to create a model that can be used by other international tribunals.

With this objective in mind, let me suggest that we work together, today and in future, to develop rigorous answers to four basic questions.

- **Why do we need a Defence Pillar?**
- **What has been experience of defence counsel to date?**
- **What are the essential elements of the Defence Pillar?**

- • **What are the next steps we can take to build a viable Defence Pillar?**

Question 1: Why do we need a Defence Pillar?

A Defence Pillar would both protect the fair trial rights of individuals more effectively and strengthen the international criminal justice system as a whole. Let me focus my comments on the system as a whole, since many policy makers are just beginning to understand its reliance on a strong corps of defence practitioners.

The two ad hoc tribunals and the International Criminal Court are essentially two-pillared institutions. The judicial and prosecutorial pillars are well-defined and independent, but there is no independent organization for the defence. This should – in my opinion – be viewed as a structural defect in the architecture of these institutions.

Architectural Defect: In the case of the ad hoc tribunals, the statutes define the judiciary (Presidency and Chamber) and that of the Office of the Prosecutor as independent court organs with well-defined powers. But there is nothing in the founding statutes that defines defence institutions and organizations.

When cases were first heard, defence lawyers were not organized. To fill the void, the Registrars of the ad hoc tribunals have stepped in and taken control of the allocation of many vital resources to the defence. It is important to point out that the Registrars are appointed by the UN Secretary General after consultation with the Presidency. They provide support to the judges and the prosecution in the performance of their duties. Under the authority of the President, they have primary responsibilty for non-judicial areas such as witness protection, detention facilities and routine court administration.

Having worked in this system for several years, many defence counsel find the concentration of power in the hands of the Registrar to be excessive. Access to an office, the right to send a fax, the payment of a bill, permission to hire an investigator or to conduct legal research, approval of travel plans, the drafting of the code of professional conduct and the conduct of a professional disciplinary actions ... all these decisions are in the hands of the Registrar. Indirectly, they may be influenced by judges hearing the cases that lawyers are pleading before the tribunals.

Most defence lawyers are used to being held accountable for their professional decisions and conduct by serveral parties – mainly their clients, law firms and independent bar associations. In their home jurisdictions, however, it would be viewed as inappropriate for judges and court officials to review decisions with a direct impact on the management of a case (using a review process that may breach client-lawyer privileges and confidentiality).

There are risks to the system that compromises defence independence to this extent. Consider these questions. What if criminal defence lawyers could be disciplined or even banned from the practice of law by judges sitting on the same court where they plead cases? What if their fees could be unilaterally reduced by a court administrator serving those judges on a daily basis? Might they hesitate to play their role as watchdogs? Would they be willing to contest the jurisdiction of the court or take a controversial case to appeal? Would they fearlessly tell their clients' stories?

The answers to these questions seems clear to many defence practitioners to whom I have talked about the situation before the ad hoc tribunals. Their main concern is not with the Registry staff, or with any one person, but with the institutional structure in which all lawyers must operate. They are very worried about the institution of the Registry and the direction in which it is evolving.

Unfortunately, the ICC is similar in structure to the ad hoc tribunals. There is no independent defence pillar and defence counsel depend on the Registry. This reflects the fact – as with the ad hoc tribunals – that the need to organize the defence was largely forgotten during the institution-building process.

Advocacy Campaign: **In the last few years, the ICDAA and a handful of NGOs have been trying to remedy this oversight. Let me give you a brief overview of our advocacy campaign. In July 1998, the ICDAA proposed the creation of an independent Office of the Defence at the Rome Conference that passed the statute creating the ICC. We argued that such an office would help to safeguard the principle of defence independence and solve some of the problems in the system of the ad hoc tribunals. Our proposal was not accepted and the statute passed**

with no provision for a defence office. In the months that followed, however, the idea was adopted and developed by certain governments, most notably the Netherlands, France, Germany and Canada. They introduced a proposal to the UN commission drafting the rules of Procedure and Evidence for the ICC.

After many months of advocacy and negotiation, language was adopted in the ICC Rules last June 2000 to define clearly the "responsibilities of the Registrar related to the rights of the defence" and the principle of ensuring fair trials. It includes a specific responsibility to "ensure the *professional independence* of defence counsel."[7[7]] *(emphasis added)* Our association is not satisfied with the new language. It does not explicitly create an independent Defence Office – as we initially proposed in July 1998. However, the new language constitutes progress in one important sense: the defence is no longer completely invisible and without any official status. As well, a number of governments are now keenly aware of the problem and seem willing to take action to protect defence independence. These include the governments of Canada and the Netherlands, host country of the Yugoslavia Tribunal and of the future ICC.

A key question that needs to be addressed at this conference is the following: What steps should be taken to implement the new language concerning the "rights of the defence" and "the professional independence of defence counsel"? I will come back to this question in a few minutes.

[7[7]] ICC Rules of Evidenced and Procedure. Rule 20 (2). PNICC/2000/INF/3/Add.1.

Reasons for the Architectural Defect: **It is worth pausing to understand why there is no Defence Pillar at the ad hoc tribunals and none so far in the design of the ICC. Let me emphasize that this oversight is no person's fault. Certainly, it is not the fault of the Registrars. It is due to a number of institutional and historical factors:**

- **First, after Nuremberg, the international criminal justice system went mute for nearly fifty years. There were no cases involving individual accused persons for the defence to prepare or plead. Now, the situation is beginning to change as the caseload grows – from a handful of carefully managed cases in the mid-1990s to more than 80 today. And many more to come, both before the new tribunals and the ICC.**
- **Second, we are all aware of the political agenda around the creation of tribunals. Understandably, the primary concern has been to put an end to total impunity in cases of war crimes. Defence has not been viewed as a priority.**
- **Third, there is no international bar association, in charge of qualifying lawyers. This void has prevented lawyers from receiving adequate training, support and advocacy at the international level.**
- **Fourth, most national and regional bar associations are domestic in focus – reflecting their member's primary interests. Since global criminal law is only starting to emerge, we cannot be surprised by their timid involvement at the international level so far. I am happy to underline here the participation of the bar associations in this**

conference. I hope this marks the start of a new era in the development of international criminal law and practice.

In this context, it becomes easier to understand why the Registrars of the ad hoc tribunals began to manage defence issues and defence lawyers to whom public funds were being disbursed by the UN. In the short term, there may not have been a workable alternative. But that is history. The question now is whether this arrangement should continue – and what can be proposed to replace it.

This is not an organizational detail but rather as a broad policy issue concerning the architecture of the ICC and the international criminal justice system. That architecture needs to be designed to stand the test of time. We are still very early in its development and we still have the opportunity to make adjustments.

Testing the Court: Building a strong Defence Pillar will do much more than relieve the everyday frustrations of defence practitioners or correct the past oversights of international policy makers. It will strengthen the system itself.

There is a misconception – held by many people today – that a strong defence will weaken a court ... by winning cases and gaining acquittals. Another version of this misconception is that giving criminals a fair trial indicates weakness or lack of resolve. This is to misconstrue the dynamics of criminal trials and trial procedure. The working principle is that "if the trial is worth conducting, it is worth conducting fairly." Courts that apply this principle rigorously become stronger, not weaker. Courts that compromise it lose their credibility and legitimacy as <u>independent</u> deliberative bodies. Courts must demonstrate by example that they are <u>governed by law</u> – rather than the passions or politics of any particular case.

This point was made, in very challenging circumstances, as the Second World War ended, by one of the architects of the Nuremberg tribunal. Justice Robert Jackson of the U.S. Supreme Court justice gave a talk in April 1945 about the then much-debated

problem of what to do with the Nazi leaders when and if they were captured. He said a political and military decision could be taken simply to execute them, based on a variety of practical and policy considerations. Then, he turned to the other main option:

> "... if good faith trials are sought, that is another matter .... all experience teaches that there are certain things you cannot do under the guise of judicial trial. *Courts try cases but cases also try courts.* You must put no man on trial before anything that is called a court .... under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty ...." *(emphasis added)*[8[8]]

Justice Jackson in effect observed that any body "called a court" should not be used to rubber stamp convictions – and executions. That could be done by political channels. A court, properly defined, must be ready for a judicial trial, based on the presumption of innocence and open to the possibility of acquittal. Some cases – the controversial ones – can be expected to "try the court." Within the framework of a trial, let me suggest that:

- The main role of judges and prosecutors is to try the case.
- The main role of defence lawyers is, where appropriate, to ensure the case tries the court.

To play this role, defence lawyers obviously need an independent base. They can work from that base to "try the court." In doing so, they strengthen the court's credibility and legitimacy. And ensure that guilt must be proved according to an established, public standard, which is beyond a reasonable doubt.

Summary: A Defence Pillar is needed because it will place defence lawyers in a stronger position to play three key roles in the international criminal justice system:

- First, vigorously enforcing the fair trial rights of individual accused persons by protecting the effective presumption of innocence and giving them the effective opportunity to tell their stories in full
- Second, acting as fair trial watchdogs who safeguard the system against the arbitrary exercise of judicial and prosecutorial power.
- Third, becoming active participants, through professional associations, in building the institutions of the international criminal justice system.

Now, let me turn to the second question.

Question 2: What has been the experience of defence lawyers to date?

Defence lawyers practising before the ad hoc tribunals for the former Yugoslvia and Rwanda have practical lessons to offer. Their experience to date indicates a growing

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[8[8]] Telford Taylor, The Anatomy of the Nuremberg Trials, Alfred A.Knopf, New York, 1992, pp 44-45.

imbalance in the system that threatens the principle of equality of arms. In the politically charged atmosphere of genocide and war crimes trials, this is effectively limiting the ability of accused persons to tell their stories and have a fair trial.

Basic fair trial guarantees are incorporated in many international instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). These guarantees appear in the Rome Statute of the ICC and the statutes of the ad hoc tribunals. So, there are well-defined fair trial rights for defendants – on paper. This a very good thing – as far as it goes. However, defence practitioners have found it hard to enforce those rights. They are becoming concerned both about the atmosphere around certain cases and about a growing institutional imbalance between the defence and the prosecution. This imbalance could eventually compromise the credibility of the whole system.

As outlined earlier, the Prosecution is a formal organ of the Court and plays a very formal role while the Defence is not an independent organ. This institutional imbalance is linked in many ways to uneven access to the resources required to manage lengthy, complex cases before these tribunals.

At a basic level, defence counsel do not have the benefit of a centralized office in The Hague and Arusha with sufficient administrative, management, secretarial, translating facilities, etc. The the Prosecution has a relative abundance of such resources.

There is also the issue of the time required to prepare a humanitarian law case. Generally, defence lawyers become involved in cases on an individual basis after an indictment is produced or disclosed and someone is in custody. The Prosecution has been working for many months (sometimes years) on these cases as a team before the arrest and has a very detailed knowledge of them. Initial contacts between prosecution and defence lawyers are therefore on very uneven ground.

There has been a complete absence of training for defence attorneys who come from all over the world and from very different legal cultures. This, coupled with uneven published information on the case-law and the court procedure and practice, reinforces the imbalance with the prosecutors. The latter are hired for long periods of time and are therefore in a better position to pass on their knowledge and their experience.

Another practical challenge, shared by prosecutors and defence lawyers, is the difficulty of gathering evidence and protecting witnesses in war-torn countries. Much media attention has been devoted to the problems encountered in making arrests and putting

together prosecution cases. Defence lawyers experience similar difficulties – but on an individual basis and without an organization backing them up. To date, they have had tremendous problems conducting on-site investigations. Potential defence witnesses are seldom accessible and try to avoid coming forward for fear of reprisals and lack of adequate protective measures.

To summarize, the principle of "equality of arms," so important to ensuring due process, is protected by written procedures. But it is being seriously jeopardized from a practical stand point before the ad hoc tribunals.

When the ad hoc tribunals were first established, the imbalance was less visible and there was a strong desire to assert their legitimacy by ensuring fair trials. The problems are becoming much more visible today as the case load builds up. Defence practitioners are becoming vocal on the issues which I have mentioned and some believe strongly that the whole system is in serious danger of becoming far too political and too prosecution minded.

You will hear more about these issues when practising defence counsel from the ICTY and the ICTR talk to you about their experiences later in this conference.

Question 3: What are the essential elements of the Defence Pillar?

It is clear from our experiences with the ad hocs and the ICC that defence lawyers are not yet strong and independent enough. It appears, in fact, that the relationship of defence lawyers with the Registrar does not respect the international Committee of Experts' guideline that: "all persons have effective access to legal services provided by an *independent* legal profession"[9][9] and that "lawyers must be able to counsel and represent their clients...in accordance with their *established professional standards and judgment without any restriction, influences, pressures, threats or undue interferences from any quarter.*" *(emphasis added)*[10][10]

The Council of Europe has just reasserted a similar principle – that "all necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and *without improper interference* from the authorities or the public ..."[11][11] *(emphasis added)*

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[9][9] Draft principles on the independence of the judiciary and on the independence the legal profession, prepared by a Committee of Experts at the International Institute of Higher Studies in Criminal Sciences, Siracusa and Noto Italy, in 1981 and 1982. Association Internationale de Droit Pénal- ERES, 1982, p. 69

[10][10] Ibid. p. 69.

[11][11] Council of Europe, Committee of Ministers, Recommendation Rec(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer. http://cm.coe.int/ta/rec/2000/2000r21.htm

Freedom from outside influence includes, of course, improper influence from judges, prosecutors and court officials.

The classic way to ensure the professional independence of lawyers is to create a bar. As stated earlier, lawyers from both the civil law and common-law countries share a fundamental belief that they should be members of an independent self-governing profession.

I believe that a major part of the solution to the challenges we face is to create an international criminal bar, supported by bar associations from many countries and legal traditions. This idea has been discussed informally for several years. I would like to place the idea of a criminal bar on the table for serious consideration at this conference – hoping this will stimulate a series of discussions now and in future. However, we need to keep in mind that the creation of such a bar will take time and require a high level of international co-operation among bar associations from the varied legal systems and regions of the world. We will need to continue taking action to improve defence organization on several fronts while the work of creating a bar is underway.

The ICDAA was created to give the defence visibility and a strong voice in the international criminal justice system while gradually gathering support from an international coalition of bar associations. Based on our experience since 1997, I would like to propose for consideration at this conference a broad vision of the Defence Pillar of the international criminal justice system. This vision actually includes six elements:

- • First, an international criminal bar will eventually provide the foundation of defence independence by qualifying lawyers. It should have the main responsibility of drafting a code of ethics and enforcing it through disciplinary procedures. Realistically, this bar will take some years to build.
- • Second, a defence unit can be created at the International Criminal Court to ensure that the Registrar has the means to promote and protect defence independence. The unit would be located in the Registry but managed at "arms length" from its other departments. Concretely, such a unit would need to be designed in the next 12 months, or it might never see the light of day. If created, it might offer a model for similar defence units at the ad hoc tribunals.
- • Third, a "representative body of counsel or legal associations" is to be created at the ICC with the possible involvement of the Assembly of States parties. It would be consulted by the ICC Registrar regarding training, a code of professional conduct and management of legal assistance to indigent accused, as specified by Rule 20.[12[12]] This body needs to be set up in the near future, hopefully on the initiative of a coalition of bars and professional associations. Creation of the ICC representative body can be linked to the creation of the international defence bar.
- • Fourth, professional associations with flexibility, like the ICDAA, can address important issues and act quickly, doing advocacy and lobbying at many levels. They

[12[12]] ICC Rules of Procedure and Evidence. Rule 20(1)(f) and Rule 20(3). See also Rules 8 and 22. PNICC/2000/INF/3/Add.1.

will also be involved in designing adequate training programmes for practitioners, providing an open forum for discussion and a powerful network. The ICDAA sees itself as a focal point for partnering among the lawyers and organizations represented at this conference.

