016 SCSL-2003-01-I-016 (113-254) 113

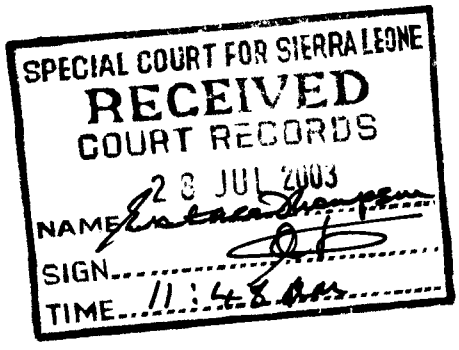
**SPECIAL COURT FOR SIERRA LEONE**
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

**IN THE TRIAL CHAMBER**

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

Registrar: Mr. Robin Vincent

Date filed: 28 July 2003




**THE PROSECUTOR**

**Against**

**CHARLES GHANKAY TAYLOR ALSO KNOWN AS CHARLES GHANKAY MACARTHUR DAPKANA TAYLOR**

CASE NO. SCSL – 2003 – 01 – PT

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**PROSECUTION RESPONSE TO DEFENCE MOTION TO QUASH THE INDICTMENT AGAINST CHARLES GHANKAY TAYLOR**

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Office of the Prosecutor:
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Mr Abdul Tejan-Cole, Appellate Counsel
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Defence Counsel:
Mr. Terence Michael Terry

**SPECIAL COURT FOR SIERRA LEONE**
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# PROSECUTION RESPONSE TO DEFENCE MOTION TO QUASH THE INDICTMENT AGAINST CHARLES GHANKAY TAYLOR

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## I. INTRODUCTION

1. The Prosecution files this response to the motion entitled "Applicant's Motion made under protest and without waiving of immunity accorded to a Head of State President Charles Ghankay Taylor requesting that the Trial Chamber do quash the said approved indictment of 7th March 2003 of Judge Bankole Thompson and that the aforesaid purported Warrant of Arrest and Order for transfer and detention of the same date issued by Judge Bankole Thompson of the Special Court for Sierra Leone, and all other consequential and related order(s) granted thereafter by either the said Judge Bankole Thompson or Judge Pierre Boutet on 12th June 2003 against the person of the said President Charles Ghankay Taylor be declared null and void, invalid at their inception and that they be accordingly cancelled and/or set aside as a matter of law" (the "**Defence Motion**") filed on behalf of Charles Ghankay Taylor (the "**Accused**") and the Government of the Republic of Liberia on 23 July 2003.[1]

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[1] Registry Page ("RP") 65-112.

2. The Defence Motion requests the Trial Chamber to quash the indictment, warrant of arrest and order for transfer and detention of the Accused, and to make certain consequential and related orders.

3. As a preliminary matter, the Prosecution observes that the Defence Motion purports to be filed not only on behalf of the Accused, but also on behalf of the Government of the Republic of Liberia. The Prosecution submits that as neither the Republic of Liberia nor its Government are parties to these proceedings[2], neither has standing to bring the present motion. Non-parties have no right to file motions or submissions in a case before the Special Court,[3] even if the non-party is a State or a government.[4] It may be that if a warrant or order is addressed to a State, the State can make submissions in relation to the validity of that warrant or order, or the State's obligations under it.[5] However, in this case, the Defence Motion does not relate to any order addressed to the Republic of Liberia or its Government. Accordingly, all parts of the Defence Motion in so far as it relates to the motion by the Republic of Liberia should be struck out.

4. In relation to the Accused, the Defence Motion should be dismissed in its entirety for the reasons given below.

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2 "Party" is defined in Rule 2 as "The Prosecutor or the accused".

3 Examples of cases in which a non-party was held not be entitled to move a Trial Chamber for relief or to appeal against a decision of a Trial Chamber include *Prosecutor v. Kolundzija,* "Order on Non-Party Motion for Discovery", IT-95-8-PT, T. Ch. III, 29 September 1999; *In the matter of Dragan Opacic,.* IT-95-7-Misc.1, Bench of App. Ch., 3 June 1997, paras. 5-6 (noting that any other ruling would open up the Tribunal's appeals procedures to non-parties such as witnesses, counsel, *amicus curiae*, and even members of the public who might nurse a grievance against a Decision of the Trial Chamber).

4 See, e.g., *Prosecutor v. Bobetko,* "Decision on Challenge by Croatia to Decision and Orders of Confirming Judge", IT-02-62-AR54*bis* & IT-02-62-AR108*bis*, Appeals Chamber, 29 November 2002 (in which the Appeals Chamber rejected an application for interlocutory appeal and application for review brought by a State against the decision of a judge to confirm an indictment and issue an arrest warrant, on the ground that such applications by a State did not fall within any of the provisions of the Statute or Rules of the Tribunal).

5 See, e.g., *Prosecutor v. Kordic and Cerkez,* "Decision on the Request of the Republic of Croatia for Review of a Binding Order", IT-95-14/2-AR108*bis*, App. Ch., 9 September 1999, para. 43.

## II. ARGUMENT

### A. The Defence Motion must be rejected as premature

5. The first argument in the Defence Motion does not challenge the jurisdiction of the Special Court. Rather, it seeks to assert that the Accused has a personal immunity from jurisdiction. The existence of jurisdiction, and the question whether there is any immunity from the exercise of that jurisdiction, are two different things. As a matter of logic, unless the Court has jurisdiction in a particular case, there can be no question of invoking any immunity from that jurisdiction.[6] In cases where jurisdictional immunities apply, a court *has* jurisdiction, but is barred from *exercising* that jurisdiction unless the State in question waives the immunity. As the Defence Motion expressly recognises, in some cases a State official who has immunity may be prosecuted for a crime after the official has left office and no longer enjoys immunity. Clearly this would not be possible if the court in question lacked jurisdiction in the first place.

6. Similarly, it is submitted that the second argument in the Defence Motion does not challenge the jurisdiction of the Special Court. In relation to this second argument, the Defence Motion expressly acknowledges that the principle of territoriality in international law is not absolute and does not prevent a State from prosecuting acts outside its territory if they have consequences on that territory.[7] This principle is irrelevant to the jurisdiction of the Special Court, since quite apart from the fact that the Special Court is not a State with territory, the Accused has been indicted, in accordance with Article 1(1) of the Statute of the Special Court for Sierra Leone ("**the Statute**"), for crimes committed *in* the territory of Sierra Leone. The essence of the complaint made in the second argument appears to be that the attempt by the Special Court to have the Accused arrested by the authorities of Ghana while he was in Ghana somehow violated the sovereignty of Ghana. However, this has nothing to do with the jurisdiction of the Special Court over the crimes charged in the Indictment.

7. For these reasons, the Prosecution submits that the Defence Motion is not a preliminary motion raising "objections based on lack of jurisdiction" within the meaning

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[6] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice, 14 February 2002 (the "***Yerodia* case"), para. 46.

of Rule 72(B)(i) of the Rules. It is certainly not a preliminary motion of any of the types referred to in Rule 72(B)(ii), (iii) or (iv), and the Defence Motion has not alleged that there has been any abuse of process within the meaning of Rule 72(B)(v). The Prosecution submits that, if anything, the Defence Motion must be a motion under Rule 73(A), which, in accordance with the express wording of that provision, can only be brought "after the initial appearance of the accused". Accordingly, this motion should be dismissed on the basis that it is premature.

8. Even if the Defence Motion could be characterised as a preliminary motion under Rule 72, it should be dismissed for the same reason. The review of an Indictment and the issuing of an arrest warrant under Rule 47 of the Rules are inherently *ex parte* proceedings, to which only the Prosecution is a party.[8] It is only when the accused appears before the Court that the proceedings become *inter partes*.[9] The Prosecution submits that it cannot be the case that an accused can *evade* the processes of the Court by refusing to appear before it, and at the same time *invoke* the processes of the Court by filing motions before it. The Prosecution thus submits that preliminary motions can only be filed following the transfer of the Accused to the Special Court.

9. Accordingly, the Prosecution submits that the Defence Motion should be rejected as premature. In the event only that the Court rejects this submission and decides to rule on the substance of this motion, the Prosecution submits the further arguments below.

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[7] Defence Motion, p. 8.

[8] See, e.g., *Prosecutor v. Kolundzija,* "Decision Rejecting Prosecutor's Request for Leave to Amend Indictments", IT-95-8-I and IT-98-30-PT, Confirming Judge, 6 July 1999 ("**CONSIDERING** that the main function of the reviewing Judge pursuant to Rules 47 and 50 is to determine whether the Prosecutor has established a *prima facie* case against a suspect or an accused and that this function is performed in *ex parte* proceedings according to the well-settled practice of the International Tribunal"). But see *Prosecutor v. Milutinovic et al.,* "Decision on Application by Dragoljub Ojdanic for Disclosure of Ex Parte Submissions",. IT-99-37-I (Confirming Judge), 8 November 2002.