- Fifth, a variety of training and educational partners could become key elements of the Defence Pillar. I am thinking about law faculties, bar schools and specialized training institutes. A key group of partners will be the "first generation" of international defence practitioners.
- Sixth, a number of national and regional bar associations will no doubt play a leadership role in supporting the development of all these elements of the Defence Pillar.

You might be surprised at the number and variety of organizations that can make up the Defence Pillar. Based on my experience building the ICDAA, I would suggest that a strong Defence Pillar should include many partners – not just a bar or a defence unit or the ICDAA.

There are several reasons to follow a broad, inclusive approach. First, we still have a lot to learn about what defence lawyers need to meet the challenges of handling complex cases before the international criminal courts. Second, we obviously need contributions from many partners and organizations, representing different countries and legal traditions. Our list of potential partners needs to be long. Over time, we can determine exactly which roles will be played by which organizations. This is part of a learning process in which we all are participating. Today's conference is a good example.

If we adopt this perspective, we can see that the Defence Pillar is already being built. The ICDAA has been at work for more than three years. I am happy to say we are now working closely with the two local defence lawyers' associations at the ICTY and the ICTR. We can now count the Defence Counsel Association (DCA) in The Hague as a full partner.

In addition, a number of professional associations – such as the Bar Human Rights Committee of England and Wales, Avocats Sans Frontieres (Belgium and France), the Paris Bar, the Canadian Bar Association, the American Bar Association and the National Association of Criminal Defense Lawyers (USA) – have become involved in advocacy around the ICC . Some of the above mentioned associations are present here, as are the Bar Associations from Quebec, France and the Netherlands.

As the number of partners grows, it is important to agree on immediate priorities – the next steps that must be taken to build the Defence Pillar.

Question 4: What are the immediate steps we can take to build a viable Defence Pillar?

One pressing challenge is to help defence counsel before the ad hoc tribunals solve practical problems with training, documentation, facilities and resources. (I have already discussed this issue and you will hear more about it during this conference from defence practitioners themselves.)

Another immediate priority is to create the best possible defence unit for the ICC. As I said earlier, the situation is not ideal. But I believe we can find a way to protect defence independence. In particular, there is an opportunity to enshrine language in the host country agreement and the financial regulations that would effectively create an autonomous defence unit. However, we need to act quickly.

Having worked on the issue of the ICC defence office for more than two years, I would like to offer a proposal for discussion at this conference. The starting point is the language of Rule 20, adopted last June.[13][13] Sub-rule 1 imposes on the ICC Registrar an obligation to "organize the staff of the Registry in a manner that promotes the *rights of the defence*, consistent with the principle of fair trial ..." Sub-rule 2, imposes a related obligation to carry out defence-related functions, including financial administration, "in such a manner as to ensure the *professional independence of defence counsel*" *(emphasis added).*

This language is new and open to interpretation. So, it is time to be creative. From my perspective, the most effective way for the Registrar to meet the obligation to ensure defence rights and defence independence is to establish a well-defined defence unit. That unit could not be totally independent under the current legal framework of the Rome Statute and the Rules. It would have to be located in the Registry. However, its autonomy could be respected by: (1) carefully defining its position within the Registry, (2) ensuring its financial independence and (3) ensuring that it maintains an "arm's length" relationship with the Registrar. The goal would be to ensure that the defence unit is managed under the Registrar's authority but separately from the everyday administration of the Presidency, the Chambers, the detention units and the victims and witnesses' unit.

Let me suggest several key features of this "arms-length" relationship:

- • The defence unit would have a clearly defined mission and duties. As suggested by Rule 20, this mission would relate only to defence rights, fair trial rights and professional defence independence.
- • The unit would have clearly defined boundaries separating it from other units in the Registry. It could, for example, be located in a different building or at least a clearly identified area of the ICC building.
- • An organizational firewall would restrict the exchange of confidential information between the unit and the rest of the Registry. This would reduce the risk,

and the perception, that the Presidency or individual judges could intervene in the management of individual defence cases.

- The unit would have a head whose only job within the Registry would be to lead the unit. He or she would report directly to the Registrar. (It would be understood that the defence unit head would be an internal advocate for defence rights and, therefore, would not become involved in non-defence-related matters).
- Appointment and dismissal of the defence unit head (and staff) would be subject to strict written procedures and controls, including review involving the Assembly of States Parties. Dismissal would be "for cause" only. The professional qualifications for this position could be similar to those applied to the Prosecutor in Article 42 of the Rome Statute.
- The financial independence of the defence unit would be protected in the financial regulations of the ICC. The unit should have a distinct budget within the Registry. This would ensure the maximum degree of financial autonomy, while defining clear accountability to the ICC for key budgetary decisions.
- Accountability could be ensured by financial audits conducted by an independent third party.
- The unit would have a distinct legal personality enabling it to conclude agreements with other organizations and governments, in particular the host state.

I look forward to hearing your ideas about the ICC defence unit. You will learn a lot more in another panel later today concerning the host state agreement.

The defence unit is an important element of the Defence Pillar. However, as I said earlier, it is not appropriate for defence lawyers to be based only inside the International Criminal Court, or any other court for that matter. A future defence unit cannot assume the sole responsibility for protecting defence independence and equality of arms. It will need to work with many other organizations in the Defence Pillar. That is why we are in favour of the establishment of an International Defence Bar in the coming years.

Conclusion:

Making the Defence a Full Partner

The process of making the international rule of law a reality is the function of a varied group. Diplomats, government officials, legal experts, judges, prosecutors, police and forensic experts. The military also has a key role to play as well as human rights groups and non-governmental organizations (NGOs).

Defence lawyers also have an important role to play, not only in arguing individual cases but in the process of institution building. To date, it can certainly be said that defence lawyers have too often been forgotten – and they themselves have failed to speak up at the right times. This has contributed to the lack of a Defence Pillar at the ad hoc tribunals and the International Criminal Court.

Now, there are practical steps we can take to design a strong Defence Pillar, build it quickly and strengthen the independence of defence counsel.

In the immediate future, we are ready to work with the host country and other states to create a viable defence unit for the ICC. The support we have been getting from the Netherlands and several bar associations is a very good sign that we are headed in the right direction.

Another priority of the ICDAA is to help organize defence lawyers before the two ad hoc tribunals, and others to come, and to provide them with training and support. We believe partnerships can be developed very soon to get this initiative started.

A longer term goal is to create an International Criminal Bar as a key element of the Third Pillar of the international criminal justice system. The presence of a bar – and sister organizations – will make defence lawyers full partners with the other actors in the system. But it will do more than just strengthen the defence. It will help law-makers, Judges and Prosecutors to maintain their independence and their impartiality. And this will legitimize and strengthen the system as a whole.

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[14][13] Ibid. Rule 20(1) and Rule 20(2).

ANNEXE 5

Explanatory memorandum • *Word* • *Français*

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

Recommendation Rec(2000)21
of the Committee of Ministers to member states

on the freedom of exercise of the profession of lawyer

(Adopted by the Committee of Ministers
on 25 October 2000
at the 727th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Having regard to the provisions of the European Convention on Human Rights;

Having regard to the United Nations Basic Principles on the Role of Lawyers, endorsed by the General Assembly of the United Nations in December 1990;

Having regard to Recommendation No. R (94) 12 on the independence, efficiency and role of judges, adopted by the Committee of Ministers of the Council of Europe on 13 October 1994;

Underlining the fundamental role that lawyers and professional associations of lawyers also play in ensuring the protection of human rights and fundamental freedoms;

Desiring to promote the freedom of exercise of the profession of lawyer in order to strengthen the rule of law, in which lawyers take part, in particular in the role of defending individual freedoms;

Conscious of the need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason;

Aware of the desirability of ensuring a proper exercise of lawyers' responsibilities and, in particular, of the need for lawyers to receive sufficient training and to find a proper balance between their duties towards the courts and those towards their clients;

Considering that access to justice may require persons in an economically weak position to obtain the services of lawyers,

Recommends the governments of member states to take or reinforce, as the case may be, all measures they consider necessary with a view to the implementation of the principles contained in this recommendation.

For the purpose of this recommendation, "lawyer" means a person qualified and authorised according to the national law to plead and act on behalf of his

or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters._

Principle I - General principles on the freedom of exercise of the profession of lawyer

1. All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights.

2. Decisions concerning the authorisation to practice as a lawyer or to accede to this profession, should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, should be subject to a review by an independent and impartial judicial authority._

3. Lawyers should enjoy freedom of belief, expression, movement, association and assembly, and, in particular, should have the right to take part in public discussions on matters concerning the law and the administration of justice and to suggest legislative reforms.

4. Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.

5. Lawyers should have access to their clients, including in particular to persons deprived of their liberty, to enable them to counsel in private and to represent their clients according to established professional standards.

6. All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law.

7. Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant files when defending the rights and interests of their clients in accordance with their professional standards.

8. All lawyers acting in the same case should be accorded equal respect by the court.

Principle II - Legal education, training and entry into the legal profession

1. Legal education, entry into and continued exercise of the legal profession should not be denied in particular by reason of sex or sexual preference, race, colour, religion, political or other opinion, ethnic or social origin, membership of a national minority, property, birth or physical disability.

2. All necessary measures should be taken in order to ensure a high standard of legal training and morality as a prerequisite for entry into the profession and to provide for the continuing education of lawyers.

3. Legal education, including programmes of continuing education, should seek to strengthen legal skills, increase awareness of ethical and human rights issues, and train lawyers to respect, protect and promote the rights and interests of their clients and support the proper administration of justice.

Principle III - Role and duty of lawyers

1. Bar associations or other lawyers' professional associations should draw up professional standards and codes of conduct and should ensure that, in defending the legitimate rights and interests of their clients, lawyers have a duty to act independently, diligently and fairly.

2. Professional secrecy should be respected by lawyers in accordance with internal laws, regulations and professional standards. Any violation of this secrecy, without the consent of the client, should be subject to appropriate sanctions.

3. The duties of lawyers towards their clients should include:

a. advising them on their legal rights and obligations, as well as the likely outcome and consequences of the case, including financial costs;

b. endeavouring first and foremost to resolve a case amicably;

c. taking legal action to protect, respect and enforce the rights and interests of their clients;

d. avoiding conflicts of interest;

e. not taking up more work than they can reasonably manage.

4. Lawyers should respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards. Any abstention by lawyers from their professional activities should avoid damage to the interests of clients or others who require their services.

Principle IV - Access for all persons to lawyers

1. All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers.

2. Lawyers should be encouraged to provide legal services to persons in

an economically weak position.

3. Governments of member states should, where appropriate to ensure effective access to justice, ensure that effective legal services are available to persons in an economically weak position, in particular to persons deprived of their liberty.

4. Lawyers' duties towards their clients should not be affected by the fact that fees are paid wholly or in part from public funds.

Principle V - Associations

1. Lawyers should be allowed and encouraged to form and join professional local, national and international associations which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers.

2. Bar associations or other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public.

3. The role of Bar associations or other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.

4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, *inter alia*, to:

a. promote and uphold the cause of justice, without fear;

b. defend the role of lawyers in society and, in particular, to maintain their honour, dignity and integrity;

c. promote the participation by lawyers in schemes to ensure the access to justice of persons in an economically weak position, in particular the provision of legal aid and advice;

d. promote and support law reform and discussion on existing and proposed legislation;

e. promote the welfare of members of the profession and assist them or their families if circumstances so require;

f. co-operate with lawyers of other countries in order to promote the role of lawyers, in particular by considering the work of international organisations of lawyers and international intergovernmental and non-governmental organisations;

g. promote the highest possible standards of competence of

lawyers and maintain respect by lawyers for the standards of conduct and discipline.

5. Bar associations or other professional lawyers' associations should take any necessary action, including defending lawyers' interests with the appropriate body, in case of:

a. arrest or detention of a lawyer;

b. any decision to take proceedings calling into question the integrity of a lawyer;

c. any search of lawyers themselves or their property;

d. any seizure of documents or materials in a lawyers' possession;

e. publication of press reports which require action on behalf of lawyers.

Principle VI - Disciplinary proceedings

1. Where lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by Bar associations or other associations of lawyers or by legislation, appropriate measures should be taken, including disciplinary proceedings.

2. Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.

3. Disciplinary proceedings should be conducted with full respect of the principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.

4. The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers.

ANNEXE 6

LA CHAMBRE D'APPEL

Composée comme suit :
M. le Juge Claude Jorda, Président
M. le Juge Lal Chand Vohrah
M. le Juge Mohamed Shahabuddeen

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ICTR-97-19-AR72
7-4-2000
(1481 - 1406)

1481

ANNEXE 6

UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: Judge Claude JORDA, Presiding
Judge Lal Chand VOHRAH
Judge Mohamed SHAHABUDDEEN
Judge Rafael NIETO-NAVIA
Judge Fausto POCAR

Registrar: Mr Agwu U OKALI

Order of: 31 March 2000

Jean Bosco BARAYAGWIZA
v
THE PROSECUTOR

Case No: ICTR-97-19-AR72

DECISION

(PROSECUTOR'S REQUEST FOR REVIEW OR RECONSIDERATION)

Counsel for Jean Bosco Barayagwiza

Ms Carmelle Marchessault
Mr David Danielson

Counsel for the Prosecutor

Ms Carla Del Ponte
Mr Bernard Muna
Mr Mohamed Othman
Mr Upawansa Yapa
Mr Sankara Menon
Mr Norman Farrell
Mr Mathias Marcussen

I. INTRODUCTION

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

2. The decision sought to be reviewed was issued by the Appeals Chamber on 3 November 1999 ("the Decision"). In the Decision, the Appeals Chamber allowed the appeal of Jean-Bosco Barayagwiza ("the Appellant") against the decision of Trial Chamber II which had rejected his preliminary motion challenging the legality of his arrest and detention. In allowing the appeal, the Appeals Chamber dismissed the indictment against the Appellant with prejudice to the Prosecutor and directed the Appellant's immediate release. Furthermore, a majority of the Appeals Chamber (Judge Shahabuddeen dissenting) directed the Registrar to make the necessary arrangements for the delivery of the Appellant to the authorities of Cameroon, from whence he had been originally transferred to the Tribunal's Detention Centre.

3. The Decision was stayed by Order of the Appeals Chamber[1] in light of the Motion for Review. The Appellant is therefore still in the custody of the Tribunal.

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

II. PROCEDURAL HISTORY

4. The Appellant himself was the first to file an application for review of the Decision. On 5 November 1999 he requested the Appeals Chamber to review item 4 of the disposition in the Decision, which directed the Registrar to make the necessary arrangements for his delivery to the Cameroonian authorities.[2] The Prosecutor responded to the application, asking to be heard on the same point[3], and in response to this the Appellant withdrew his request.[4]

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

6. On 19 November 1999 the Prosecutor filed a "Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999" ("the Prosecutor's Notice of Intention")[6], informing the Chamber of her intention to file her own request for review of the Decision pursuant to Article 25 of the Statute of the Tribunal, and in the alternative, a "motion for reconsideration". On 25 November, the Appeals Chamber issued an Order staying execution of the Decision for 7 days pending the filing of the Prosecutor's Motion for Review. The Appeals Chamber also ordered that that the direction in the Decision that the Appellant be immediately released was to be read subject to the direction to the Registrar to arrange his delivery to the authorities of Cameroon. On the same day, the Chamber received the Appellant's objections to the Prosecutor's Notice of Intention.[7]

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[2] *Notice of Review and Stay of Dispositive Order No.4 of the Decision of the Appeals Chamber dated 3rd November 1999*

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

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

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

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

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

7. The Prosecutor's Motion for Review was filed within the 7 day time limit, on 1 December 1999. Annexes to that Motion were filed the following day.[8] On 8 December 1999 the Appeals Chamber issued an Order continuing the stay ordered on 25 November 1999 and setting a schedule for the filing of further submissions by the parties. The Prosecutor was given 7 days to file copies of any statements relating to new facts which she had not yet filed. This deadline was not complied with, but additional statements were filed on 16 February 2000, along with an application for the extension of the time-limit.[9] The Appellant objected to this application.[10]

8. The Order of 8 December 1999 further provided that that the Chamber would hear oral argument on the Prosecutor's Motion for Review, and that the Government of Rwanda might appear at the hearing as *amicus curiae* with respect to the modalities of the release of the Appellant, if that question were reached. The Government of Rwanda filed a memorial on this point on 15 February 2000.[11]

9. On 10 December 1999 the Appellant filed four motions: challenging the jurisdiction of the Appeals Chamber to entertain the review proceedings; opposing the request of the Government of Rwanda to appear as *amicus curiae*; asking for clarification of the Order of 8 December and requesting leave to make oral submissions during the hearing on the

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

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

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

[11] *Memorial amicus curiae of the Government of the Republic of Rwanda pursuant to Rule 74 of the Rules of Procedure and Evidence.*

Prosecutor's Motion for Review.[12] The Prosecutor filed her response to these motions on 3 February 2000.[13]

10. On 17 December 1999, the Appeals Chamber issued a Scheduling Order[14] clarifying the time-limits set in its previous Order of 8 December 1999 and on 6 January 2000 the Appellant filed his response to the Prosecutor's Motion for Review.

11. Meanwhile, the Appellant had requested the withdrawal of his assigned counsel, Mr. J.P.L. Nyaberi, by letter of 16 December 1999. The Registrar denied his request on 5 January 2000, and this decision was confirmed by the President of the Tribunal on 19 January 2000.[15] The Appellant then filed a motion before the Appeals Chamber insisting on the withdrawal of assigned counsel, and the assignment of new counsel and co-counsel to represent him with regard to the Prosecutor's Motion for Review.[16] The Appeals Chamber granted his request by Order of 31 January 2000. In view of the change of counsel, the Appellant was given until 17 February 2000 to file a new response to the Prosecutor's Motion for Review, such response to replace the earlier response of 6 January 2000. The Prosecutor was given four further days to reply to any new response submitted. Both these documents were duly filed.[17]

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

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

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

[14] Filed on 21 December 1999

[15] *Decision on Review in Terms of Article 19(E) of the Directive on Assignment of Defence Counsel*

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

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

III. APPLICABLE PROVISIONS

A. The Statute

Article 25: Review Proceedings

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

B. The Rules

Rule 120: Request for Review

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

Rule 121: Preliminary Examination

If the Chamber which ruled on the matter decides that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

IV. SUBMISSIONS OF THE PARTIES

A. The Prosecution Case

13. The Prosecutor relies on Article 25 of the Statute and Rules 120 and 121 of the Rules as the legal basis for the Motion for Review[18]. The Prosecutor bases the Motion for Review primarily on its claimed discovery of new facts[19]. She states that by virtue of Article 25, there are two basic conditions for an Appeals Chamber to reopen and review its decision, namely the discovery of new facts which were unknown at the time of the original proceedings and which could have been a decisive factor in reaching the original decision[20]. The Prosecutor states that the new facts she relies upon affect the totality of the Decision and open it up for review and reconsideration in its entirety.[21]

14. The Prosecutor opposes the submission by the Defence (paragraph 27 below), that Article 25 can only be invoked following a conviction. The Prosecutor submits that the wording "persons convicted... or from the Prosecutor" provides that both parties can bring a request for review under Article 25, and not that such a right only arises on conviction. The Prosecutor submits that there is no requirement that a motion for review can only be brought after final judgement.[22]

15. The "new facts" which the Prosecutor seeks to introduce and rely on in the Motion for Review fall, according to her, into two categories: new facts which were not known or could not have been known to the Prosecutor at the time of the argument before the Appeals Chamber; and facts which although they "may have possibly been discovered by the Prosecutor" at the time, are, she submits, new, as they could not have been known to be part of the factual dispute or relevant to the issues subsequently determined by the Appeals

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[18] *Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution*, filed on 1 December 1999 at § 1.
[19] *Brief in Support of the Prosecutor's Motion for Review of the Appeals Chamber Decision rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor Following the Orders of the Appeals Chamber dated 25 November 1999*, at §§ 45 and 46.
[20] *Ibid.*, at § 48.
[21] *Ibid.*, at § 46.
[22] Transcript of Hearing in Arusha on 22 February 2000 ("Transcript") at pages 248 *et seq.* See also, *Prosecutor's Reply to the Appellant's Response to the Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution* (" Reply"), filed on 21 February 2000, at §§ 5-15

Chamber.[23] The Prosecutor in this submission relies on Rules 121, 107, 115, 117, and 5 of the Rules and Article 14 of the Statute. The Prosecutor submits that the determination of whether something is a new fact, is a mixed question of both fact and law that requires the Appeals Chamber to apply the law as it exists to the facts to determine whether the standard has been met. It does not mean that a fact which occurred prior to the trial cannot be a new fact, or a "fact not discoverable through due diligence."[24]

16. The Prosecutor alleges that numerous factual issues were raised for the first time on appeal by the Appeals Chamber, *proprio motu*, without a full hearing or adjudication of the facts by the Trial Chamber,[25] and contends that the Prosecutor cannot be faulted for failing to comprehend the full nature of the facts required by the Appeals Chamber. Indeed, the Prosecutor alleges that the questions raised did not correspond in full to the subsequent factual determinations by the Appeals Chamber and that at no time was the Prosecutor asked to address the factual basis of the application of the abuse of process doctrine relied upon by the Appeals Chamber in the Decision[26]. The Prosecutor further submits that application of this doctrine involved consideration of the public interest in proceeding to trial and therefore facts relevant to the interests of international justice are new facts on the review.[27] The Prosecutor alleges that she was not provided with the opportunity to present such facts before the Appeals Chamber.[28]

17. In application of the doctrine of abuse of process, the Prosecutor submits that the remedy of dismissal with prejudice was unjustified, as the delay alleged was, contrary to the findings in the Decision, not fully attributable to the Prosecutor.[29] New facts relate to the application of this doctrine and the remedy, which was granted in the Decision.

18. The Prosecutor submits that the Appeals Chamber can also reconsider the Decision, pursuant to its inherent power as a judicial body, to vary or rescind its previous orders, maintaining that such a power is vital to the ability of a court to function properly.[30] She

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[23] *Supra* note 19 at § 49.
[24] Transcript at page 253-256.
[25] The Prosecutor alleges that these new facts arose as a result of questions asked by the Appeals Chamber in its Scheduling Order of 3 June 1999. See supra note 19 at §§ 29, 50-54, 147 and158.
[26] *Ibid.*, §§ 54-55.
[27] *Ibid.*, § 56.
[28] *Ibid.*, at § 62.
[29] *Ibid.*, §§ 57-62. In making this submission, the Prosecutor refers to §§ 75, 76, 86, 98-100 and 106 of the Decision.
[30] *Ibid.*, §§ 63- 65.

asserts that this inherent power has been acknowledged by both Tribunals and cites several decisions in support. The Prosecutor maintains that a judicial body can vary or rescind a previous order because of a change in circumstances and also because a reconsideration of the matter has led it to conclude that a different order would be appropriate.[31] In the view of the Prosecutor, although the jurisprudence of the Tribunal indicates that a Chamber will not reconsider its decision if there are no new facts or if the facts adduced could have been relied on previously, where there are facts or arguments of which the Chamber was not aware at the time of the original decision and which the moving party was not in a position to inform the Chamber of at the time of the original decision, a Chamber has the inherent authority to entertain a motion for reconsideration.[32] The Prosecutor asks the Appeals Chamber to exercise its inherent power where an extremely important judicial decision is made without the full benefit of legal argument on the relevant issues and on the basis of incomplete facts.[33]

19. The Prosecutor submits that although a final judgement becomes *res judicata* and subject to the principle of *non bis in idem*, the Decision was not a final judgement on the merits of the case.[34]

20. The Prosecutor submits that she could not have been reasonably expected to anticipate all the facts and arguments which turned out to be relevant and decisive to the Appeals Chamber's Decision.[35]

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

[31] *Ibid.*, § 66.
[32] *Ibid.*, §§ 70-73.
[33] *Ibid.*, § 85.
[34] *Ibid.*, §§ 74-80.
[35] *Ibid.*, § 84.

the Conclusion and could have been decisive factors in determination of the Appeals Chamber's remedies. [36]

22. The Prosecutor submits that the extreme measure of dismissal of the indictment with prejudice to the Prosecutor is not proportionate to the alleged violations of the Appellant's rights and is contrary to the mandate of the Tribunal to promote national reconciliation in Rwanda by conducting public trial on the merits.[37] She states that the Tribunal must take into account rules of law, the rights of the accused and particularly the interests of justice required by the victims and the international community as a whole.[38]

23. The Prosecutor alleges a violation of Rule 5, in that the Appeals Chamber exceeded its role and obtained facts which the Prosecutor alleges were outside the original trial record. The Prosecutor submits that in so doing the Appeals Chamber acted *ultra vires* the provisions of Rules 98, 115 and 117(A) with the result that the Prosecutor suffered material prejudice, the remedy for which is an order of the Appeals Chamber for review of the Decision, together with the accompanying Dispositive Orders.[39]

24. The Prosecutor submits that her ability to continue with prosecutions and investigations depends on the government of Rwanda and that, unless the Appellant is tried, the Rwandan government will no longer be "involved in any manner".[40]

25. Finally, the Prosecutor submits that review is justified on the basis of the new facts, which establish that the Prosecutor made significant efforts to transfer the Appellant, that the Prosecutor acted with due diligence and that any delays did not fundamentally compromise the rights of the Appellant and would not justify the dismissal of the indictment with prejudice to the Prosecutor.[41]

26. In terms of substantive relief, the Prosecutor requests that the Appeals Chamber either review the Decision or reconsider it in the exercise of its inherent powers, that it vacate the Decision and that it reinstate the Indictment. In the alternative, if these requests

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[36] *Ibid.*, §§ 86,87.
[37] *Ibid.*, § 146.
[38] *Ibid.*, § 181.
[39] *Ibid.*, §§ 147-171.
[40] Transcript at pages 27 and 28.
[41] *Ibid.*, at page 122 and *supra* note 19 at § 184.

are not granted, the Prosecutor requests that the Decision dismissing the indictment is ordered to be without prejudice to the Prosecutor[42].

B. The Defence Case

27. The Appellant submits that Article 25 is only available to the parties after an accused has become a "convicted person". The Appeals Chamber does not have jurisdiction to consider the Prosecutor's Motion as the Appellant has not become a "convicted person" The Appellant submits that Rules 120 and 121 should be interpreted in accordance with this principle and maintains that both rules apply to review after trial and are therefore consistent with Article 25 which also applies to the right of review of a "convicted person"[43].

28. The Appellant submits that the Appeals Chamber does not have "inherent power" to revise a final decision. He submits that the Prosecutor is effectively asking the Appeals Chamber to amend the Statute by asking it to use its inherent power only if it concludes that Article 25 and Rule 120 do not apply. The Appellant states that the Appeals Chamber cannot on its own create law. [44]

29. The Appellant submits that the Decision was final and unappealable and that he should be released as there is no statutory authority to revise the Decision.[45]

30. The Appellant maintains that the Prosecutor has ignored the legal requirements for the introduction of new facts and has adduced no new facts to justify a review of the Decision. Despite the attachments provided by the Prosecutor and held out to be new facts, the Appellant submits that the Prosecutor has failed to produce any evidence to support the two-fold requirement in the Rules that the new fact should not have been known to the moving party and could not have been discovered through the exercise of due diligence.[46]

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[42] *Supra* note 18 at § 7.
[43] *Appellant's Response to Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution* ("Appellant's Response") filed on 17th February 2000, at §§ 1-12. Transcript at page 129 *et seq.* and pages 227-230.
[44] Appellant's Response at §§ 13 – 16. Transcript at page 139 *et seq.*
[45] Appellant's Response at.§§ 17-24.
[46] *Ibid.*, § 28.

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

32. The Appellant maintains that the Prosecutor's contention that the applicability of the abuse of process doctrine was not communicated to it before the Decision is groundless. The Appellant alleges that this issue was fully set out in his motion filed on 24 February 1998 and that when an issue has been properly raised by a party in criminal proceedings, the party who chooses to ignore the points raised by the other does so at its own peril.[47]

33. In relation to the submissions by the Prosecutor that the Decision of the Appeals Chamber was wrong in light of UN Resolution 955's goal of achieving national reconciliation for Rwanda, the Appellant urges the Appeals Chamber "to forcefully reject the notion that the human rights of a person accused of a serious crime, under the rubric of achieving national reconciliation, should be less than those available to an accused charged with a less serious one".[48]

[47] *Ibid.*, §§ 45-49.
[48] *Ibid.*, §§ 51-53.

V. THE MOTION BEFORE THE CHAMBER

34. Before proceeding to consider the Motion for Review, the Chamber notes that during the hearing on 22 February 2000 in Arusha, Prosecutor Ms Carla Del Ponte, made a statement regarding the reaction of the government of Rwanda to the Decision. She stated that: "The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999."[49] Later, the Attorney General of Rwanda appearing as representative of the Rwandan Government, in his submissions as "amicus curiae' to the Appeals Chamber, openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review.[50] The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council.[51]

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

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

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[49] Transcript, pages 26-28.