[9] See *Prosecutor v. Karadzic and Mladic,* "Decision Rejecting the Request Submitted by Mr. Medvene and Mr. Hanley III Defence Counsels for Radovan Karadzic", IT-95-5-R-61, IT-95-18-R61, T. Ch., 5 July 1996 (stating, in relation to a Rule 61 hearing, that the accused "has the right to appear, accompanied by his counsel, before the Tribunal; that if such is the case the nature of the proceedings change and become *inter partes*").

### B. An accused is not able to invoke head of State immunity before the Special Court

10. The Defence Motion invokes the principle of international law articulated by the International Court of Justice ("**ICJ**") in the *Yerodia* case that a Head of State when abroad enjoys full immunity from criminal jurisdiction,[10] and that there is no exception to this immunity even when a Head of State is suspected of having committed war crimes or crimes against humanity.[11]

11. However, the principle articulated in the *Yerodia* case concerns the immunities of a Head of State from the jurisdiction of the courts of *another State*. Indeed, the ICJ stated clearly in that case that even an *incumbent* Minister for Foreign Affairs may be subject to criminal proceedings before international criminal courts where they have jurisdiction, and cited the International Criminal Tribunal for the Former Yugoslavia ("**ICTY**"), the International Criminal Tribunal for Rwanda ("**ICTR**"), and the International Criminal Court ("**ICC**") as examples.[12]

12. Every international war crimes tribunal since Nuremberg has had jurisdiction over all perpetrators, including Heads of State and other high officials. The Nuremberg Charter,[13] the Tokyo Charter,[14] the Statute of the ICTY,[15] the Statute of the ICTR,[16] and

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[10] See *Yerodia* case, para. 54. The International Court of Justice in that case was concerned with the immunities of a Minister for Foreign Affairs, but the Prosecution does not contend that there is for present purposes any material difference between the immunities of a Minister for Foreign affairs and those of a Head of State.

[11] *Yerodia* case, paras. 56-57.

[12] *Yerodia* case, para. 61. See also the Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 61; Dissenting Opinion of Judge Al-Khasawneh, para. 6; Dissenting opinion of Judge van den Wyngaert, para. 37.

[13] Article 7 of the Nuremberg Charter: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."

[14] "Article 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires." Charter of the International Military Tribunal for the Far East.

[15] ICTY Statute, Article 7(2): "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

[16] ICTR Statute, Article 6(2): "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

the ICC Statute[17] all provide that official capacity shall not exempt a person from criminal responsibility for war crimes, crimes against humanity and genocide. Similar provision is made in Article 6(2) of the Statute of the Special Court.

13. These provisions have been applied in practice. The most prominent examples include the indictment by the ICTR of former Prime Minister Jean Kambanda,[18] who subsequently pled guilty to several counts of genocide, and the indictment by the ICTY of Slobodan Milosevic[19] while he was Head of State of Yugoslavia, who is currently being tried for genocide, war crimes and crimes against humanity. Both indictees were incumbent Heads of Government and State respectively at the time of their indictment. Other examples include Milan Milutinovic,[20] and the trial and subsequent conviction of German Grand Admiral Doenitz[21] at Nuremberg.

14. A Trial Chamber of the ICTY has confirmed that customary international law permits international tribunals to indict and try Heads of State. In upholding the validity of Article 7(2) of the ICTY Statute[22] the Trial Chamber held that: "There is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time *reflects a rule of customary international law.*"[23] The Rome Statute of the International Criminal

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17 Rome Statute of the International Criminal Court, Article 27 (1): "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2): "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc A/CONF.183/9(1998).

18 *Prosecutor v. Kambanda*, ICTR-97-23.

19 *Prosecutor v. Milosevic*, ICTY-99-37 (Kosovo), ICTY-01-51 (Bosnia), ICTY-02-50 (Croatia).

20 *Prosecutor v. Milutinovic et al.* (IT-99-37) "Kosovo." Milan Milutinovic was elected President of Serbia on 21 December 1997. He was subsequently indicted on 24 May 1999 for Crimes against Humanity and Violations of the Law and Customs of War, while he remained President. Paragraph 63 of his Indictment noted that "Milan Milutinovic is the head of State. He represents Serbia and conducts its relations with foreign states and international organizations."

21 Admiral Doenitz became German Head of State on 1 May 1945 upon the announcement that Adolf Hitler was dead and had designated Doenitz as his successor. He was subsequently tried and convicted to 10 years imprisonment for crimes of war on the high seas and abetting and aiding Hitler's wars of conquest.

22 This provides that "(T)he official position of any accused person, whether as Head of State...shall not relieve such person of criminal responsibility..."

23 *Milosevic*, "Decision on Preliminary Motions", Trial Chamber, November 8, 2001, paras 26-30. See also Antonio Cassese, International Law (2001) ("**Cassese**") at 259-260, who notes the customary rule as follows: "[A]ll state officials are entitled to claim immunity from the civil and criminal jurisdiction of

Court, signed by Liberia, further codifies this customary law and explicitly denies immunity to heads of state for genocide, crimes against humanity and war crimes.[24]

15. The Prosecution submits that the Accused's arguments are based on the faulty premise that the Special Court is a national court, part of the judiciary of the Republic of Sierra Leone.[25] The Prosecution submits that this is a wholly erroneous premise. The Prosecution submits that the Special Court enjoys a treaty-based international jurisdiction stemming from the Agreement between the United Nations and the Government of Sierra Leone.[26] That Agreement is a treaty under international law. The Statute of the Special Court (the "**Statute**"), which forms part of that Agreement, determines the parameters of the Special Court's jurisdiction, and governs the exercise thereof.[27] The Special Court was thus established, not under the municipal law of Sierra Leone, but under *international law*. It exists and functions in the sphere of international law. The judicial power that it exercises is not the judicial power of the Republic of Sierra Leone.[28] Nor are arrest warrants issued by the Special Court warrants under Sierra Leone national law.

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foreign States for acts or transactions performed in their official capacity (...). However this privilege does not apply when they are accused of international crimes, and they may be brought to justice for such crimes. The removal of immunities was first applied in the case of war crimes to member of the army of belligerents and other lawful combatants; then, by virtue of the [Nuremberg Charter] it was extended to senior State officials, and made applicable to war crimes, crimes against peace, and crimes against humanity. The cancellation of immunities was then reaffirmed in the Statutes of the ICTY, the ICTR, and the ICC. As these treaty rules or provisions of 'legislative' acts adopted by the SC have been borne out by State practice, it is safe to contend that they have turned into customary law."

[24] Liberia became a signatory to the Rome Statute as of July 1998, at which time Charles Taylor was President.

[25] The Defence Motion repeatedly cites the Special Court Agreement 2002, Ratification Act, 2002, a piece of Sierra Leone legislation, as the source of the Special Court's authority, and suggests, for instance, that any order of the Special Court would "have the same force or effect as *any other order from any other part of the Sierra Leone legal system*" (italics added).

[26] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 (the "**Special Court Agreement**").

[27] That jurisdiction includes the crimes for which Accused has been indicted.

[28] See the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 (the "Report of the Secretary-General"), para. 9, indicating that the Special Court is "treaty-based."

16. The Special Court applies international law, is composed of a majority of international judges who are appointed by the Secretary-General, and its Rules of Procedure and Evidence are based upon those which govern the ICTR. [29]

17. The Defence Motion argues that a Security Council resolution under Chapter VII is required in order for an international court or tribunal to be able to exercise its jurisdiction over Heads of State. The Prosecution submits that this is incorrect. For example, the Statute of the ICC, which does not enjoy Chapter VII powers, explicitly denies immunity to heads of state for genocide, crimes against humanity and war crimes. The Prosecution submits that the question whether a Head of State has immunity from jurisdiction before an international court or tribunal does not turn on the question whether or not the court or tribunal has Chapter VII powers.

18. In the *Yerodia* case, the ICJ did not expressly articulate the criteria for determining whether an international court is one before which Head of State immunity will not apply. However, this should not depend on whether or not the court in question has coercive powers vis-à-vis States, or on the nature of any such powers. The issue is not whether the court in question has the power to *coerce* a State to do anything. Rather, the issue is whether the court in question is required to *refrain* from exercising a jurisdiction which it has. The Prosecution submits that an international criminal court is not obliged to refrain from exercising its jurisdiction over an accused, even in circumstances where the accused is an incumbent Head of State or high official, if the court in question is exercising the judicial power of the international community. It has been said that the ICC satisfies this criterion.[30] So does the Special Court. The Special

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[29] The Security Council also specifically intended that the Special Court for Sierra Leone would try those who bear the greatest responsibility for atrocities committed in the civil war, irrespective of official status and it intended that the court exercise jurisdiction over those who bear the greatest responsibility for the commission of international crimes, including leaders (referred to in plural form). Security Council Resolution 1315 includes the following paragraphs:
"Recommends further that the special court should have personal jurisdiction over *persons who bear the greatest responsibility* for the commission of the crimes referred to in paragraph 2, *including those leaders who*, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone" (operative paragraph 3, emphasis added).