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

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

A. REVIEW

1. General considerations

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

38. Article 61 of the Statute of the International Court of Justice is such a provision and provides the Court with the power to revise judgements on the discovery of a fact, of a decisive nature which was unknown to the court and party claiming revision when the judgement was given, provided this was not due to negligence [52]. Similarly Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides for the reopening of cases if there is *inter alia*, "evidence of new or newly discovered facts"[53]. Finally, on this subject, the International Law Commission has stated that such a provision was a "necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal. "[54]

39. In national jurisdictions, the facility for review exists in different forms, either specifically as a right to review a decision of a court, or by virtue of an alternative route which achieves the same result. Legislation providing a specific right to review is most prevalent in civil law jurisdictions, although again, the exact criteria to be fulfilled before a

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

[53] 22 November 1984, 24 ILM 435 at 436.

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

court will undertake a review can differ from that provided in the legislation for this Tribunal[55].

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

41. Returning to the procedure in hand, it is clear from the Statute and the Rules[56] that, in order for a Chamber to carry out a review, it must be satisfied that four criteria have been met. There must be a new fact; this new fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and it must be shown that the new fact could have been a decisive factor in reaching the original decision.

42. The Appeals Chamber of the International Tribunal for the former Yugoslavia has highlighted the distinction, which should be made between genuinely new facts which may justify review and additional evidence of a fact [57]. In considering the application of Rule 119 of the Rules of the International Tribunal for the former Yugoslavia (which mirrors Rule 120 of the Rules), the Appeals Chamber held that:

> Where an applicant seeks to present a new fact which becomes known only after trial, despite the exercise of due diligence during the trial in discovering it, Rule 119 is the governing provision. In such a case, the Appellant is not seeking to admit additional evidence of a fact that was considered at trial but rather a new fact...It is for the Trial Chamber to review the Judgement and determine whether the new fact, if proved, could have been a decisive factor in reaching a decision".[58]

Further, the Appeals Chamber stated that-

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

[56] Article 25, Rules 120 and 121.

[57] Prosecutor v. Duško Tadić, *Decision on Appellant's Motion for the extension of the time-limit and admission of additional evidence*, Case no, IT-94-1-A, 15th October 1998.

[58] *Ibid.*, at 30.

> a distinction exists between a fact and evidence of that fact. The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules.[59]

43. The Appeals Chamber would also point out at this stage, that although the substantive issue differed, in *Prosecutor v. Dražen Erdemović*,[60] the Appeals Chamber undertook to warn both parties that "[t]he appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing". The Appeals Chamber confirms that it notes and adopts both this observation and the test established in *Prosecutor v. Duško Tadić* in consideration of the matter before it now.

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

2. Admissibility

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

> Rule 120 of the Rules of Procedure and Evidence is not intended for revision or review before conviction, but after ... a proper trial.[61]

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[59] *Ibid.*, at 32.
[60] *Judgement*, Case no IT-96-22-A, 7 October 1997 at § 15.
[61] Transcript of the hearing of 22 February 2000 ("transcript"), p.134.

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

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

47. Both Article 24 (which relates to appellate proceedings) and Article 25 of the Statute, expressly refer to a convicted person. However, Rule 72D and consistent decisions of both Tribunals [62] demonstrate that a right of appeal is also available in *inter alia* the case of dismissal of preliminary motions brought before a Trial Chamber, which raised an objection based on lack of jurisdiction.[63] Such appeals are on interlocutory matters and therefore by definition do not involve a remedy available only following conviction. Accordingly, it is the Appeals Chamber's view that the intention was not to interpret the Rules restrictively in the sense suggested by the Appellant, such that availability of the right to apply for review is only triggered on conviction of the accused; the Appeals Chamber will not accept the narrow interpretation of the Rules submitted by the Appellant. If the Appellant were correct that there could be no review unless there has been a conviction, it would follow that there could be no appeal from acquittal for the same reason. Appeals from acquittals have been allowed before the Appeals Chamber of the ICTY. The Appellant's logic is not therefore correct. Furthermore, in this case, the Appellant himself had recourse to the mechanism of interlocutory appeals which would not have been successful had the Chamber accepted the arguments he is now putting forward.

48. The Appeals Chamber accordingly subscribes to the Prosecutor's reasoning. Inclusion of the reference to the "Prosecutor" and the " convicted person" in the wording of

[62] i.e. the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).
[63] Rule 72(D) of the Rules. See also the additional provisions for appeal provided in Rules 65(D), 77D and 91(C) of the Rules, and in Rules 72, 73, 77(J), 65(D), 91(C) of the Rules of Procedure and Evidence of the ICTY, as pointed out in the Reply at §§ 11.

the article indicates that each of the parties may seek review of a decision, not that the provision is to apply only after a conviction has been delivered.

49. The Chamber considers it important to note that only a final judgement may be reviewed pursuant to Article 25 of the Statute and to Rule 120[64]. The parties submitted pleadings on the final or non-final nature of the Decision in connection with the request for reconsideration. The Chamber would point out that a final judgement in the sense of the above-mentioned articles is one which terminates the proceedings; only such a decision may be subject to review. Clearly, the Decision of 3 November 1999 belongs to that category, since it dismissed the indictment against the Appellant and terminated the proceedings.

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

3. Merits

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

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

[64] In this respect, the Appeals Chamber does not agree with the *Decision on the Alternative Request for Renewed Consideration of Delalić's Motion for an Adjournment until 22 June or Request for Issue of Subpoenas to Individuals and Requests for Assistance to the Government of Bosnia and Herzegovina* (IT-96-

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

(a) First period (15.4.1996 – 21.2.1997)

54. The Appeals Chamber considers that several elements submitted by the Prosecutor in support of her Motion for Review are evidence rather than facts. The elements presented in relation to the first period consist of transcripts of proceedings before the Cameroonian courts: on 28 March 1996 ; 29 March 1996 ; 17 April 1996 and 3 May 1996.[65] It is manifest from the transcript of 3 May 1996 that the Tribunal's request was discussed[66] at that hearing. The Appellant addressed the court and opposed Rwanda's request for extradition, stating that, « c'est le tribunal international qui est compétent »[67]. The Appeals Chamber considers that it may accordingly be presumed that the Appellant was informed of the nature of the crimes he was wanted for by the Prosecutor. This was a new fact for the Appeals Chamber. The Decision is based on the fact that:

> l'Appelant a été détenu pendant une durée totale de 11 mois avant d'être informé de la nature générale des chefs d'accusation que le Procureur avait retenus contre lui. [68]

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

21-T. 22 June 1998), which suggests that interlocutory decisions can be subject to review. The Appeals Chamber confirms that the law is as stated above.

[65] Annexes 8, 9 and 11 to the Motion for Review.

[66] On page 3 of the transcript of 3 May, the Public Prosecutor explains that he is waiting for "the Tribunal to send us the relevant documentation (« *que le Tribunal International nous procure les documents* »).

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

(b) Second period (21.2.1997 – 19.11.1997)

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

1. The report by Judge Mballe of the Supreme Court of Cameroon.[69] In his report, Justice Mballe explains that the request by the Prosecutor pursuant to Article 40 *bis* was transmitted immediately to the President of the Republic for him to sign a legislative decree authorising the accused's transfer. As he sees it, if the legislative decree could be signed only on 21 October 1997 that was due to the pressure exerted by the Rwandan authorities on Cameroon for the extradition of detainees to Kigali. He adds that in any event this semi-political semi-judicial extradition procedure was not the one that should have been followed.

2. A statement by David Scheffer, ambassador-at-large for war crimes issues, of the United States.[70] Mr. Scheffer described his involvement in the Appellant's case between September and November 1997. In his statement, Mr. Scheffer explains that the signing of the Presidential legislative decree was delayed owing to the elections scheduled for October 1997, and that Mr. Bernard Muna of the Prosecutor's Office asked Mr. Scheffer to intervene to speed up the transfer. He went on to say that, subsequent to that request, the United States Embassy made several representations to the Government of Cameroon in this regard between September and November 1997. Mr. Scheffer says he also wrote to the Government on 13 September 1997 and that around 24 October 1997

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[67] Page 4 of the transcript.
[68] Decision, §85.
[69] Annexe N°1 de la Demande en révision.
[70] Filed on 10 December 1999.

the Cameroonian authorities notified the United States Embassy of their willingness to effect the transfer.

57. In the Appeals Chamber's view a relevant new fact emerges from this information. In its Decision, the Chamber determined on the basis of the evidence adduced at the time that "Cameroon was willing to transfer the Appellant"[71], as there was no proof to the contrary. The above information however goes to show that Cameroon had not been prepared to effect its transfer before 24 October 1997. This fact is new. The request pursuant to Article 40 bis had been wrongly subject to an extradition process, when under Article 28 of the Statute all States had an obligation to co-operate with the Tribunal. The President of Cameroon had elections forthcoming, which could not prompt him to accede to such a request. And it was the involvement of the United States, in the person of Mr. Scheffer, which in the end led to the transfer.

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

> It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the *writ of habeas corpus*. **Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant.** Rather it appears that the Appellant was simply forgotten about.[72]

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

(c) Third period (19.11.1997 – 23.2.1998)

59. In her Motion for Review, the Prosecutor submitted few elements relating to the third period, that is the detention in Arusha. However, on 16 February 2000 she lodged

[71] Decision, §59.
[72] Decision, §96 (emphasis added).

additional material in this regard, along with a motion for deferring the time-limits imposed for her to submit new facts. Having examined the Prosecutor's request and the Registrar's memorandum relative thereto as well as the Appellant's written response lodged on 28 February 2000[73], the Appeals Chamber decides to accept this additional information.

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

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

> There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge during the period of the provisional detention and the Appellant contends that he was denied this opportunity.[74]

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

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[73] The President of the Appeals Chamber authorised the filing of this document during the hearing of 22 February, see page 57 of the transcript.
[74] Decision, §69.

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

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

64. The new facts identified in the first two periods were not known to the Chamber at the time of its Decision but they may have been known to the Prosecutor or at least they could have been discovered. With respect to the second period, the Prosecutor was not unaware that Cameroon was unwilling to transfer the Appellant, especially as it was her deputy, Mr. Muna, who sought Mr. Scheffer's intervention to facilitate the process. But evidently it was not known to the Chamber at the time of the Appeal proceedings. On the contrary, the elements before the Chamber led it to the opposite finding, which was an important factor in its conclusion that "the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence."[75]

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

66. There is precedent for taking such an approach. Other reviewing courts, presented with facts which would clearly have altered an earlier decision, have felt bound by the interests of justice to take these into account, even when the usual requirements of due diligence and unavailability were not strictly satisfied. While it is not in the interests of justice that parties be encouraged to proceed in a less than diligent manner, "courts cannot close their eyes to injustice on account of the facility of abuse"[76].

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[75] Decision, §101.

[76] Berggren v Mutual Life Insurance Co., 231 Mass. at 177. The full passage reads:
"The mischief naturally flowing from retrials based upon the discovery of alleged new evidence leads to the establishment of a somewhat stringent practice against granting such motions unless upon a survey of the

67. The Court of Appeal of England and Wales had to consider a situation not unlike that currently before the Appeals Chamber in the matter of *Hunt and Another v Atkin*.[77] In that case, a punitive order was made against a firm of solicitors for having taken a certain course of action. It emerged that the solicitors were in possession of information that justified their actions to a certain extent, and which they had failed to produce on an earlier occasion, despite enquiries from the court. As in the current matter, the moving party (the solicitors) claimed that the court's enquiries had been unclear, and that they had not fully understood the nature of the evidence to be presented. The Judge approached the question as follows:

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

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

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

> In all the circumstance, if the evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury, I do not think it should be excluded on the ground that reasonable diligence was not exercised to obtain it at or before the trial.[78]

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

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whole case a miscarriage of justice is likely to result if a new trial is denied. This is the fundamental test, in aid of which most if not all the rules upon the matter from time to time alluded to have been formulated. Ease in obtaining new trials would offer temptations to the securing of fresh evidence to supply former deficiencies. But courts cannot close their eyes to injustice on account of facility of abuse'."

[77] Court of Appeal (Civil Division) 6 May 1964.

presented by the Prosecutor, in the light of their impact on the Decision, would indeed be to close ones eyes to reality.

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

4. Conclusion

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

> ... the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him.[79]

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

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

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[78] (1964) 1 CCC 142, 46 DLR (2d) 372.
[79] Decision, §106.

B. RECONSIDERATION

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

VI. CONCLUSION

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

VII. DISPOSITION

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

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

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

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

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

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

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

Judge Shahabuddeen appends a Separate Opinion to this Decision.

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

_____s/._____	_____s/._____	_____s/._____
Claude Jorda, Presiding	Lal Chand Vohrah	Mohamed Shahabuddeen

_____s/._____	_____s/._____
Rafael Nieto-Navia	Fausto Pocar

Dated this thirty-first day of March 2000
At The Hague,
The Netherlands

[Seal of the Tribunal]

1048 1453

DECLARATION OF JUDGE LAL CHAND VOHRAH

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

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

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

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

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

S/.

Lal Chand Vohrah

Dated this 31st day of March 2000
At The Hague,
The Netherlands.

[Seal of the Tribunal]

1050 1451.

DECLARATION OF JUDGE RAFAEL NIETO-NAVIA

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

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

> "Let me just say a few words with respect to the government of Rwanda. The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999. It was a politically motivated decision, which is understandable. It can only be understood if one is cognisant with the situation, if one is aware of what happened in Rwanda in 1994. I also notice that, well, it was the Prosecutor that had no visa to travel to Rwanda. It was the Prosecutor who was unable to go to her office in Kigali. It was the Prosecutor who could not be received by the Rwandan authorities. In November, after your decision, there was no co-operation, no collaboration with the office of the Prosecutor. In other words, justice, as dispensed by this Tribunal was paralysed. It was the trial of Baglishima which had to be adjourned because the Rwandan government did not allow 16 witnesses to appear before this Court. In other words, they were not allowed to leave the territory of Rwanda. Fortunately, things have improved currently, and we again enjoy the support of the government. Why? Because we were able to show our good will, our willingness to continue with our work based on the mandate entrusted to us. However, your Honours, due account has to be taken of that fact. Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend on the government of Rwanda. That is the reality that we face. What is the reality? Either Barayagwiza can be tried by this Tribunal, in the alternative; or the only other solution that you have is for Barayagwiza to be handed over to the state of Rwanda to his natural judge, judex naturalis. Otherwise I am afraid, as we say in Italian, possiamo chiudere la baracca. In other words we can as well put the key to that door, close the door and then open that of the prison. And in that case the Rwandan government will not be involved in any manner"[1]

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

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

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

> "The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal."[2]

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

5. In order to cater for this, and aware of the need to ensure effective and ongoing co-operation, Article 28 of the Statute compels States to co-operate with the Tribunal "in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law"[3]. This is a general obligation incumbent on all States but the Rwandan government is specially obliged, because the Tribunal was established "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda"[4]. In addition, being the territory in which most of the crimes alleged took place, the co-operation of the Rwandan government with the Tribunal in fulfilment of their obligations as prescribed by Article 28, is paramount.

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

7. In my view, the Appeals Chamber, although mindful of this essential need for co-operation by the Rwandan government, is also mindful of the role the Tribunal plays in this process and therefore I refute most strenuously the suggestion that in reaching decisions, political considerations should play a persuasive or governing role, in order to assuage States and ensure co-operation to achieve the long-term goals of the Tribunal. On the contrary, in no circumstances would such considerations cause the Tribunal to compromise

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

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

its judicial independence and integrity. This is a Tribunal whose decisions must be taken, solely with the intention of both implementing the law and guaranteeing justice to the case before it, not as a result of political pressure and threats to withhold co-operation being exerted by an angry government.

8. Faced with non co-operation by a State and having exhausted the facilities available to it to ensure co-operation, a clear mechanism has been provided in the Statute and Rules[5] whereby the Tribunal may make a finding concerning the particular State's failure to observe the provisions of the Statute or the Rules and thereafter may report this finding to the Security Council.[6] It then falls to the Security Council to determine appropriate action to take against the State in question.[7] The involvement of the Tribunal will cease at the point of referral to the Security Council and indeed its position is safeguarded further by the stipulation, as has been held, that "the finding by the International Tribunal must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding."[8]. This mechanism ensures that clear separation in roles is maintained and more importantly that the independence of the Tribunal cannot be called into question. Its mandate is the prosecution of those responsible for serious violations of international humanitarian law[9] and it must do so in an impartial and unbiased fashion. It must not qualify this independence under any circumstances.

9. The concept of "the separation of powers" plays a central role in national jurisdictions. This concept ensures that a clear division is maintained between the functions of the legislature, judiciary and executive and provides that "one branch is not permitted to encroach on the domain or exercise the powers of another branch." [10] It ensures that the judiciary maintains a role apart from political considerations and safeguards its independence.

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[4] *Security Council Resolution 955 (1994) (S/RES/955)(1994)* § 1.
[5] *E.g.*, Rule 54 includes the power to issue orders, summonses, subpoenas, warrants and transfer orders. *See* Prosecutor v. Duško Tadić, *Judgement,* Case no. IT-94-1-A, 15 July 1999, § 52.
[6] Rule *7bis* of the Rules. *Supra* note 2 at 26 and 33. Also, Prosecutor v. Duško Tadić, *Judgement*, Case no. IT-94-1-A, 15 July 1999 § 51.
[7] Such failure by States to comply with their obligations under the Statute, have been referred to the Security Council on several occasions to date *(Supra.* note 2, § 34).
[8] *Supra.* note 2 § 36.
[9] Article 1 of the Statute.
[10] *Blacks Law Dictionary*, 6th edition, West Publishing Co, 1990, p. 1365.

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

11. In consideration of this issue, I note the importance accorded to the principle by the United Nations, in appointing a Special Rapporteur on the Independence of Judges and Lawyers and by the General Assembly, in the promulgation of the 1985 UN Basic Principles on the Independence of the Judiciary.[11] The Principles as a whole are of the utmost importance, but it serves now to highlight the following provisions:

> "1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary;
>
> 2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.[12]"

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

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

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

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

> "The United States believed that the law has long afforded standards by which a juridical hearing could be conducted to make sure that we punish only the right men and for the right reasons"[13]

13. Political reasons are not the right reasons. The Tribunal is endowed with a Statute, which ensures that trials take place by means of a transparent process, wherein widely accepted international standards of criminal law are applied. Central to this process is the maintenance of human rights standards of the highest level, to ensure that the basic Rule of Law is upheld.

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

> "For a Tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments"[15]

15. It must not be forgotten that the Rwandan government itself has recognised the importance of impartial justice. In requesting the establishment of a Tribunal by the international community, the Rwandan government stated that it supported an international tribunal because of its desire to avoid "any suspicion of its wanting to organise speedy vengeful justice".[16] Accordingly, this Tribunal's fundamental aim is to vindicate the highest standards of international criminal justice, in providing an impartial and equitable system of justice.

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

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

[15] Prosecutor v. Duško Tadić, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case no. IT-94-1-AR72, 2 October 1995, § 45.

[16] UN Doc. S/PV.3453 (1994) at 14.

16. But now the government of Rwanda has suggested that the Tribunal should convict all the indictees who come before it. It is wrong. The accused can be acquitted if the Trial Chamber is not satisfied that guilt has been proven beyond a reasonable doubt.[17] Alternatively, the accused can be released on procedural grounds, as was the case in the Decision. In the application of impartial justice the role of the Tribunal is not simply to convict all those who appear before it, but to consider a case upholding the fundamental principles of human rights.

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

> "Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace",[18]

This was subsequently reiterated by Resolution 1165 of 1998, when the Security Council stated that it "remain[ed] convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law will contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda and in the region"[19]. This aim can only be achieved by an independent Tribunal, mindful of the task entrusted to it by the international community.

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

> "The charges against the applicant are far from trivial and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are

[17] Rule 87(A) of the Rules of Procedure and Evidence.
[18] *Supra* note 4.
[19] *Security Council Resolution 1165 (1998) (S/RES/1165) (1998).*

> charged with the commission of serious crimes. Yet that trial can only be undertaken if the guarantee under.... the Constitution has not been infringed."[20]

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

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19. I wish to draw attention to the matter of *res judicata,* which was referred to by both the Appellant and the Prosecutor in their written briefs[21]. I wish to briefly discuss the applicability of this principle to the case in hand, noting that the Appeals Chamber has now reviewed its Decision.

20. The principle of *res judicata* is well settled in international law as being one of those "general principles of law recognized by civilised nations", referred to in Article 38 of the Statutes of the Permanent Court of International Justice ("PCIJ") and the International Court of Justice ("ICJ").[22] As such, it is a principle which should be applied by the Tribunal. The principle can be enunciated as meaning that, once a case has been decided by a final and valid judgement rendered by a competent tribunal, the same issue may not be disputed again between the same parties before a court of law[23].

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

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

[22] *See* Judge Anzilotti's dissenting opinion in the *Chorzow Factory Case* (Interpretation), PCIJ Series A (1927), No. 13 at 27. *See* also PCIJ, Advisory Committee of Jurists: *Procès-verbaux of the Proceedings of the Committee, June 16-July 24, 1920, with Annexes,* The Hague, 1920, pp. 315-316.

[23] *Effect of Awards of Compensation made by the United Nations Administrative Tribunal,* ICJ Reports 1954, p. 47.

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

22. The impact of the Appeals Chamber Decision is twofold. On the one hand the Appeals Chamber decided to allow an appeal[24] against a decision of Trial Chamber II[25] which dismissed a preliminary objection by the accused based on lack of personal jurisdiction, on the grounds *inter alia,* that the fundamental human rights of the accused to a fair and expeditious trial were violated as a result of his arrest and long detention in Cameroon before being transferred to the U.N. Detention Facilities in Arusha. On the other hand, the Decision "DISMISSE[D] THE INDICTMENT with prejudice to the Prosecutor."[26] This rendered the Decision final and definitive, as stated by the Appeals Chamber in its decision today.[27]

23. The International Court of Justice has held:

> "It is contended that the question of the Applicants' legal right or interest was settled by the [1962][28] Judgement and cannot now be reopened. As regards the issue of preclusion, the Court finds it unnecessary to pronounce on various issues which have been raised in this connection, such as whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term, --whether it ranks as a "decision" for the purposes of Article 59 of the Court's Statute, or as "final" within the meaning of Article 60. The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to its merits, whether or not it has in fact been dealt with in connection with the preliminary objection". [29]

24. In domestic jurisdictions a preliminary objection on lack of competence, raised by a party before a court does not prevent the matter being brought before the competent court. However, some decisions on preliminary points which are primarily within the competence

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[24] *Supra* note 20, § 113(1).
[25] Prosecutor v. Barayagwiza, *Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect*, Case No. ICTR-97-19-1, 17 November 1998, and Prosecutor v. Barayagwiza, *Corrigendum*, Case No. ICTR-97-19-1, 24 November 1998.
[26] *Supra* note 20, § 113(2).
[27] § 49.
[28] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) Preliminary Objections*, ICJ Reports. 1962, p. 319.
[29] *South West Africa, Second phase, Judgement,* ICJ Reports. 1966, p. 6 at § 59.

of the court acquire the force of *res judicata* on the question decided and the court is bound by its own decisions.[30]

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

26. Some common law systems consider that dismissal of an indictment with prejudice bars the right to bring an action again on the same issue and is, therefore, *res judicata*.[31] The instant case has not been litigated on the merits. What seems to be "final" is the issue of the prejudice to the Prosecutor, because the Prosecutor was barred from bringing the case before the Tribunal again. As I understood it, the Decision considered the finding of "prejudice to the Prosecutor" as a form of punishment due to the violations of fundamental human rights committed by the Prosecutor against the Appellant.[32]

27. If the new facts brought before the Appeals Chamber under Article 25 mean that the Prosecutor is responsible for less extensive violations (as accepted by the Appeals Chamber today),[33] she cannot be punished because of them, the dismissal cannot be with prejudice to her and hence the Decision must be amended. That is what we are deciding today.

28. Human rights treaties provide that when a state[34] violates fundamental human rights, it is obliged to ensure that appropriate domestic remedies are in place to put an end to such

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

[31] This concept is unknown to civil law systems.

[32] *Supra* note 20, § 76.

[33] § 72.

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

violations and in certain circumstances to provide for fair compensation to the injured party.[35]

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

* * *

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

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

s/.
Rafael Nieto-Navia

Dated this 31st day of March 2000
At The Hague,
The Netherlands.

[35] Article 50, ECHR; Article 63.1, ACHR. International jurisprudence has considered a "general concept of law" that violations of international obligations which cause harm deserve adequate reparation (*Factory at Chorzów, Jurisdiction*, Judgement No. 8, 1927, P.C.I.J., Series A, No. 9, p.21; *Factory at Chorzów, Merits*, Judgement No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

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

(i) The limits of the present hearing

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

3. Decisions rendered within the International Criminal Tribunal for the former Yugoslavia ("ICTY") on the competence of a Chamber to reconsider a decided point vary from the exercise of a relatively free power of reconsideration to a denial of any such power based on the statement, made in *Kordić,* "that motions to reconsider are not provided for in the Rules and do not form part of the procedures of the International

Tribunal".[1] Where the decisions suggest a relatively free power of reconsideration, they concern something in the nature of an operationally passing position taken in the course of continuing proceedings; in such situations the Chamber remains seised of the matter and competent, not acting capriciously but observing due caution, to revise its position on the way to rendering the ultimate decision. In situations of more lasting consequence, it appears to me that the absence of rules does not conclude the issue as to how a judicial body should behave where complaint is made that its previous decision was fundamentally flawed, and more particularly where that body is a court of last resort, as is the Appeals Chamber. Not surprisingly, in *^elebići* the Appeals Chamber of the ICTY introduced a qualification in stating that "in the absence of particular circumstances justifying a Trial Chamber or the Appeals Chamber to reconsider one of its decisions, motions for reconsideration do not form part of the procedure of the International Tribunal".[2] The first branch of that statement is important, including its non-reproduction of the *Kordić* words "that motions to reconsider are not provided for in the Rules": the implication of the omission seems to be that the fact that the Rules do not so provide is not by itself determinative of the issue whether or not the power of reconsideration exists in "particular circumstances". Alternatively, the omitted words were not intended to deny the inherent jurisdiction of a judicial body to reconsider its decision in "particular circumstances".

4. Circumscribed as they evidently are, it is hard, and perhaps not in the interest of the policy of the law, to attempt exhaustively to define "particular circumstances" which might justify reconsideration. It is clear, however, that such circumstances include a case in which the decision, though apparently *res judicata*, is void, and therefore non-existent

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[1] *Kordić*, IT-95-14/2-PT, 15 February 1999. And see similarly *Kovačević*, IT-97-24-PT, 30 June 1998.
[2] Order of the Appeals Chamber on Hazim Delić's Emergency Motion to Reconsider Denial of Request for Provisional Release, IT-96-21-A, 1 June 1999.

in law, for the reason that a procedural irregularity has caused a failure of natural justice.[3] An aspect of that position was put this way by the presiding member of the Appellate Committee of the British House of Lords:

> In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co Ltd v. Broome (No.2)* [1972] 2 All ER 849, [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.[4]

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

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

7. Whether a party was or was not "subjected to an unfair procedure" is a matter of substance, not technicality. If the party did not understand that an issue would be considered (which is the Prosecutor's contention), that could found a claim that it was disadvantaged. But, provided that that was understood and that there was opportunity to

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

respond, I do not see that the procedure was unfair merely because a Chamber considered an issue not raised by the parties. The interests involved are not merely those of the parties; certainly, they are not interests submitted by them to adjudication on a consensual jurisdictional basis; they include the interests of the international community and are intended to be considered by a court exercising compulsory jurisdiction. In *Erdemović*[5] the Appeals Chamber raised, considered and decided issues not presented by the parties, observing that there was "nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties".[6]

8. Further, a Chamber need not echo arguments addressed to it; its reasoning may be its own.[7] When the present matter is examined, all that appears is that the Appeals Chamber in some cases used arguments other than those presented to it. The basic issue was one on which the parties had an opportunity to present their positions, namely, whether the rights of the appellant had been violated by undue delay so as to lead to lack of jurisdiction. For the reasons given below, I am satisfied that there is not any substance in the contention of the prosecution that it had no notice that certain questions would be determined. It is more to the point to say that the prosecution did not avail itself of opportunities to present its position on certain matters; in particular, it did not assist either the Trial Chamber or the Appeals Chamber with relevant material at the time when that assistance should have been given.

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[4] *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)*, [1999] 1 All ER 577, HL, at pp. 585-586, per Lord Browne-Wilkinson.
[5] IT-96-22-A, 7 October 1997, para. 16.
[6] With respect, this can benefit from qualification in the case of the International Court of Justice. That court would be acting *ultra petita* if it decided issues (as distinguished from arguments concerning an issue) not presented by the parties, since the jurisdiction is consensual. See Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II (Cambridge, 1986), p. 531.

9. In short, there was no unfairness in procedure in this case. Accordingly, the previous decision of the Appeals Chamber cannot be set aside and the appeal reopened. It is thus not possible to accede to the Prosecutor's proposition, among others, that that decision was wrong when made and should for that reason be now changed.[8]

10. For the reasons given in today's judgment, the procedure of review is nevertheless available.[9] As mentioned above, the possibility of revision which this opens up is however limited to consideration of the question whether the same decision would have been rendered if certain new facts had been at the disposal of the Appeals Chamber, and, if not, what is the decision which would then have been given.