[30] See Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, *The Statute of the International Criminal Court* (May 2002), para. 3.46 ("The judicial power to be exercised by the ICC will be that of the international community, not of the Commonwealth of Australia");

Court Agreement was negotiated and concluded by the Secretary-General at the request of the Security Council,[31] the Security Council having determined that "the situation in Sierra Leone continues to constitute a threat to international peace and security in the region",[32] and that "a credible system of justice and accountability for the very serious crimes committed there … would contribute to … the restoration and maintenance of peace".[33] Article 24(1) of the United Nations Charter provides that "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf". Thus, this is not a case in which one State is seeking to exercise judicial power over the incumbent head of another equally sovereign and independent State. The Prosecution submits that the Special Court necessarily is exercising the judicial power of the international community.

### C. There has been no violation of the sovereignty of Ghana

19. The Prosecution submits that the second argument in the Defence Motion alleging a violation of the territorial sovereignty of Ghana is difficult to understand. As argued in paragraph 5 above, the Accused has been indicted, in accordance with Article 1(1) of the Special Court's Statute, for crimes *committed in the territory of Sierra Leone*. He is certainly not indicted for anything alleged to have been done in Ghana. There is a suggestion in the Defence Motion that transmitting the warrant of arrest to the authorities of Ghana somehow in and of itself was a violation of the sovereignty of Ghana. However, the Defence Motion does not explain how the transmission of documents to the Government of a State could in any way violate the sovereignty of that State, and the argument must be rejected.

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and see *ibid.*, para. 2.50, referring to Louis Henkin, *Foreign Affairs and the United States Constitution* (2nd edn 1996), p. 269.

31 Security Council Resolution 1315 (2000).

32 *Ibid.*, preambular para. 12.

33 *Supra* note 31, preambular para. 7.

## III. CONCLUSION

The Court should therefore dismiss the Defence Motion in its entirety.

## IV. MISCELLANEOUS

The Prosecution notes that the Defence Motion exceeds the word limitation of 3,000 stipulated under Article 8 of the *Practice Direction on Filing Documents Before the Special Court for Sierra Leone*, signed by the Registrar and entered into force on 27 February 2003, as it is presented in smaller than 12 pt. font and single line spacing, and for which the Defence ought to have first sought leave to file an oversized document. The Prosecution submits that the Defence has therefore incurred a filing defect, which places the Prosecution in the position of replying to an oversized Document within the prescribed time and page limitations.

Freetown, 28 July 2003

For the Prosecution,

Desmond de Silva, QC
Deputy Prosecutor

Walter Marcus-Jones
Senior Appellate Counsel

Abdul Tejan-Cole
Appellate Counsel

# PROSECUTION INDEX OF AUTHORITIES

## Conventions

1. *Rome Statute of the International Criminal Court*, July 17, 1998, U.N. Doc A/CONF.183/9

2. *Charter of the International Military Tribunal at Nuremberg, Annex to the London Agreement* (8 Aug. 1945) 82 U.N.T.S. 279

3. *Charter of the International Military Tribunal for the Far East* (1946) as amended by General Orders No. 20 (26 April 1946), T.I.A.S. No. 1589

4. ICTY Statute, U.N. Doc S/RES/827(1993) (Annex)

5. ICTR Statute, U.N. Doc S/RES/955(1994) (Annex)

## Cases

6. *Prosecutor v. Kolundzija,* "Order on Non-Party Motion for Discovery" ICTY-95-8-PT, T. Ch. III, 29 September 1999

7. *In the Case of Dragan Opacic,* ICTY-95-7-Misc.1, Bench of App. Ch., 3 June 1997

8. *Prosecutor v. Bobetko*, "Decision on Challenge by Croatia to Decision and Orders of Confirming Judge", ICTY-02-62-AR54bis & ICTY-02-62-AR108bis, Appeals Chamber, 29 November 2002

9. *Prosecutor v. Kordic and Cerkez*, "Decision on the Request of the Republic of Croatia for Review of a Binding Order", ICTY-95-14/2-AR108bis, Appeals Chamber, 9 September 1999

10. *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium),* I.C.J. 14 February 2002; Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, Dissenting Opinion of Judge Al-Khasawneh, Dissenting opinion of Judge van den Wyngaert.

11. *Prosecutor v. Kolundzija*, "Decision Rejecting Prosecutor's Request for Leave to Amend Indictments", ICTY-95-8-I and ICTY-98-30-PT, Confirming Judge, 6 July 1999

12. *Prosecutor v. Milutinovic et al.*, "Decision on Application by Dragoljub Ojdanic for Disclosure of Ex Parte Submissions". ICTY-99-37-I (Confirming Judge), 8 November 2002

13. *The Prosecutor v. Radovan Karadzic and Ratko Mladic*, "Decision Rejecting The Request Submitted By Mr Medvene and Mr Hanley III Defence Counsels for

Radovan Karadzic," ICTY-95-5-T, and ICTY-95-18-T, Trial Chamber, 5 July 1996

14. *Prosecutor v. Milutinovic et al.* (Indictment) ICTY-99-37

15. *Prosecutor v. Milosevic*, ICTY-99-37(Kosovo), ICTY-01-51 (Bosnia), ICTY-02-50 (Croatia), "Decision on Preliminary Motions", Trial Chamber, November 8, 2001

**Reports, Statements, Declarations, Resolutions**

16. Security Council Resolution 1315 (2000) (U.N. Doc S/RES/1315)

**Learned Writers**

17. Antonio Cassese, *International Law* (2001: Oxford University Press) pp 72-75, 259-260

**Domestic Documents**

18. Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, The Statute of the International Criminal Court (May 2002), para. 3.46

# PROSECUTION INDEX OF AUTHORITIES

## ANNEX 1.

*Rome Statute of the International Criminal Court*, July 17, 1998, U.N. Doc A/CONF.183/9

### Article 29. The status, privileges and immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the Registrar and his or her staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

### Article 30. Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.

### Article 31. Working languages

The working languages of the International Tribunal for Rwanda shall be English and French.

### Article 32. Annual Report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

## Rome Statute of the International Criminal Court

Adopted by the U.N. Diplomatic Conference, July 17, 1998

### Preamble

*Conscious* that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

*Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

*Recognizing* that such grave crimes threaten the peace, security and well-being of the world,

*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

*Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

*Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

*Reaffirming* the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,



*Emphasizing* in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict in the internal affairs of any State,

*Determined* to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

*Resolved* to guarantee lasting respect for the enforcement of international justice,

Have agreed as follows:

### Part 1. Establishment of the Court

### Article 1. The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

### Article 2. Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

### Article 3. Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

### Article 4. Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

### Part 2. Jurisdiction, Admissibility and Applicable Law

### Article 5. Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

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## Part 3. General Principles of Criminal Law

### Article 22. *Nullum crimen sine lege*

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of this Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

### Article 23. *Nulla poena sine lege*

A person convicted by the Court may be punished only in accordance with this Statute.

### Article 24. Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

### Article 25. Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.



4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

### Article 26. Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

### Article 27. Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

### Article 28. Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

### Article 29. Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

# PROSECUTION INDEX OF AUTHORITIES

## ANNEX 2.

*Charter of the International Military Tribunal at Nuremberg, Annex to the London Agreement* (8 Aug. 1945) 82 U.N.T.S. 279

2. The protection to which medical units and transport are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

Article 12 - The distinctive emblem

Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

Part IV. Civilian Population

Article 13 - Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.

Article 14 - Protection of objects indispensable to the survival of the civilian population

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works.

Article 15 - Protection of works and installations containing dangerous forces

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

Article 16 - Protection of cultural objects

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Article 17 - Prohibition of forced movement of civilians

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.



Article 18 - Relief societies and relief actions

1. Relief societies located in the territory of the High Contracting Party such as Red Cross (Red Crescent, Red Lion and Sun) organizations may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.

2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

Part V. Final Provisions

Article 19 - Dissemination

This Protocol shall be disseminated as widely as possible.

Article 20 - Signature

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period of twelve months.

Article 21 - Ratification

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depository of the Conventions.

Article 22 - Accession

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

Article 28 - Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic shall be deposited with the depository, which shall transmit certified true copies thereof to all the Parties to the Conventions.

## Charter of the International Military Tribunal at Nuremberg

Annex to the London Agreement (8 Aug. 1945), 82 U.N.T.S. 279

I. Constitution of the International Military Tribunal

Article 1

In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2

The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member

of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

Article 3

Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a Trial, other than by an alternate.

Article 4

(a) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.

(b) The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation or presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.

(c) Save as aforesaid the Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive: provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

Article 5

In case of need and depending on the number of the matters to be tried, other Tribunals may be set up; and the establishment, functions, and procedure of each Tribunal shall be identical, and shall be governed by this Charter.