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

11. Before moving on, I shall pause over the question, alluded to above, as to whether the prosecution availed itself of opportunities to present its position on certain points. The question may be considered illustratively in relation to the issue of detention between the appellant's transfer from Cameroon to the Tribunal's detention unit in Arusha and his initial appearance before a Trial Chamber, extending from 19 November 1997 to 23 February 1998. The prosecution takes the position, which it stresses, that it had no opportunity to address this issue because it did not know that the Appeals Chamber would be dealing with it. That, if correct, is a sufficiently weighty matter to justify

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[7] See the *"Lotus", (1927), PCIJ, Series A, No. 10,* p. 31; *Fisheries, ICJ Reports 1951,* p. 116, at p. 126; *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, ICJ Reports 1974,* p. 3, at pp. 9-10, para. 17. As to a distinction between issues and arguments, see Fitzmaurice, *supra.*
[8] Transcript, Appeals Chamber, 22 February 2000, p. 13.
[9] See also *Zejnil Delalić,* IT-96-21-T, 22 June 1998, paras. 38-40, which would seem, however, to apply the idea of review to an ordinary interlocutory decision even if it does not put an end to the case.

reconsideration, as it would show that the prosecution was subjected to an unfair procedure in the Appeals Chamber. So it should be examined.

12. The prosecution submitted that the issue of delay between transfer and initial appearance was not argued by the appellant in the course of the oral proceedings in the Trial Chamber and was not included in his grounds of appeal. Although, as will be seen, the appellant did include a claim on the point in his motion, I had earlier made a similar observation, noting that, in the Trial Chamber, "no issue was presented as to delay between transfer and initial appearance",[10] that the "Trial Chamber was not given any reason to believe that there was such an issue", and, in respect of the appeal proceedings, that it "does not appear that the Prosecutor thought that she was being called upon to meet an argument about delay between transfer and initial appearance".[11] But it seems to me that, apart from the action of the appellant, account has to be taken of the action of the Appeals Chamber and that the position changed with the issuing by the latter of its scheduling order of 3 June 1999; that order, referred to below, clearly raised the matter. After the order was made, the appellant went back to the claim which he had originally raised; equally, the prosecution gave its reaction. Thus, in the event, the Appeals Chamber did not pass on the matter without affording an opportunity to the Prosecutor to address the point.

13. To fill out this brief picture, it is right to consider the factual basis of the proposition that the appellant did include a claim on the point in his motion. As I noted

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

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

at page 1 of a separate opinion appended to the decision of the Appeals Chamber of 3 November 1999, in paragraphs 2 and 9 of the motion the appellant complained of "continued provisional detention". Viewing the time when that complaint was made (three months after the transfer), he was thus also complaining of the detention following on his transfer, inclusive of delay between transfer and initial appearance. In fact, as I also pointed out, annexure DM2 to his motion spoke of "**98 days** of detention after transfer and before initial appearance" (original emphasis, but actually 96 days). Further, in paragraph 11 of his brief in support of that motion he referred to Articles 7, 8, 9 and 10 of the Universal Declaration of Human Rights, relating *inter alia* to protection of the law and to freedom from arbitrary arrest and detention. More particularly, he also referred to Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), stating that this required that "the accused should be brought before the court without delay". That was obviously a reference to paragraph 3 of Article 9 of the ICCPR which stipulates that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". It follows that, in his motion, the appellant did make a complaint on the matter to the Trial Chamber.

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

15. In the Trial Chamber, the prosecution did not file a response to the appellant's motion in which the appellant complained of delay between transfer and initial appearance. Indeed, some part of the oral hearing before the Trial Chamber on 11 September 1998 was taken up with this very fact - that the prosecution had not submitted a reply, with the consequential difficulty, about which the appellant

remonstrated, that he did not know exactly what issues the prosecution intended to challenge at the hearing before the Trial Chamber. In the words then used by his counsel, "... in an adversarial system we should not leave leeway for ambush".[12] In his reply, counsel for the prosecution simply said, "We didn't do it in this case and I have no explanation for that. ... we don't have an explanation for why we haven't followed our *usual practice*".[13] In turn, the Presiding Judge, though not sanctioning the prosecution, noted that what was done was contrary to the established procedure.[14] At the oral hearing before the Appeals Chamber on 22 February 2000, counsel for the prosecution took the position that there was no rule requiring the prosecution to file a response.[15] Counsel for the prosecution before the Trial Chamber had earlier made the same point.[16] They were both right. But that circumstance was not determinative. As the Presiding Judge of the Trial Chamber had made clear, it was the practice to file a response; and, as counsel for the prosecution later conceded at the oral hearing before the Appeals Chamber on 22 February 2000, the Presiding Judge "did draw the conclusion that [what was done] was contrary ... to the practice of the Tribunal".[17] Indeed, at the hearing before the Trial Chamber on 11 September 1998, counsel for the prosecution accepted, as has been seen, that the failure of the prosecution to submit a written reply was contrary to the "usual practice" of the prosecution itself.

16. The failure of the prosecution to respond to the appellant's complaint of undue delay between transfer and initial appearance did not of course remove the complaint. The dismissal of the appellant's motion included dismissal of that complaint. The complaint and its dismissal formed part of the record before the Appeals Chamber. This being so, it appears to me that at this stage the question of substance is whether the

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[12] Transcript, Trial Chamber, 11 September 1998, p. 5.
[13] Ibid., p. 8, emphasis added.
[14] Ibid., p. 9.
[15] Transcript, Appeals Chamber, 22 February 2000, p. 105.
[16] Transcript, Trial Chamber, 11 September 1998, p. 8.

Prosecutor knew that the Appeals Chamber intended to deal with the complaint, and, if so, whether the Prosecutor had an opportunity to address it. The answer to both questions is in the affirmative. This results from the Appeals Chamber's scheduling order of 3 June 1999, referred to above.

17. That order required the parties "to address the following questions and provide the Appeals Chamber with all relevant documentation: ....4). The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance". The requisition was made on the stated basis that the Appeals Chamber needed "additional information to decide the appeal". At the oral hearing in the Appeals Chamber on 22 February 2000, a question from the bench to counsel for the Prosecutor was this: "Did the prosecution understand from that, that the Appeals Chamber was proposing to consider reasons for any delay between transfer of the Appellant and his initial appearance?".[18] Counsel for the Prosecutor correctly answered in the affirmative. He also agreed that the prosecution did not object to the competence of the Appeals Chamber to consider the matter and did not ask for more time to respond to the request by the Appeals Chamber for additional information.[19] In fact, in paragraphs 17-20 of its response of 21 June 1999, the prosecution sought to explain the delay in so far as it then said that it could, stating that it had no influence over the scheduling of the initial appearance of accused persons, that these matters lay with the Trial Chambers and the Registrar, that assignment of defence counsel was made only on 5 December 1997, and that there was a judicial holiday from 15 December 1997 to 15 January 1998. In stating these things (how adequate they were being a different matter), the prosecution fell to be understood as having accepted that the Appeals Chamber would be dealing one way or another with the question to which those things were a response.

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[17] Transcript, Appeals Chamber, 22 February 2000, p. 107.

18. Focusing on the issues as she saw them, the Prosecutor, as I understood her, submitted that the Appeals Chamber was confined to the issues presented by the parties. As indicated above, that is not entirely correct. The cases show that the leading principle is that the overriding task of the Tribunal is to discover the truth. Since this has to be done judicially, limits obviously exist as to permissible methods of search; and those limits have to be respected, for the Appeals Chamber is not an overseer. It cannot gratuitously intervene whenever it feels that something wrong was done: beyond the proper appellate boundaries, the decisions of the Trial Chamber are unquestionable. However, as is shown by *Erdemović*,[20] the Appeals Chamber can raise issues whether or not presented by a party, provided, I consider, that they lie within the prescribed grounds of appeal, that they arise from the record, and that the parties are afforded an opportunity to respond. I think that this was the position in this case.

19. As has been demonstrated above, the record before the Appeals Chamber included both a claim by the appellant that there was impermissible delay between transfer and initial appearance[21] and dismissal by the Trial Chamber of the motion which included that claim. Where an issue lying within the prescribed grounds of appeal is raised on the record, the Appeals Chamber can properly require the parties to submit additional information on the point; there is not any basis for suggesting, as the Prosecutor has done, that in this case the Appeals Chamber went outside of the appropriate limits in search of evidence.

20. In conclusion, it appears to me that the substance of the matter is that the Prosecutor had notice of the intention of the Appeals Chamber to deal with the point, had

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[18] Ibid., p. 108.
[19] Ibid.
[20] IT-96-22-A, 7 October 1997.
[21] By contrast, the appellant's motion did not, in my opinion, include a claim that there was impermissible delay in the hearing of his habeas corpus motion.

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

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

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

22. An opinion which I appended to the decision given on 2 July 1998 by the Appeals Chamber of the ICTY in *Prosecutor v. Kovačević* included an observation to the effect that, because of the preparatory problems involved, the jurisprudence recognises that there is "need for judicial flexibility" in applying to the prosecution of war crimes the principle that criminal proceedings should be completed within a reasonable time. The prosecution correctly submits that, in determining whether there has been a breach of that principle, a court must weigh competing interests. As it was said in one case, the court "must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in" the territory concerned.[22] To do this, the court "should assess such factors

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

as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant".[23] The reason for the delay could of course include the complexity of the case and the conduct of the prosecuting authorities as well as that of the court as a whole.

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

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

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

25. The matter turns, it appears to me, on a distinction between the right of a person to a trial within a reasonable time and the right of a person to freedom from arbitrary interference with his liberty. The right to a trial within a reasonable time can be violated even if there has never been any arrest or detention; by contrast, a complaint of arbitrary interference with liberty can only be made where a person has been arrested or detained. I am not certain that the distinction was recognised by the prosecution.[24] In the view of its counsel, which he said was based on the decision of the Appeals Chamber and on other cases, the object of the Rule 62 requirement for the accused to be brought "without delay" before the Trial Chamber was to allow him "to know the formal charges against him" and to enable him "to mount a defence".[25] The submission was that, in this case, both of these purposes had been served before the initial appearance, the indictment having been given to the appellant while he was still in Cameroon. But it seems to me that, as counsel later accepted,[26] there was yet another purpose, and that that purpose could only be served if there was an initial appearance. That purpose – a fundamentally important one – was to secure to the detained person a right to be placed "without delay" within the protection of the judicial power and consequently to ensure that there was no arbitrary curtailment of his right to liberty. That purpose is a major one in the work of an institution of this kind; it is worthy of being marked.

26. For present purposes, the law seems straightforward. It is not in dispute that the controlling instruments of the Tribunal reflect the internationally recognised requirement that a detained person shall be brought "without delay" to the judiciary as required by Rule 40*bis*(J) and Rule 62 of the Tribunal's Rules of Procedure and Evidence, or "promptly" as it is said in Article 5(3) of the European Convention on Human Rights and Article 9(3) of the ICCPR, the latter being alluded to by the appellant in paragraph 11 of

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[24] Transcript, Appeals Chamber, 22 February 2000, pp. 97-98.
[25] Ibid., pp. 72-73.
[26] Ibid., pp. 95-97.

the brief in support of his motion of 19 February 1998, as mentioned above. It will be convenient to refer to one of these provisions, namely, Article 5(3) of the European Convention on Human Rights. This provides that "[e]veryone arrested or detained in accordance with the provisions of paragraph 1.*c* of this article [relating to arrests for reasonable suspicion of having committed an offence] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...".

27. So first, as to the purpose of these provisions. Apart from the general entitlement to a trial within a reasonable time, it is judicially recognised that the purpose is to guarantee to the arrested person a right to be brought promptly within the protection of the judiciary and to ensure that he is not arbitrarily deprived of his right to liberty.[27] The European Court of Human Rights, whose case law on the subject is persuasive, put the point by observing that the requirement of promptness "enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty.... Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5§3 [of the European Convention on Human Rights], which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, 'one of the fundamental principles of a democratic society ...'".[28]

28. Second, as to the tolerable period of delay, the decision of the Appeals Chamber of 3 November 1999 correctly recognised that this is short. The work of the United Nations Human Rights Committee shows that it is about four days. In *Portorreal v. Dominican Republic*, a period of 50 hours was held to be too short to constitute delay.[29]

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[27] Eur. Court H.R., Schiesser judgment of 4 December 1979, Series A no. 34, p. 13, para. 30.
[28] Eur. Court H.R., Brogan and Others judgment of 29 November 1988, Series A no. 145-B, p. 32, para. 58.
[29] United Nations Human Rights Committee, Communication No. 188/1984 (5 November 1987).

But a period of 35 days was considered too much in *Kelly v. Jamaica.*[30] In *Jijón v. Ecuador*[31] a five-day delay was judged to be violative of the rule.

29. The same tendency in the direction of brevity is evident in the case law of the European Court of Human Rights. In *McGoff*[32], on his extradition from the Netherlands to Sweden, the applicant was kept in custody for 15 days before he was brought to the court. That was held to be in violation of the rule. *De Jong, Baljet and van den Brink*[33] concerned judicial proceedings in the army. "[E]ven taking due account of the exigencies of military life and military justice", the European Court of Human Rights considered that a delay of seven days was too long.

30. In *Koster,*[34] which also concerned judicial proceedings in the army, a five-day delay was held to be in breach of the rule. The fact that the period included a weekend and two-yearly military manoeuvres, in which members of the court - a military court - had been participating was disregarded; in the view of the European Court of Human Rights, the rights of the accused took precedence over matters which were "foreseeable".[35] The military manoeuvres "in no way prevented the military authorities from ensuring that the Military Court was able to sit soon enough to comply with the requirements of [Article 5(3) of the European Convention on Human Rights], *if necessary on Saturday or Sunday*".[36]

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[30] United Nations Human Rights Committee, Communication No. 253/1987 (8 April 1991).
[31] United Nations Human Rights Committee, Communication No. 277/1988 (26 March 1992).
[32] Eur. Court H.R., McGoff judgment of 26 October 1984, Series A no. 83, pp. 26-27, para. 27.
[33] Eur. Court H.R., de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52.
[34] Eur. Court H.R., Koster judgment of 28 November 1991, Series A no. 221.
[35] Ibid., para. 25.
[36] Ibid., emphasis added.

31. No doubt, as it was said in *de Jong, Baljet and van den Brink*, "The issue of promptness must always be assessed in each case according to its special features".[37] The same thing was said in *Brogan*.[38] But this does not markedly enlarge the normal period. *Brogan* was a case of terrorism; the European Court of Human Rights was not altogether unresponsive to the implications of that fact, to which the state concerned indeed appealed.[39] Yet the Court took the view that a period of six days and sixteen and a half hours was too long; indeed, it considered that even a shorter period of four days and six hours was outside the constraints of the relevant provision. The Court began its reasoning by saying:

> No violation of Article 5§3 [of the European Convention on Human Rights] can arise if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible ... If the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer.[40]

32. Thus, in measuring permissible delay, the Court started out by having regard to the time within which it would have been "feasible" to establish judicial control of the detention in the circumstances of the case. The idea of feasibility obviously introduced a margin of flexibility in the otherwise strict requirement of promptness. But how to fix the limits of this flexibility? The Court looked at the "object and purpose of Article 5", or, as it said, at the "aim and ... object" of the Convention", and stated that –

> the degree of flexibility attaching to the notion of 'promptness' is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features ..., the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5§3 [of the European Convention on Human Rights], that is to the point of effectively

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[37] Eur. Court H.R., de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52.
[38] Eur. Court H.R., Brogan and Others judgment of 29 November 1988, Series A no. 145-B, para. 59.
[39] Ibid., para. 62.
[40] Ibid., para. 58.

> negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.[41]

33. In paragraph 62 of its judgment in *Brogan*, the European Court of Human Rights again mentioned that the "scope for flexibility in interpreting and applying the notion of 'promptness' is very limited". Thus, although the Court appreciated the special circumstances which terrorism represented, it said that "[t]he undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5§3".[42]

34. To refer again to *McGoff*, in that case the European Commission of Human Rights recalled that, in an earlier matter, it had expressed the view that a period of four days was acceptable; "it also accepted five days, but that was in exceptional circumstances".[43]

35. In the case at bar, counting from the time of transfer to the Tribunal's detention unit in Arusha (19 November 1997) to the date of initial appearance before a Trial Chamber (23 February 1998), the period - the Arusha period - was 96 days, or *nearly 20 times the maximum acceptable period of delay.*

36. As a matter of juristic logic, any flexibility in applying the requirements concerning time to the case of war crimes has to find its justification not in the nature of the crimes themselves, but in the difficulties of investigating, preparing and presenting cases relating to them. Consequently, that flexibility is not licence for disregarding the requirements where they can be complied with. It is only "the austerity of tabulated legalism", an idea not much favoured where, as here, a generous interpretation is called

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[41] Ibid., para. 59.
[42] Ibid., para. 62.
[43] Eur. Court H.R., McGoff judgment of 26 October 1984, Series A no. 83, Annex, Opinion of the Commission, p. 31, para. 28.

for[44], which could lead to the view that, once a crime is categorised as a war crime, that suffices to justify the conclusion that the requirements concerning time may be safely put aside.

37. In this case, it is not easy to see what difficulty beset the authorities in bringing the appellant from the Tribunal's detention unit to the Trial Chamber. That scarcely inter-galactic passage involved no more than a fifteen minute drive by motor car on a macadamised road. To plead the character of the crimes in justification of the manifest breach of an applicable requirement which was both of overriding importance and capable of being respected with the same ease as in the ordinary case is to transform an important legal principle into a statement of affectionate aspiration.

38. On the facts as they earlier appeared to it, the Appeals Chamber could not come to any conclusion other than that the rights of the appellant in respect of the period between transfer and initial appearance had been breached, and very badly so. As today's decision finds, the new facts do not show that they were not breached. I agree, however, that the new facts show that the breach was not as serious as it at first appeared, it being now clear that defence counsel, although having opportunities, did not object and could be treated as having acquiesced in the passage of time during most of the relevant period.

(iv) Whether a breach could be remedied otherwise than by release

39. Now for the question of remedy, assuming the existence of a breach. In this respect, the prosecution argues that, if there was a breach of the appellant's rights, it was open to the Appeals Chamber to grant some form of compensatory relief short of release and that it should have done so. In support, notice may be taken of a view that, particularly though not exclusively in the case of war crimes, the remedy for a breach of

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[44] See the criticism made by Lord Wilberforce in *Minister of Home Affairs v. Fisher* [1980] AC 319, PC, at 328 G-H.

the principle that a trial is to be held within a reasonable time may take the form of payment of monetary compensation or of adjustment of any sentence ultimately imposed, custody being meanwhile continued.[45]

40. That view is useful, although not altogether free from difficulty;[46] it is certainly not an open-ended one. If the concern of the law with the liberty of the person, as demonstrated by the above-mentioned attitude of the courts, means anything, it is necessary to contemplate a point of time at which the accused indisputably becomes entitled to release and dismissal of the indictment. In this respect, it is to be observed that, according to the European Commission of Human Rights, contrary to an opinion of the German Federal Court, in 1983 a committee of three judges of the German Constitutional Court held that "unreasonable delays of criminal proceedings might under certain circumstances only be remedied by discontinuing such proceedings".[47] As is shown by the last paragraph of the report of *Bell's* case, *supra*, the only reason why a formal order prohibiting further proceedings was not made in that case by the Privy Council was because it was understood that the practice in Jamaica was that there would be no further proceedings. Paragraph 108 of the decision of the Appeals Chamber of 3 November 1999 cites cases from other territories in which further proceedings were in fact prohibited. I find no fault with the position taken in those cases; true, those cases concerned delay in holding and completing the trial, but I do not accept that the principle on which they rest is necessarily inapplicable to extended pre-arraignment delay.

41. More importantly, the view that relief short of release is possible is subject to any statutory obligation to effect a release. In this respect, in its previous decision the

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[45] See, inter alia, P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed. (The Hague, 1998), pp. 449-450; and see generally the cases cited therein, including *Neubeck*, D & R 41 (1985), p. 57, para. 131; *H v. Federal Republic of Germany*, D & R 41 (1985), pp. 253-254; and *Eckle*, Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no.51, p. 31, para. 67.
[46] See discussion in van Dijk and van Hoop, *loc.cit.*

Appeals Chamber held that Rule 40*bis* of the Tribunal's Rules of Procedure and Evidence applied to the Cameroon period of detention. I respectfully disagreed with that view and still do, but it is the decision of the Appeals Chamber which matters; and so I proceed on the basis that the Rule applied. Now, Sub-Rule (H) of that Rule provided as follows:

> The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event that the indictment has not been confirmed and an arrest warrant signed, the suspect *shall be released* ... (emphasis added).

42. Consistently with the judicial approach to detention in the early phases of a criminal case, the object of the cited provision is to control arbitrary interference with the liberty of the person by guaranteeing him a right to be released if he is not charged within the stated time. In keeping with that object, the Rule, which has the force of law, provides its own sanction. Where that sanction comes into operation through breach of the 90-day limit set by the Rule, release is both automatic and compulsory: a court order may be made but is not necessary. The detained person has to be mandatorily released in obedience to the command of the Rule: no consideration can be given to the possibility of keeping him in custody and granting him a remedy in the form of a reduction of sentence (if any) or of payment of compensation; any discretion as to alternative forms of remedy is excluded, however serious were the allegations.

43. In effect, the premise of the conclusion reached by the Appeals Chamber that the appellant had to be released was the Chamber's interpretation, on the facts then before it, that the Rule applied to the Cameroon period of detention. These being review proceedings and not appeal proceedings, the premise would continue to apply, and so would the conclusion, unless displaced by new facts.

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[47] *H v. Federal Republic of Germany*, application no. 10884/84, D & R, no. 41, decision of 13 December 1984, p. 253.

(v) Whether there are new facts

44. So now for the question whether there are new facts. The temptation to use national decisions in this area may be rightly restrained by the usual warnings of the dangers involved in facile transposition of municipal law concepts to the plane of international law. Such borrowings were more frequent in the early or formative stages of the general subject; now that autonomy has been achieved, there is less reason for such recourse. It is possible to argue that the current state of criminal doctrine in international law approximates to that of the larger subject at an earlier phase and that accordingly a measure of liberality in using domestic law ideas is both natural and permissible in the field of criminal law. But it is not necessary to pursue the argument further. The reason is that, altogether apart from the question whether a particular line of municipal decisions is part of the law of the Tribunal, no statutory authority needs to be cited to enable a court to benefit from the scientific value of the thinking of other jurists, provided that the court remains master of its own house. Thus, nothing prevents a judge from consulting the reasoning of judges in other jurisdictions in order to work out his own solution to an issue before him; the navigation lights offered by the reflections of the former can be welcome without being obtrusive. This is how I propose to proceed.

45. The books are full of statements, and rightly so, concerning the caution which has to be observed, as a general matter, in admitting fresh evidence. Latham CJ noted that "[t]hese are general principles which should be applied to both civil and criminal trials".[48] Accordingly, there is to be borne in mind the principle familiar in civil cases, somewhat quaintly expressed in one of them, that it is the "duty of [a party] to bring forward his

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[48] *Green v. R.* (1939) 61 C.L.R. 167, at 175.

whole case at once, and not to bring it forward piecemeal as he found out the objections in his way".[49]

46. The prosecution advanced a claim to several new facts. Agreeably to the caution referred to, the Appeals Chamber has not placed reliance on all of them. I shall deal with two which were accepted, beginning with the statement of Ambassador Scheffer as to United States intervention with the government of Cameroon. Five questions arise in respect of that statement.

47. The first question is whether the Ambassador's statement concerns a "new fact" within the meaning of Article 25 of the Statute. It has to be recognised that there can be difficulty in drawing a clear line of separation between a new fact within the meaning of that Article of the Statute and additional evidence within the meaning of Rule 115 of the Tribunal's Rules of Procedure and Evidence. A new fact is generically in the nature of additional evidence. The differentiating specificity is this: additional evidence, though not being merely cumulative, goes to the proof of facts which were in issue at the hearing; by contrast, evidence of a new fact is evidence of a distinctly new feature which was not in issue at the trial. In this case, there has not been an issue of fact in the previous proceedings as to whether the government of the United States had intervened. True, the intervention happened before the hearing, but that does not make the fact of the intervention any the less new. As is implicitly recognised by the wording of Article 25 of the Statute and Rule 120 of the Rules of Procedure and Evidence of the Tribunal, the circumstance that a fact was in existence at the time of trial does not automatically disqualify it from being regarded as new; the newness has to be in relation to the facts previously before the court. In my opinion, Ambassador Scheffer's statement is evidence of a new fact.

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[49] *In re New York Exchange, Limited* (1888) 39 Ch. D. 415, at 420, CA.

48. The second question is whether the new fact "could not have been discovered [at the time of the proceedings before the original Chamber] through the exercise of due diligence" within the meaning of Rule 120 of the Rules. The position of the prosecution is that it did ask Ambassador Scheffer to intervene with the government of Cameroon. This being so, it is reasonable to hold that the prosecution knew that the requested intervention was needed to end a delay caused by Cameroon, and that it was also in a position to know that the intervention had in fact taken place and that it involved the activities in question. It is therefore difficult to find that the material in question could not have been discovered with due diligence. In this respect, I agree with the appellant.

49. But, for the reasons given in today's judgment, that does not end the matter. Certainly the general rule is that " the interests of justice" will not suffice to authorise the admission of material which was available at trial, diligence being a factor in determining availability. The principle of finality supports that view. But, as has been recognised by the Appeals Chamber of the ICTY, "the principle [of finality] would not operate to prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice".[50] As was also observed by that Chamber,[51] "the principle of finality must be balanced against the need to avoid a miscarriage of justice". I see no reason why the necessity to make that balance does not apply to a review.

50. Thus, there has to be recognition of the possibility of there being a case in which, notwithstanding the absence of diligence, the material in question is so decisive in demonstrating mistake that the court in its discretion is obliged to admit it in the upper interests of justice. This was done in one case in which an appeal court observed, "All the evidence tendered to us could have been adduced at the trial: indeed, three of the witnesses, whom we have heard... did give evidence at the trial. Nevertheless we have

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[50] *Tadić,* IT-94-1-A, 15 October 1998, para. 72. The context suggests that the word "not" in the expression "not available" in line 8 of para. 35 of that decision was inserted *per incuriam.*
[51] Ibid., para. 35.

thought it necessary, exercising our discretion in the interests of justice, to receive" their evidence.[52] It is not the detailed underlying legislation which is important, but the principle to be discerned.

51. The principle was more recently affirmed by the Supreme Court of Canada in the case of *R v. Warsing*.[53] There the leading opinion recalled an earlier view that "the criterion of due diligence... is not applied strictly in criminal cases" and said: "It is desirable that due diligence remain only one factor and its absence, particularly in criminal cases, should be assessed in light of other circumstances. If the evidence is compelling and the interests of justice require that it be admitted then the failure to meet the test should yield to permit its admission".[54] In the same opinion, it was later affirmed that "a failure to meet the due diligence requirement should not 'override accomplishing a just result'".[55]

52. It may be thought that an analogous principle can be collected from *Aleksovski,* in which the Appeals Chamber of the ICTY held "that, in general, accused before this Tribunal have to raise all possible defences, where necessary in the alternative, during trial ..." ,[56] but stated that it "will nevertheless consider" a new defence. Clearly, if the new defence was sound in law and convincing in fact, it would have been entertained in the higher interests of justice notwithstanding the general rule.

53. Thus, having regard to the superior demands of justice, I would read the reference in Rule 120 to a new fact which "could not have been discovered through the exercise of due diligence" as directory, and not mandatory or peremptory. In this respect, it is said that the "language of a statute, however mandatory in form, may be deemed directory

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[52] See *R v. Lattimore* (1976) 62 Cr. App. R. 53, at 56.
[53] [1998] 3 S.C.R. 579.
[54] Ibid., para. 51 of the opinion of Justices Cory, Iacobucci, Major and Binnie.
[55] Ibid., para. 56.
[56] See paragraph 51 of IT-95-14/1-A of 24 March 2000.

whenever legislative purpose can best be carried out by [adopting a directory] construction".[57] Here, the overriding purpose of the provision is to achieve justice. Justice is denied by adopting a mandatory interpretation of the text; a directory approach achieves it. This approach, it is believed, is consonant with the broad view that, as it has been said, "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case".[58] That remark was made about rules of civil procedure, but, with proper caution, the idea inspiring it applies generally to all rules of procedure to temper any tendency to rely too confidently, or too simplistically, on the maxim *dura lex, sed lex.*[59] I do not consider that this approach necessarily collides with the general principle regulating the interpretation of penal provisions and believe that it represents the view broadly taken in all jurisdictions.

54. The question then is whether, even if there was an absence of diligence, the material in this case so compellingly demonstrates mistake as to justify its admission. Ambassador Scheffer's statement makes it clear that the delay in Cameroon was due to the workings of the decision-making process in that country, that that process was expedited only after and as a result of his and his government's intervention with the highest authorities in Cameroon, that Cameroon was otherwise not ready to effect a transfer, and that accordingly the Tribunal was not to blame for any delay, as the Appeals Chamber thought it was. Has the Appeals Chamber to close its eyes to Ambassador Scheffer's statement, showing, as it does, the existence of palpable mistake bearing on the correctness of the previous conclusion? I think not.

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[57] 82 *Corpus Juris Secundum* (Brooklyn, 1990), pp. 871-872, stating also, at p. 869, that "a statute may be mandatory in some respects, and directory in others". And see *Craies on Statute Law*, 7th edn. (London, 1971), pp. 62, 249-250, and 260-271.
[58] *In re Coles and Ravenshear* [1907] 1 K.B. 1, at 4.