II. Jurisdiction and General Principles

Article 6

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.



Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 9

At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the Indictment the Tribunal shall give notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have the power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11

Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Article 12

The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Article 13

The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

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**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 3.

*Charter of the International Military Tribunal for the Far East* (1946) as amended by General Orders No. 20 (26 April 1946), T.I.A.S. No. 1589

Article 23

One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorised by him.

The function of... [Counsel] for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorised thereto by the Tribunal.

Article 24

The proceedings at the Trial shall take the following course:

(a) The Indictment shall be read in court.

(b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty".

(c) The Prosecution shall make an opening statement.

(d) The Tribunal shall ask the Prosecution and the Defence what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.

(e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defence. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defence.

(f) The Tribunal may put any question to any witness and to any Defendant, at any time.

(g) The Prosecution and the Defence shall interrogate and may cross-examine any witness and any Defendant who gives testimony.

(h) Defence shall address the court.

(i) The Prosecution shall address the court.

(j) Each Defendant may make a statement to the Tribunal.

(k) The Tribunal shall deliver judgment and pronounce sentence.

Article 25

All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

VI. Judgment and Sentence

Article 26

The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Article 27

The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.

Article 28

In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.



Article 29

In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof for such action as they may consider proper, having regard to the interests of justice.

VII. Expenses

Article 30

The expenses of the Tribunal and of the Trials shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

## Tokyo Charter for the International Military Tribunal for the Far East (1946)

as amended by General Orders No. 20 (26 April 1946), T.I.A.S. No. 1589

Section I. Constitution of Tribunal

Article 1

*Tribunal Established.* The International Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

Article 2

*Members.* The Tribunal shall consist of not less than five nor more than nine Members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

Article 3

*Offices and Secretariat.*

a. *President.* The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.

b. *Secretariat.*

(1) The Secretariat of the Tribunal shall be composed of a General Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.

(2) The General Secretary shall organize and direct the work of the Secretariat.

(3) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide necessary clerical services to the Tribunal and its members, and perform such other duties as may be designated by the Tribunal.

Article 4

*Convening and Quorum, Voting, and Absence.*

a. *Convening and Quorum.* When as many as six members of the Tribunal are present, they may convene the Tribunal in formal session. The presence of a majority of all members shall be necessary to constitute a quorum.

b. *Voting.* All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.

c. *Absence.* If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings; unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.

Section II. Jurisdiction and General Provisions

Article 5

*Jurisdiction Over Persons and Offenses.* The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

a. *Crimes against Peace*: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

b. *Conventional War Crimes*: Namely, violations of the laws or customs of war;

c. *Crimes against Humanity*: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Article 6

*Responsibility of Accused.* Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 7

*Rules of Procedure.* The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.

Article 8

*Counsel.*

a. *Chief Counsel.* The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal and will render such legal assistance to the Supreme Commander as is appropriate.

b. *Associate Counsel.* Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel.



Section III. Fair Trial for Accused

Article 9

*Procedure for Fair Trial.* In order to insure fair trial for the accused, the following procedure shall be followed:

a. *Indictment.* The indictment shall consist of a plain, concise and adequate statement of each offense charged. Each accused shall be furnished in adequate time for defense a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused.

b. *Language.* The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.

c. *Counsel for Accused.* Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide a fair trial.

d. *Evidence for Defense.* An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to reasonable restrictions as the Tribunal may determine.

e. *Production of Evidence for the Defense.* An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness or the document and the relevancy of such facts to the defense. If the Tribunal grants the application the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.

Article 10

*Applications and Motions before Trial.* All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

Section IV. Powers of Tribunal and Conduct of Trial

Article 11

*Powers.* The Tribunal shall have the power:

a. To summon witnesses to the trial, to require them to attend and testify, and to question them.

b. To interrogate each accused and to permit comment on his refusal to answer any question.

c. To require the production of documents and other evidentiary material.

d. To require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness, and to administer oaths.

e. To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

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# PROSECUTION INDEX OF AUTHORITIES

## ANNEX 4.

ICTY Statute, U.N. Doc S/RES/827(1993) (Annex)

(2) An accused person shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel.

(3) An accused person shall have the right to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution.

18. **No excuse from answering any question.**—A witness shall not be excused from answering any question put to him on the ground that the answer to such question will criminate or may tend directly of indirectly to criminate such witness, or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind:

Provided that no such answer which a witness shall be compelled to give shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence.

19. **Rules of evidence.**—

(1) A Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value.

(2) A Tribunal may receive in evidence any statement recorded by a Magistrate or an Investigation Officer being a statement made by any person who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable.

(3) A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(4) A Tribunal shall take judicial notice of official governmental documents and reports of the United Nations and its subsidiary agencies or other international bodies including non-governmental organisations.

20. **Judgement and sentence.**—

(1) The Judgement of a Tribunal as to the guilt or the innocence of any accused person shall give the reasons on which it is based:

Provided that each member of the Tribunal shall be competent to deliver a judgement of his own.

(2) Upon conviction of an accused person, the Tribunal shall award sentence of death or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper.

(3) The sentence awarded under this Act shall be carried out in accordance with the orders of the Government.

21. **Right of appeal.**—A person convicted of any crime specified in section 3 and sentenced by a Tribunal shall have the right of appeal to the Appellate Division of the Supreme Court of Bangladesh against such conviction and sentence:

Provided that such appeal may be proffered within sixty days of the date of order of conviction and sentence.



22. **Rules of procedure.**—Subject to the provision of this Act, a Tribunal may regulate its own procedure.

23. **Certain laws not to apply.**—The provisions of the Criminal Procedure Code, 1898 (V of 1898), and the Evidence Act, 1872 (I of 1872), shall not apply in any proceedings under this Act.

24. **Bar of Jurisdiction.**—No order, judgment or sentence of a Tribunal shall be called in question in any manner whatsoever in or before any Court or other authority in any legal proceedings whatsoever except in the manner provided in section 21.

25. **Indemnity.**—No suit, prosecution or other legal proceeding shall lie against the Government or any person for anything, in good faith, done or purporting to have been done under this Act.

26. **Provisions of the Act over-riding all other laws.**—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

## Statute of the International Criminal Tribunal for Fromer Yugoslavia
U.N. S.C. Res. 827
(1993)

Article 1
Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2
Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.

Article 3
Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

Article 4
Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;

(e) complicity in genocide.

Article 5
Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;



(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

Article 6
Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8
Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9
Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 5.

ICTR Statute, U.N. Doc S/RES/955(1994) (Annex)

## Part Eight
## REVIEW PROCEEDINGS

### Rule 119
Request for Review

Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement.

### Rule 120
Preliminary Examination

If a majority of Judges of the Chamber that pronounced the judgement agree that the new fact, if proved, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

### Rule 121
Appeals

The judgement of a Trial Chamber on review may be appealed in accordance with the provisions of Part Seven.

### Rule 122
Return of Case to Trial Chamber

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.

## Part Nine
## PARDON AND COMMUTATION OF SENTENCE

### Rule 123
Notification by States

If, according to the law of the State in which a convicted person is imprisoned, he is eligible for pardon or commutation of sentence, the State shall, in accordance with Article 28 of the Statute, notify the Tribunal of such eligibility.

### Rule 124
Determination by the President

The President shall, upon such notice, determine, in consultation with the Judges, whether pardon or commutation is appropriate.

### Rule 125
General Standards for Granting Pardon or Commutation

In determining whether pardon or commutation is appropriate, the President shall take into account, inter alia, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's



demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.

# Statute of the International Tribunal for Rwanda
U.N. S.C. Res. 955 (8 Nov. 1994)

The Security Council,

*Reaffirming* all its previous resolutions on the situation in Rwanda,

*Having considered* the reports of the Secretary-General pursuant to paragraph 3 of resolution 935 (1994) 1 July 1994 (S/1994/879 and S/1994/906), and having taken note of the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (S/1994/1157, annex I and annex II),

*Expressing appreciation* for the work of the Commission of Experts established pursuant to resolution 935 (1994), in particular its preliminary report on violations of international humanitarian law in Rwanda transmitted by the Secretary-General's letter of 1 October 1994 (S/1994/1125),

*Expressing once again* its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

*Determining* that this situation continues to constitute a threat to international peace and security,

*Determined* to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

*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,

*Believing* that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

*Stressing* also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects,

*Considering* that the Commission of Experts established pursuant to resolution 935 (1994) should continue on an urgent basis the collection of information relating to evidence of grave violations of international humanitarian law committed in the territory of Rwanda and should submit its final report to the Secretary-General by 30 November 1994,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Decides* hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;

2. *Decides* 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 Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures;

3. *Considers* that the Government of Rwanda should be notified prior to the taking of decisions under articles 26 and 27 of the Statute;

4. *Urges* States and intergovernmental and non-governmental organisations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

5. *Requests* the Secretary-General to implement this resolution urgently and in particular to make practical arrangements for the effective functioning of the International Tribunal, including recommendations to the Council as to possible locations for the seat of the International Tribunal at the earliest time to report periodically to the Council;

6. *Decides* that the seat of the International Tribunal shall be determined by the Council having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy, and subject to the conclusion of appropriate arrangements between the United Nations and the State of the seat, acceptable to the Council, having regard to the fact that the International Tribunal may meet away from its seat when it considers necessary for the efficient exercise of its functions; and decides that an office will be established and proceedings will be conducted in Rwanda, where feasible and appropriate, subject to the conclusion of similar appropriate arrangements;

7. *Decides* to consider increasing the number of judges and Trial Chambers of the International Tribunal if it becomes necessary;

8. *Decides* to remain actively seized of the matter.

## Annex

## Statute of the International Tribunal for Rwanda

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

### Article 1. Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

### Article 2. Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.



2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

### Article 3. Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape;

(h) Persecutions on political, racial and religious grounds;

(i) Other inhumane acts.

### Article 4. Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

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(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;

(h) Threats to commit any of the foregoing acts.

### Article 5. Personal jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

### Article 6. Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

### Article 7. Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

### Article 8. Concurrent jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

### Article 9. *Non bis in idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.



2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:

(a) The act for which he or she was tried was characterised as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

### Article 10. Organisation of the International Tribunal for Rwanda

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

(a) The Chambers, comprising three Trial Chambers and an Appeals Chamber;

(b) The Prosecutor;

(c) A registry.

### Article 11. Composition of the Chambers

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

(a) Three judges shall serve in each of the Trial Chambers;

(b) Five judges shall serve in the Appeals Chamber.

### Article 12. Qualification and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The members of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal for the former Yugoslavia") shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

3. The judges of the Trial Chambers of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the Trial Chambers from States Members of the United Nations and non-member States maintaining permanent observer missions at the United Nations Headquarters;

(b) Within thirty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality and neither of whom shall be one of the same nationality as any judge on the Appeals Chamber;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of

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**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 6.

*Prosecutor v. Kolundzija,* "Order on Non-Party Motion for Discovery" ICTY-95-8-PT, T. Ch. III, 29 September 1999

**UNITED NATIONS**

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

Case No.: IT-95-8-PT

Date: 29 September 1999

Original: ENGLISH

**IN THE TRIAL CHAMBER**

**Before:** **Judge Richard May, Presiding**
**Judge Mohamed Bennouna**
**Judge Patrick Robinson**

**Registrar:** **Mrs. Dorothee de Sampayo Garrido-Nijgh**

**Order of:** **29 September 1999**

**PROSECUTOR**

**v.**

**DRAGAN KOLUND@IJA**

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# ORDER ON NON-PARTY MOTION FOR DISCOVERY

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**The Office of the Prosecutor:**

**Mr. Grant Niemann** **Mr. Michael Keegan**
**Mr. Kapila Waidyaratne**

**Counsel for the Accused:**

**Mr. Du{an Vu~i}evi}**

**Counsel for the non-parties Milan and Miroslav Vuckovic:**

**Mr. Deyan Ranko Brashich**

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

**NOTING** the filing in this matter entitled "None parties Milan and Miroslav Vuckovic's motion for an order compelling discovery" filed on 3 September 1999 by counsel for Milan and Miroslav Vuckovic ("the Motion"), the Reply from the Office of the Prosecutor ("Prosecution") filed on 21 September 1999 and the "Notice by counsel for non parties Milan and Miroslav Vuckovic", filed on 24 September 1999,

**NOTING** that neither Milan Vuckovic nor Miroslav Vuckovic is named on the indictment in this matter and that neither one of them has appeared before this Trial Chamber,

**CONSIDERING** that the relief sought in the Motion is not a matter for resolution by this Trial Chamber,

**HEREBY DISMISSES** the Motion.

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

Richard May
Presiding

Dated this twenty-ninth day of September 1999
At The Hague
The Netherlands

**[Seal of the Tribunal]**

**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX 7.**

*In the Case of Dragan Opacic,* ICTY-95-7-Misc.1, Bench of App. Ch., 3 June 1997

**UNITED NATIONS**

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

Case No.: IT-95-7-Misc.1

Date: 3 June 1997

Original: English

**BEFORE A BENCH OF THE APPEALS CHAMBER**

**Before:** **Judge Antonio Cassese, Presiding**
**Judge Haopei Li**
**Judge Saad Saood Jan**

**Registrar:** **Mrs. Dorothee de Sampayo Garrido-Nijgh**

**Decision of:** **3 June 1997**

**IN THE CASE OF DRAGAN OPA^I]**

# DECISION ON APPLICATION FOR LEAVE TO APPEAL

**Counsel for the Applicant**

**Ms. Branislava Isailovi}**

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1. In an application dated 30 May 1997, and filed in the Registry on the same day, Dragan Opa~i}, a witness in the *Tadi}* case (IT-94-1-T), detained at the Tribunal pursuant to Rule 54 of the Rules of Procedure and Evidence, seeks to appeal the Decision of the Trial Chamber rendered on 27 May 1997 ordering that he be remanded to the authorities of the Republic of Bosnia and Herzegovina.

2. The application does not state the Rule of the Tribunal pursuant to which the appeal is made. It is readily apparent, however, that the applicant does not have standing to appeal to the full Appeals Chamber, since, according to Article 25 of the Statute, "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor ..."; the applicant has not been convicted by the Trial Chamber nor may he appeal on behalf of the Prosecutor.

3. The only course open is, therefore, to treat the applicant's motion as an application for leave to appeal pursuant to Rule 72 of the Rules of Procedure and Evidence, which reads in petinent part:

> (A) After the initial appearance of the accused, either party may move before a Trial Chamber for appropriate relief or ruling. Such motions may be written or oral, at the discretion of the Trial Chamber.
>
> (B) The Trial Chamber shall dispose of preliminary motions in *limine litis* and without interlocutory appeal, save
>
> [...]
>
> (ii) in other cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon serious cause being shown, within seven days following the impugned decision.

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4. On the basis of the above, a Bench of the Appeals Chamber has been constituted, in the interests of justice, to consider the present application.

5. On even the most cursory examination of the application, however, it is clear that the applicant equally lacks standing to invoke Rule 72 of the Rules of Procedure and Evidence. Rule 72 applies to preliminary motions filed by "either party". The term "party" is defined in Rule 2 of the Rules of Procedure and Evidence as "The Prosecutor or the accused". The detained witness, Dragan Opa~i}, who has not been indicted, being neither the Prosecutor nor the accused, is therefore not a party. Accordingly he has no standing to invoke Rule 72.

6. If this view of the matter appears overly legalistic, any other ruling would open up the Tribunal's appeals procedures to non-parties - witnesses, counsel, *amicus curiae*, even members of the public who might nurse a grievance against a Decision of the Trial Chamber. This could not be. The Tribunal has a limited appellate jurisdiction which categorically cannot be invoked by non-parties.

7. In this connection, the Bench would further request the Registrar not to seize the Appeals Chamber in future of putative appeals which are lodged by non-parties, nor to pay the costs of such applications, including the present application.

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**DISPOSITION**

The Bench of the Appeals Chamber,

Ruling unanimously,

For the above reasons,

Pursuant to Rule 72(B)(ii) of the Rules of Procedure and Evidence,

REJECTS the application of Applicant Dragan Opa~i} for leave to appeal the Decision of 27 May 1997.

CERTIFIES that the defence costs of the present application were not reasonably incurred and therefore requests the Registrar not to reimburse the sums so incurred,

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

Antonio Cassese
President

Dated this 3rd day of June 1997
At The Hague
The Netherlands

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(Seal of the Tribunal)

**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 8.

*Prosecutor v. Bobetko*, "Decision on Challenge by Croatia to Decision and Orders of Confirming Judge", ICTY-02-62-AR54bis & ICTY-02-62-AR108bis, Appeals Chamber, 29 November 2002

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Case: IT-02-62-AR54*bis* & IT-02-62-AR108*bis*

**IN THE APPEALS CHAMBER**

**Before:**
**Judge Claude Jorda, Presiding**
**Judge Mohamed Shahabuddeen**
**Judge David Hunt**
**Judge Mehmet Güney**
**Judge Fausto Pocar**

**Registrar:**
**Mr Hans Holthuis**

**Decision of:**
**29 November 2002**

**PROSECUTOR**
**v**
**JANKO BOBETKO**

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# DECISION ON CHALLENGE BY CROATIA TO DECISION AND ORDERS OF CONFIRMING JUDGE

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**Counsel for the Prosecutor**

**Ms Carla Del Ponte**

**Applicant**

**The Republic of Croatia, represented by Mr Goran Mikulicic**

## Procedural Background

1. On 17 September 2002, an indictment against Janko Bobetko ("Bobetko") was confirmed by Judge Liu and, on 17 and 20 September 2002, the Judge issued warrants of arrest and orders to (*inter alia*) Croatia to search for, arrest and surrender Bobetko to the International Tribunal.