55. The third question is which Chamber should process the significance of the new fact: Is it the Appeals Chamber? Or, is it the Trial Chamber? In the *Tadić* Rule 115 application, the ICTY Appeals Chamber took the position, in paragraph 30 of its Decision of 15 October 1998, that the "proper venue for a review application is the Chamber that rendered the final judgement". Well, this is a review and it is being conducted by the Chamber which gave the final judgement - namely, the Appeals Chamber. So the case falls within the *Tadić* proposition.

56. I would, however, add this: On the basis of the statement in question, there could be argument that the Appeals Chamber cannot itself assess a new fact where the Appeals Chamber is sitting on appeal. However, it appears to me that the statement need not be construed as intended to neutralise the implication of Rule 123 of the Rules of Procedure and Evidence of the Tribunal that the Appeals Chamber may itself determine the effect of a new fact in an appeal pending before it. That Rule states: "If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion". The word "may" shows that the Appeals Chamber need not send the matter to the Trial Chamber but may deal with it itself. The admissibility of this course is supported by the known jurisprudence, which shows that matter in the nature of a new fact may be considered on appeal. Thus, in *R. v. Ditch* (1969) 53 Cr. App. R. 627, at p. 632, a post-trial confession by a co-accused was admitted on appeal as fresh or additional evidence, having been first heard *de bene esse* before being formally admitted.[60] Structures differ; it is the principle involved which matters. The jurisprudence referred to above in relation to mandatory and directory provisions also works to the same end. In my view, that end means this:

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[59] Cited sometimes in legal discourse, as in *Serbian Loans*, P.C.I.J., Ser. A, No. 20-21, p. 56, dissenting opinion of Judge de Bustamante.
[60] Earlier cases suggested that this sort of evidence should be processed through the clemency machinery; but the position was changed by s. 23(2) of the Criminal Appeal Act 1968 (UK).

where the new fact is in its nature conclusive, it may be finally dealt with by the Appeals Chamber itself; a reference back to the Trial Chamber is required only where, without being conclusive, the new fact is of such strength that it might reasonably affect the verdict, whether the verdict would in fact be affected being left to the evaluation of the Trial Chamber.[61]

57. The fourth question is whether the new fact brought forward in Ambassador Scheffer's statement "could have been a decisive factor in reaching the decision", within the meaning of Article 25 of the Statute. The simple answer is "yes". As mentioned above, the decision of the Appeals Chamber proceeded on the basis that the Tribunal was responsible for the delay in Cameroon and that the latter was always ready to make a transfer. The Ambassador's statement shows that these things were not so.

58. The fifth and last question relates to a submission by the appellant that the Appeals Chamber should disregard Ambassador Scheffer's activities because he was merely prosecuting the foreign policy of his government and had no role to play in proceedings before the Tribunal. As has been noticed repeatedly, the Tribunal has no coercive machinery of its own. The Security Council sought to fill the gap by introducing a legal requirement for states to co-operate with the Tribunal. That obligation should not be construed so broadly as to constitute an unacceptable encroachment on the sovereignty of states; but it should certainly be interpreted in a manner which gives effect to the purposes of the Statute. I cannot think that anything in the purposes of the Statute prevents a state from using its good offices with another state to ensure that the needed cooperation of the latter with the Tribunal is forthcoming; on the contrary, those purposes would be consistent with that kind of *démarche*. Thus, accepting that Ambassador Scheffer was prosecuting the foreign policy of his

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[61] See the statement in a previous case cited by Ritchie, J., in his leading opinion in *McMartin v. The Queen*, 1964 DLR LEXIS 1957, 46 DLR 2d 372. The statement related to "fresh evidence" but there is no reason why the principle involved cannot apply to new facts under the scheme of the Tribunal.

government, I cannot see that he was acting contrary to the principles of the Statute. Even if he was, I do not see that there was anything so inadmissibly incorrect in his activities as to outweigh the obvious relevance for this case of what he in fact did.

59. The statement of Judge Mballe of Cameroon is equally admissible as a new fact. It corroborates the substance of Ambassador Scheffer's statement in that it shows that, whatever was the reason, the delay was attributable to the decision-making process of the government of Cameroon; it was not the responsibility of the Tribunal or of any arm of the Tribunal.

(vi) The effect of the new facts

60. The appellant, along with others, was detained by Cameroon on an extradition request from Rwanda from 15 April 1996 to 21 February 1997. During that period of detention, he was also held by Cameroon at the request of the Prosecutor of the Tribunal for one month, from 17 April 1996 to 16 May 1996. In the words of the Appeals Chamber, on the latter day "the Prosecutor informed Cameroon that she only intended to pursue prosecutions against four of the detainees, *excluding* the Appellant".[62] Later, on "15 October 1996, responding to a letter from the Appellant complaining about his detention in Cameroon, the Prosecutor informed the Appellant that Cameroon was not holding him at her behest".[63] Today's judgment also shows that the appellant knew, at least by 3 May 1996, of the reasons for which he was held at the instance of the Prosecutor. These things being so, it appears to me that, from the point of view of proportionality, the Appeals Chamber focused on the subsequent period of detention at the request of the Tribunal, from 21 February 1997 to 19 November 1997, on which latter date the appellant was transferred from Cameroon to the Tribunal's detention unit in

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[62] Decision of the Appeals Chamber, 3 November 1999, para. 5, original emphasis.
[63] Ibid., para. 7.

Arusha. How would the Appeals Chamber have viewed the appellant's detention during this period had it had the benefit of the new facts now available?

61. Regard being had to the jurisprudence, considered above, on the general judicial attitude to delay in the early phases of a criminal case, it is reasonable to hold that Rule 40*bis* contemplated a speedy transfer. If the transfer was effected speedily, no occasion would arise for considering whether the provision applied to extended detention in the place from which the transfer was to be made. In this case, the transfer was not effected speedily and the Appeals Chamber thought that the Tribunal (through the Prosecutor) was responsible for the delay, for which it accordingly looked for a remedy. In searching for this remedy, it is clear, from its decision read as a whole, that the central reason why it was moved to hold that the protection of that provision applied was because of its view that there was that responsibility. In this respect, I note that the appellant states that it "is the Prosecutor's failure to comply with the mandates of Rule 40 and Rule 40*bis* that compelled the Appeals Chamber to order the Appellant's release".[64] I consider that this implies that the appellant himself recognises that the real reason for the decision to release him was the finding by the Appeals Chamber that the Prosecutor (and, through her, the Tribunal) was responsible for the delay in Cameroon. It follows that if, as is shown by the statements of Ambassador Scheffer and Judge Mballe, the Tribunal was not responsible, the Appeals Chamber would not have had occasion to consider whether the provisions applied and whether the appellant should be released in accordance with Rule 40*bis*(H).

62. Thus, without disturbing the previous holding, made on the facts then known to the Appeals Chamber, that Rule 40*bis* was applicable to the Cameroon period (with which I do not agree), the conclusion is reached that, on the facts now known, the Appeals Chamber would not have held that the Rule applied to that period, with the

consequence that the Rule would not have been regarded as yielding the results which the Appeals Chamber thought it did.

63. Argument may be made on the basis of the previous holding (with which I disagreed) that Cameroon was the constructive agent of the Tribunal. On that basis, the contention could be raised that, even if the delay was caused by Cameroon and not by the Tribunal, the Tribunal was nonetheless responsible for the acts of Cameroon. However, assuming that there was constructive agency, such agency was for the limited purposes of custody pending speedy transfer. Cameroon could not be the Tribunal's constructive agent in respect of delay caused, as the new facts show, by Cameroon's acts over which the Tribunal had no control, which were not necessary for the purposes of the agency, and which in fact breached the purposes of the agency. Hence, even granted the argument of constructive agency, the new facts show that the Tribunal was not responsible for the delay as the Appeals Chamber thought it was on the basis of the facts earlier known to it.

64. There are other elements in the case, but that is the main one. Other new facts, mentioned in today's judgment, show that the violation of the appellant's rights in respect of delay between transfer and initial appearance was not as extensive as earlier thought; in any case, it did not involve the operation of a mandatory provision requiring release. The new facts also show that defence counsel acquiesced in the non-hearing of the habeas corpus motion on the ground that it had been overtaken by events. Moreover, as is also pointed out in the judgment, the matter has to be regulated by the approach taken by the Appeals Chamber in its decision of 3 November 1999. Paragraphs 106-109 of that decision made it clear that the conclusion reached was based not on a violation of any single right of the appellant but on an accumulation of violations of different rights. As

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[64] Appellant's Response to Prosecutor's Motion for Review or Reconsideration, 17 February 2000, para.

has now been found, there are new facts which show that important rights which were thought to have been violated were not, and that accordingly there was not an accumulation of breaches. Consequently, the basis on which the Appeals Chamber ordered the appellant's release is displaced and the order for release vacated.

(vii) Conclusion

65. There are two closing reflections. One concerns the functions of the Prosecutor; the other concerns those of the Chambers.

66. As to her functions, the Prosecutor appeared to be of a mind that the independence of her office was invaded by a judicial decision that an indictment was dismissed and should not be brought back. She stated that she had "never seen" an instance of a prosecutor being prohibited by a court "from further prosecution ...".[65] In her submission, such a prohibition was at variance with her "completely independent" position and was "contrary to [her] duty as a prosecutor".[66] Different legal cultures are involved in the work of the Tribunal and it is right to try to understand those statements. It does appear to me, however, that the framework provided by the Statute of the Tribunal can be interpreted to accommodate the view of some legal systems that the independence of a prosecutor does not go so far as to preclude a court from determining that, in proper circumstances, an indicted person may be released and may not be prosecuted again for the same crime. The independence with which a function is to be exercised can be separated from the question whether the function is itself exercisable in a particular situation. A judicial determination as to whether the function may be exercised in a given situation is part of the relief that the court orders for a breach of the person's rights

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[65] Transcript, Appeals Chamber, 22 February 2000, p. 12.
[66] Ibid.

committed in the course of a previous exercise of those functions. This power of the courts has to be sparingly used; but it exists.

67. Also, the Prosecutor stated, in open court, that she had personally seen "5000 skulls" in Rwanda.[67] She said that the appellant was "responsible for the death of over ... 800,000 people in Rwanda, and the evidence is there. Irrefutable, incontrovertible, he is guilty. Give us the opportunity to bring him to justice."[68] Objecting on the basis of the presumption of innocence,[69] counsel for the appellant submitted that the Prosecutor had expressed herself in "a more aggressive manner than she should ..." and had "talked as if she was a depository of justice before" the Appeals Chamber.[70] I do not have the impression that the latter remark was entirely correct, but the differing postures did appear to throw up a question concerning the role of a prosecutor in an international criminal tribunal founded on the adversarial model. What is that role?

68. The Prosecutor of the ICTR is not required to be neutral in a case; she is a party. But she is not of course a partisan. This is why, for example, the Rules of the Tribunal require the Prosecutor to disclose to the defence all exculpatory material. The implications of that requirement suggest that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel "ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice".[71] The prosecution takes the position that it would not prosecute without itself believing in guilt. The point of importance is that an assertion by the prosecution of its belief in guilt is not relevant to the proof. Judicial traditions vary and the Tribunal must seek to benefit from all of them. Taking due account of that circumstance, I nevertheless

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[67] Ibid., p. 19.
[68] Ibid., p. 14.
[69] Ibid., p. 243.
[70] Ibid., pp. 138-139.

consider that the system of the Statute under which the Tribunal is functioning will support a distinction between an affirmation of guilt and an affirmation of preparedness to prove guilt. In this case, I would interpret what was said as intended to convey the latter meaning, but the strength with which the statements were made comes so close to the former that I consider it right to say that the framework of the Statute is sufficiently balanced and sufficiently stable not to be upset by the spirit of the injunction referred to concerning the role of a prosecutor. I believe that it is that spirit which underlies the remarks now made by the Appeals Chamber on the point.

69. As to the functions of the Chambers, whichever way it went, the decision in this case would call to mind that, on the second occasion on which *Pinochet's* case went to the British House of Lords, the presiding member of the Appellate Committee of the House noted that -

> [t]he hearing of this case ... produced an unprecedented degree of public interest not only in this country but worldwide. ... The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. ... This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions.[72]

Naturally, however, (and as in this case), "the members of the Appellate Committee were in no doubt as to their function ...".[73]

70. Here too there has been interest worldwide, including a well-publicised suspension by Rwanda of cooperation between it and the Tribunal. On the one hand, the

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[71] *R v Banks* [1916] 2 KB 621 at 623, per Avory J. In keeping with that view, it is indeed said that prosecuting counsel "should not regard himself as appearing for a party". See Code of Conduct of the Bar of England and Wales, para. 11(1).
[72] *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)*, [1999] 1 All ER 577, HL, at pp. 580-581, per Lord Browne-Wilkinson.
[73] Ibid.

appellant has asked the Appeals Chamber to "disregard ... the sharp political and media reaction to the decision, particularly emanating from the Government of Rwanda".[74] On the other hand, the Prosecutor has laid stress on the necessity for securing the cooperation of Rwanda, on the seriousness of the alleged crimes and on the interest of the international community in prosecuting them.

71. These positions have to be reconciled. How? This way: the sense of the international community has to be respectfully considered by an international court which does not dwell in the clouds; but that sense has to be collected in the whole. The interest of the international community in organising prosecutions is only half of its interest. The other half is this: such prosecutions are regarded by the international community as also designed to promote reconciliation and the restoration and maintenance of peace, but this is possible only if the proceedings are seen as transparently conforming to internationally recognised tenets of justice. The Tribunal is penal; it is not simply punitive.

72. It is believed that it was for this reason that the Security Council chose a judicial method in preference to other possible methods. The choice recalls the General Assembly's support for the 1985 Milan Resolution on Basic Principles on the Independence of the Judiciary, paragraph 2 of which reads: "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".[75] That text, to which counsel for the appellant appealed,[76] is a distant but clear echo of the claim that the law of Rome was "of a sort that cannot be bent by influence, or broken by power, or

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[74] Defence Reply to the Prosecutor's Motion for Review or Reconsideration, 6 January 2000, para. 53.
[75] See General Assembly Resolution 40/32 of 29 November 1985, para. 1, General Assembly Resolution 40/146 of 13 December 1985, para. 2, and Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August - 6 September 1985 (United Nations, New York, 1986), p. 60, para. 2.
[76] Transcript, Appeals Chamber, 22 February 2000, pp. 213-214.

spoilt by money". The timeless constancy of that ancient remark, cited for its substance rather than for its details, has in turn to be carried forward by a system of international humanitarian justice which was designed to function in the midst of powerful cross-currents of world opinion. Nor need this be as daunting a task as it sounds: it is easy enough if one holds on to the view that what the international community intended to institute was a system by which justice would be dispensed, not dispensed with.

73. But this view works both ways. In this case, there are new facts. These new facts both enable and require me to agree that justice itself has to regard the effect of the previous decision as now displaced; to adhere blindly to the earlier position in the light of what is now known would not be correct.

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

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Mohamed Shahabuddeen

Dated this 31st day of March 2000
At The Hague
The Netherlands