2. On 30 September 2002, the Republic of Croatia ("Croatia") filed an "Application of the Republic of Croatia to Submit an Interlocutory Appeal Against the Warrant of Arrest and Order for Surrender of 20 September 2002" ("First Application"). On 4 October 2002, Croatia filed a "Request from the Republic of Croatia for a Review of the Judge's Decision of 17 September Confirming the Indictment Against Janko Bobetko and the Order for his Arrest and Surrender of 20 September 2002" ("Second Application"). On 11 October 2002, the President issued an order assigning Judges to the Appeals

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Chamber and joining both applications so that they be treated together[1]. The prosecution filed its responses to these two applications, respectively, on 10 October and 21 October 2002, while Croatia's replies were filed respectively on 21 October and 29 October 2002.

3. On 11 October 2002, the Senior Trial Attorney for the prosecution wrote a confidential letter to the Registry requesting that the confidential aspects of its "Prosecution's Response to the Application of the Republic of Croatia to Submit an Interlocutory Appeal against the Warrant of Arrest and Order for Surrender of 20 September 2002" be lifted[2], and, on 17 October 2002, Croatia filed Bobetko's medical report and analysis of his medical condition. Finally, by letter of 18 October 2002, Croatia informed the Appeals Chamber that Mr Goran Mikulicic had been appointed as its representative (Legal Counsel) in relation to these proceedings.

**Arguments of the parties**

4. The nature of the two applications and the terminology adopted by Croatia in them is mistaken or at least confused. Rather than rejecting both applications on technicalities, the Appeals Chamber has considered the merits of each of them by reference to the real issues which they raise, and regardless of the heading or terminology used in the application in question.

5. The following issues are raised by Croatia's applications:

i. Does the Statute or the Rules provide for a right to appeal or to seek a review of a decision of a confirming Judge?

ii. If so, does Croatia have *locus standi* to make such an application?

iii. Was the prosecution under an obligation prior to issuing an arrest warrant to interview the proposed accused person?

iv. Should the confirming Judge have requested the prosecution to submit evidence which would demonstrate the necessity to arrest the accused?

v. Should the confirming Judge have adopted a procedure less constraining than the issue of an arrest warrant if that other procedure could have served the same objective? In particular, if the accused satisfies the conditions for provisional release, does he nevertheless still need to be arrested?

6. The Prosecution says that Rule 54 and Rule 108*bis* do not provide for either a right to appeal from, or for a review of, a decision of a single Judge confirming an indictment and issuing a warrant of arrest and order for surrender. Croatia, the Prosecution submits, does not have *locus standi* in relation to such a matter. The Prosecution adds that, contrary to Croatia's submission, Rules 54, 47(H), (I) and 55(A) do not mandate an optional regime for the issuing of arrest warrants. The Prosecution contends that Croatia's reliance on Rule 54*bis* for its submission that a Judge must request a written application with supporting evidence from the Prosecution before issuing an arrest warrant is misconceived. The Prosecution also submits that there is no requirement in the Statute and the Rules that other measures for securing the appearance of an accused before the Tribunal must be exhausted before resorting to a warrant of arrest, nor that a Judge would be obliged to contact a State before issuing a warrant of arrest against a citizen of that State.

**Discussion**

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7. Croatia's First Application is brought under Rule 54, 54*bis*, 73(D) and 73(E) of the Rules of Procedure and Evidence ("Rules"). Rule 54 confers a general procedural competence to a Judge or a Chamber to issue orders and warrants, but it does not provide for any right of appeal. Rule 54*bis* does not in any way apply to the present matter, as it deals with "Orders directed to States for the *Production of Documents*" (emphasis added), and it cannot therefore give Croatia any right to appeal against the decision and orders of a confirming Judge pursuant to that rule. Rules 73(D) and (E) were, at the time of the application, no longer in force.

8. The Second Application is brought under Rule 108*bis* of the Rules. This provision gives a State directly affected by an interlocutory decision of a Trial Chamber the right to file a request for review by the Appeals Chamber if that decision concerns issues of general importance relating to the powers of the Tribunal. Such an application in the present case must fail for a number of reasons.

9. First, the decision and orders challenged by Croatia's application have been made by a confirming Judge, not by a Trial Chamber to which Rule 108*bis* refers.

10. Secondly, the confirmation of an indictment is not an interlocutory order for the purpose of that rule since, at the time when the confirmation takes place, the proceedings in which the indictment is to be filed have not yet commenced[3]. It is only after the indictment has been confirmed that the proceedings against the accused have commenced, and only then can an interlocutory order be made by a Chamber or a Judge. The Tribunal will not entertain submissions made by an accused person or by counsel who seek to speak on behalf of the accused prior to his appearance before the Tribunal[4]. Even if the Appeals Chamber were of the view that Rule 108*bis* provided a State with a right to appeal against an order to arrest or to surrender a citizen of that State, it would not entertain an appeal against the warrant of arrest issued in any case before the accused has appeared before the Tribunal.

11. Thirdly, and in any event, even if the Appeals Chamber had been satisfied that the warrant of arrest constituted an interlocutory order for the purposes of Rule 108*bis*, the Appeals Chamber does not accept that Croatia has standing to make the present application. Rule 108*bis* was adopted to permit States directly affected by an interlocutory decision to seek a review where it is claimed that an interlocutory decision of a Trial Chamber has impacted upon its *legal* rights, such as when a State is ordered to produce documents or records from its archives. This provision is not available where the State claims that its legitimate *political* interests have been affected, or where it has a genuine concern that the facts alleged in the indictment are not historically accurate[5]. The time for the investigation into the truth of the facts alleged in an indictment does not arise until the trial.

12. Article 29 of the Tribunal's Statute provides that all States shall cooperate with the Tribunal and comply without undue delay with any request for assistance or order issued by this Tribunal. In particular, Article 29(d) expressly provides that this general obligation includes a duty to comply with any such request or order relating to "the arrest or detention of persons". Croatia's role in complying with such a request or order is the purely ministerial one of executing the warrants and carrying out such arrest and detention as ordered by the Tribunal. A State which is ordered to arrest or detain an individual pursuant to Article 29(d) has no standing to challenge the merits of that order.

13. Croatia's submission that the prosecution must interview or offer to interview every proposed accused person before seeking a confirmation of an indictment has no merit. The prosecution may interview a proposed accused person before seeking confirmation of an indictment against him if he is willing to be interviewed and if it wishes to do so, as it has done at times in the past, but it has no obligation to do so in every case. There is no requirement obliging the prosecution to submit evidence demonstrating a necessity to arrest a proposed accused before the Judge may confirm the indictment, or

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which obliges the Judge to adopt a procedure less constraining than an arrest warrant if another procedure could serve the same objective. There is nothing to prevent the prosecution and the accused from reaching an agreement whereby he is able to make his initial appearance before the Tribunal whilst still at liberty. One accused, Biljana Plavsic, was recently permitted by a Trial Chamber to enter a plea by video-link rather than to re-enter detention in order to do. But, unless such an agreement is reached, and the Trial Chamber approves, the usual procedure remains one of arrest and detention until any issue of provisional release is resolved.

14. Croatia further submitted that, because Bobetko satisfies all the requirements for provisional release, he need not be arrested because he would at once be granted provisional release. The Appeals Chamber cannot pronounce on matters concerning provisional release in the case *in concreto* before an appeal is brought by the Accused to the Appeals Chamber from a Trial Chamber decision on an application for provisional release. Therefore, arguments based on considerations which are relevant to an appeal for provisional release are premature so far as the Appeals Chamber is concerned. Whether or not the Trial Chamber before which Bobetko may appear would grant provisional release can only be determined by that Trial Chamber upon the material placed before it at that time.

15. The Appeals Chamber does point out that an accused person who has appeared before the Tribunal is not without remedy in relation to the issue of the indictment against him if he is able to demonstrate that its issue constitutes an abuse of the Tribunal's process. The Tribunal has an inherent power to stay proceedings which are an abuse of process, such a power arising from the need for the Tribunal to be able to exercise effectively the jurisdiction which it has to dispose of the proceedings.[6] Nothing alleged in the applications made by Croatia would demonstrate that such an abuse of the process had occurred in the present case.

**Disposition**

16. Accordingly, the Appeals Chamber rejects both applications made by Croatia.

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

Dated this 29th day of November 2002,
At The Hague,
The Netherlands.

_____
Claude Jorda
Presiding

President Jorda and Judge Shahabuddeen append a Declaration to this decision.

Judge Hunt and Judge Pocar append a Separate Opinion to this decision.

**[Seal of the Tribunal]**

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1 - Ordonnance du Président Portant Nomination de Juges à la Chambre d'Appel, 11 octobre 2002.
2 - No order has been made in response to that request.
3 - The ICTR Appeals Chamber has held that there is no appeal from a decision to confirm an indictment: *see*; *Prosecutor v Bagosora et al*, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others", 8 June 1998. *See* also, *Prosecutor v Kovacevic*, Decision on Defence Motion to Strike Confirmed Amended Indictment, 3 July 1998.
4 - See, eg, *Prosecutor v Radovan Karadzic and Ratko Mladic*, Decision Rejecting the Request Submitted by Mr Medvene and Mr Hanley III Defence Counsels for Radovan Karadzic, 5 July 1996.
5 - Second Application, par 8.
6 - *See Prosecutor v Tadic*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, par 13.

# PROSECUTION INDEX OF AUTHORITIES

## ANNEX 9.

*Prosecutor v. Kordic and Cerkez*, "Decision on the Request of the Republic of Croatia for Review of a Binding Order", ICTY-95-14/2-AR108bis, Appeals Chamber, 9 September 1999

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UNITED

NATIONS

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

Case No.: IT-95-14/2-AR108*bis*

Date: 9 September 1999

Original: English

**IN THE APPEALS CHAMBER**

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

**Registrar:** **Mrs. Dorothee de Sampayo Garrido-Nijgh**

**Decision of:** **9 September 1999**

**THE PROSECUTOR**

**v.**

**DARIO KORDI] AND MARIO ^ERKEZ**

# DECISION ON THE REQUEST OF THE REPUBLIC OF CROATIA FOR REVIEW OF A BINDING ORDER

**The Office of the Prosecutor:**
**Mr. Geoffrey Nice**
**Mr. Kenneth Scott**
**Ms. Susan Sommers**
**Mr. Patrick Lopez-Terres**

**Counsel for the Republic of Croatia:**
**Mr. David B. Rivkin, Jr.**
**Mr. Lee A. Casey**
**Mr. Darin R. Bartram**

**Counsel for the Accused Dario Kordi}:**
**Mr. Mitko Naumovski**
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**Mr. David Geneson**

**Counsel for the Accused Mario ^erkez:**
**Mr. Bo`idar Kova~i}**
**Mr. Goran Mikuli~i}**

# I. INTRODUCTION

## Background

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Tribunal") is seised of a request for review of a binding order of Trial Chamber III of 4 February 1999 ("the Binding Order"), filed by the Republic of Croatia ("Requesting State") on 11 February 1999.[1] In the Binding Order, Trial Chamber III ordered the Requesting State to disclose certain documents to the Office of the Prosecutor ("the Prosecution").

2. The Requesting State requests that the Appeals Chamber quash the Binding Order on the following two main grounds: 1) the Binding Order was issued without the Requesting State having been given notice and an opportunity to be heard; and 2) the Binding Order is inconsistent with the criteria for the issuance of binding orders as established by the Appeals Chamber's Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *The Prosecutor v. Bla{ki}* (Case No.: IT-95-14-T), of 29 October 1997 ("the Judgement").

3. Having considered the written submissions of the Requesting State and the Prosecution, the Appeals Chamber hereby renders its decision pursuant to the Statute and the Rules of Procedure and Evidence of the Tribunal ("the Statute" and "the Rules" respectively), as follows.

[1] Notice of State Request for Review of Order to the Republic of Croatia for the Production of Documents.

## Procedural history

4. Pursuant to an *ex parte* request by the Prosecution, Trial Chamber III on 4 February 1999, issued the Binding Order to the Requesting State. In its decision Trial Chamber III considered the Judgement and stated that -

> "[a]ny request for an order for production of documents issued under article 29, paragraph 2, of the Statute, whether before or after the commencement of a trial, must (1) identify specific documents and not broad categories. . . .; (2) set out succinctly the reasons why such documents are deemed relevant to the trial. . . .; (3) not be unduly onerous. . . .; (4) give the requested State sufficient time for compliance. . . " [and] that those conditions were mandatory and cumulative".

5. Trial Chamber III found Requests 1 to 27, 29 to 38 and 40 to be specific, relevant and not unduly onerous and requests number 28 and 39 not to meet the criterion of relevance as set out in the Judgement. Therefore, it ordered the Requesting State to disclose to the Prosecution the documents described in Requests 1 to 27, 29 to 38 and 40 in the Binding Order "as soon as possible and no later than within sixty days of the date of" that Order.

6. The Requesting State then filed an *ex parte* Notice of State Request for Review of Order to the Republic of Croatia for the Production of Documents on 11 February 1999 pursuant to Rule 108*bis* of the Rules. On 17 March 1999, the Appeals Chamber issued a scheduling order declaring the Prosecution and the Defence to be at liberty to file written submissions by 24 March 1999, addressing, *inter alia*, whether the issues raised by the request for review were of general importance relating to the powers of the Tribunal within the meaning of Sub-rule 108*bis*(A) of the Rules and, in the event the Appeals Chamber should hold the request to be admissible, whether the execution of the Binding Order should be suspended pending resolution of the Appeals Chamber's review. The Prosecution filed its response on 24 March 1999.[2] The Defence did not file any written submissions.

[2] Response to Notice of State Request for Review of Order to the Republic of Croatia for the Production of Documents.

7. On 26 March 1999, the Appeals Chamber rendered its decision on the admissibility of the request for review.[3] In that decision, the Appeals Chamber held the request admissible on the ground that the Requesting State was clearly directly affected by the Binding Order, which it found to concern issues of general importance relating to the powers of the Tribunal within the meaning of Rule 108*bis*. The Appeals Chamber further found it to be in the interests of justice that the Binding Order be suspended pending its review. On that same day, the Appeals Chamber also issued a scheduling order directing the Requesting State to submit a written brief by 9 April 1999, to which the Prosecution was to respond within seven days of the filing of the Requesting State's brief. In addition, the Appeals Chamber ordered that the Defence was at liberty to file any written submissions within the same time-period.

8. Briefs were filed by the Requesting State and the Prosecution on 9 and 16 April 1999,[4] respectively. The Defence did not file any written submissions.

## II. THE REVIEW

### Preliminary issue

9. The Requesting State requests that oral arguments be scheduled so that a full exposition of the issues involved may be provided for the Appeals Chamber's consideration. The Prosecution expresses no opinion on the matter.

10. The Appeals Chamber finds that it is not necessary to hear oral arguments prior to determination of the issues raised by the review. Consequently, the request is denied.

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[3] Order on Admissibility of State Request for Review of Order to the Republic of Croatia for the Production of Documents Issued by Trial Chamber III on 4 Feb. 1999 and Request for Suspension of Execution of Order.

[4] Merits Brief of the Republic of Croatia on State Request for Review of Order to the Republic of Croatia for the Production of Documents ("*Merits Brief*") and the Prosecutor's Response to the "Merits Brief" of the Republic of Croatia on State Request for review of Order to the Republic of Croatia for the Production of Documents Filed on 9 April 1999 ("*Prosecutor's Response*").

**First Ground for Review: whether the Requesting State had a right to be notified and heard prior to the issuance of the Binding Order**

1. Submissions of the Parties

(a) The Requesting State

11. The Requesting State contends that an Article 29(2) binding order for document production may not be issued without affording the requested State notice and an opportunity to be heard.[5] Its position is three-pronged. First, States have a right to notice and a hearing in Article 29(2) proceedings. Second, States must be accorded notice and a hearing before an Article 29(2) binding order is issued. Third, a State's right to be heard before an Article 29(2) binding order is issued includes the right to be heard on all of the Judgement's criteria, including that of relevance.

12. The Requesting State characterizes the first point as the right to be heard before judicial action is taken, a right that it claims to be part of the principle of due process.[6] After a brief survey of national and international legal texts, it concludes that "[t]here is no justification in law or reason for the International Tribunal to eschew this most basic rule of both national and international law, requiring that a party be heard before judicial action with respect to it is taken".[7] It submits that neither the Statute nor the Rules provide for such a derogation as to allow *ex parte* action on an Article 29(2) application, but that such an action may be justifiable only in "the most extreme and exigent circumstances".[8]

13. The second point is based on the alleged "significant consequences" for a State that is subject to an Article 29(2) binding order.[9] According to the Requesting State, it would be

[5] *Merits Brief*, para. 10.
[6] *Ibid.*, para. 11.
[7] *Ibid.*, para. 15.
[8] *Ibid.*
[9] *Ibid.*, para. 16.

for the State affected by the order to prove that the order was issued in error, and to prove this would be an unfair burden for the State which could have proved the request for the order to be unfounded before the order was issued.[10] Moreover, the issuance of the order without hearing the State on the requirements for binding orders may raise the "suspicion" that the Trial Chamber's action would suggest that the request for the order was well founded, and that the State had failed in its obligations to the Tribunal.[11] The Requesting State claims also that such orders may only be issued after "the applicant has satisfied each of the requirements articulated by the Appeals Chamber in the 29 October 1997 Judgement".[12] Lastly, the Requesting State argues that there is no "urgency or administrative necessity" to justify the issuance of the Binding Order *ex parte*, since the trial in the present case is yet to commence.

14. The Requesting State argues, in respect of the third point, that, as a matter of due process, it "is entitled to notice and a hearing on the legal sufficiency of the applicant's showing on each of the requirements for a binding order established in the 29 October 1997 Judgement, including relevance, before an Article 29(2) binding order issues".[13] The entitlement arises from the adversarial nature of the procedures "designed" by the United Nations Security Council for the Tribunal.[14] The Requesting State further argues that inferences drawn from the second and fourth criteria for binding orders laid down in the Judgement entitles it to be notified of an Article 29(2) application, and to be heard *before* a binding order is issued.[15] With regard to the second criterion, the Requesting State submits that even if the Prosecution may, in certain circumstances, be entitled to articulate the detailed reasons concerning relevance to the Trial Chamber alone, this criterion obligates the Prosecution to notify the Requesting State of, at least, the general grounds on which the

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[10] *Ibid.*, para. 20.
[11] *Ibid.*
[12] *Ibid.*, para. 16, and also para. 19.
[13] *Ibid.*, para. 28.
[14] *Ibid.*, paras. 26 and 27.
[15] *Ibid.*, para 27. The second criterion requires that a binding order "set[s] out succinctly the reasons why such documents are deemed relevant to the trial; if that party considers that setting forth the reasons for the request might jeopardise its prosecutorial or defence strategy it should say so and at least indicate the general grounds on which its request rests"; whereas the fourth criterion states that the requested State must be given "sufficient time for compliance; this of course would not authorise any unwarranted delays by that state. Reasonable and workable deadlines could be set by the Trial Chamber after consulting the requested State".

Article 29(2) application is based. The Requesting State further submits that the language used in the forth criterion implies a right to notice of an Article 29(2) application and a right to be heard prior to an order being issued.

(b) The Prosecution

15. As to the argument of the Requesting State that *ex parte* proceedings for binding orders are extraordinary, the Prosecution states that "no legal system contemplates that, in the course of an investigation or prosecution, a third party with relevant evidence must be consulted or asked permission before a subpoena or order can be addressed to that person".[16] As to the argument that the adversarial procedures of the Tribunal would be undermined if a binding order is issued to a State without it being notified and heard beforehand, the Prosecution contends that the Requesting State "is not a *party* to proceedings before the Tribunal", but that it should be treated like a witness, when it receives the Binding Order.[17] With respect to the claim of the Requesting State that it is entitled to be heard in respect of the criteria for binding orders laid down in the Judgement, the Prosecution argues that the relevance of evidence sought by binding orders is a matter which concerns the parties to the case and especially the Trial Chamber,[18] and that any challenge to the orders, on whatever grounds, is allowed by the Rules, but only after they are issued, and that the rights of the recipient of the orders are, therefore, safeguarded.[19] Concerning the point that reasonable time-limits could be set by way of consultation between the relevant Trial Chamber and the receiving State, as suggested by the Appeals Chamber in the Judgement, the Prosecution considers it as a matter of discretion rather than of duty on the part of the Trial Chamber.[20]

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[16] *Prosecutor's Response*, para. 7.
[17] *Ibid.*, paras.10 and 13.
[18] *Ibid.*, paras. 11 to 13 and 15.
[19] *Ibid.*, paras. 14 to 18.
[20] *Ibid.*, para. 19.

## 2. Discussion and Findings

16. The Tribunal's competence extends to trying persons charged with serious violations of international humanitarian law.[21] In order for the Tribunal to discharge this function, it must rely upon the co-operation of States since it is not endowed with an enforcement mechanism of its own. In the Judgement, the Appeals Chamber held that the Tribunal is empowered to issue binding orders and requests to States pursuant to Article 29 of the Statute, which derives its binding force "from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council resolutions adopted pursuant to those provisions".[22] By affording judicial assistance to the Tribunal, States do not thereby subject themselves to the primary jurisdiction of the Tribunal, which is limited to natural persons. Rather, when issuing binding orders to States, the Tribunal exercises its "ancillary (or incidental) mandatory powers *vis-à-vis* States" as embodied in Article 29 of the Statute.[23]

17. The Requesting State contends that the principle of due process requires that it be afforded notice and an opportunity to be heard before a binding order for the production of documents is issued to it. Citing *Mathews v. Eldrige,* 424 U.S. 319, 333 (1976) (quoting in part *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)), it claims that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[24] The pertinent question then is what constitutes "meaningful" procedural guarantees, if any, for the Requesting State. As shown by the case law referred to by the Requesting State, "[d]ue process is flexible and calls for such procedural protection as the particular situation demands".[25] Furthermore, the Requesting State recognises that "a State involved in Article 29(2) proceedings is not a party before the International Tribunal".[26] Yet, it contends that the adversarial nature of the Tribunal's procedure entitles it to certain due process guarantees. Significant due process guarantees,

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[21] Article 1 of the Statute.
[22] *Judgement*, para. 26.
[23] *Ibid.*, para. 28.
[24] *Merits Brief*, para. 12.
[25] *Merits Brief*, para. 12, referring to *Mathews v. Eldrige,* 424 U.S. 319, 334 (1976) (quoting in part *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).
[26] *Ibid.*, para. 23.

however, are afforded to parties. Rule 2 defines parties as the Prosecutor and the accused. Consequently, what constitutes "meaningful" has to be determined in that context. The Appeals Chamber agrees that the Requesting State is entitled to an opportunity to be "heard at a meaningful time and in a meaningful manner." It finds, however, that Rule 108*bis* sufficiently satisfies that purpose. Equity is done by affording the Requesting State an opportunity to challenge the Binding Order before it is implemented through the procedure established in Rule 108*bis*.

18. The Appeals Chamber now turns to the second point of the Requesting State which is based on the alleged "significant consequences" for a State that is subject to an Article 29(2) binding order. It is not persuaded by the argument that it would be unfair to relegate the Requesting State to an opportunity, after a Binding Order has been issued, to prove that it was issued erroneously for failure to meet the four criteria of the Judgement. Nor is the Appeals Chamber persuaded that the case for the Requesting State is improved by the argument that it would be more logical for the Requesting State to have an opportunity before the Binding Order was issued, to prove that the request for it was unfounded. In the view of the Appeals Chamber, the *ex parte* nature of a request for a Binding Order excludes the claimed right to a prior hearing. The Appeals Chamber stresses that the issuance of a binding order by a Trial Chamber does not indicate a finding of a failure of a State to fulfil its obligations under the Statute and the United Nations Charter. The Appeals Chamber also considers that there is no requirement of "urgency or administrative necessity", as claimed by the Requesting State, for binding orders to be issued on an *ex parte* basis. Such orders may become necessary whenever co-operation is found to be inadequate for the purpose of obtaining such documents as are required for the conduct of a trial.

19. In respect of the third point, the Appeals Chamber notes its close relationship with the first point raised by the Requesting State. The Appeals Chamber will not repeat what has already been stated in respect of the right to be heard based on the requirement of the

principle of due process.[27] Instead, the Appeals Chamber will focus on the inferences drawn by the Requesting State from the second and fourth criteria in the Judgement.[28] These inferences are not persuasive. The Requesting State submits that, while arguments concerning relevance may be *ex parte*, the general grounds on which a request is based should be disclosed to a State in an application under Article 29(2). The Appeals Chamber disagrees. Nothing in the second criterion provides for notification of, or hearings on, grounds of relevance, or on the general grounds on which a request is based, in advance of a binding order issuing. It is for the Trial Chamber and not the Requesting State to assess the relevance and admissibility of the documents requested. The fourth criterion established by the Judgement provides that "[r]easonable and workable deadlines could be set by the Trial Chamber after consulting the requested State."[29] The Requesting State submits that this language implies a right to notice of an Article 29(2) application and a right to be heard prior to an order being issued. Again, the Appeals Chamber disagrees. The correct inference is that, once the binding order is served on the State concerned, the State may come back to the Trial Chamber if it deems insufficient the time allowed by the order. Rescheduling for compliance obligations may be possible but it is clear that this happens only after the order is served.

20. For the foregoing reasons, the Appeals Chamber finds that the Requesting State had no right to be notified or to be heard before the Binding Order was issued to it.

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[27] *Supra*, para. 17.
[28] *Supra*, para. 14.
[29] *Judgement*, para. 32.

## Second Ground for Review: whether the Binding Order is inconsistent with the criteria for the issuance of binding orders established by the Judgement

### 1. Submissions of the Parties

#### (a) The Requesting State

21. The Requesting State submits that the criteria adopted in the Judgement are binding on the Trial Chambers as the law of the Tribunal, either through a rule of precedent, *stare decisis*, or through some similar means.[30] It contends that the Binding Order does not meet the mandatory and cumulative criteria laid down in the Judgement. Its arguments may be summarised as follows.

22. Regarding the first point that the criteria adopted in the Judgement are binding on the Trial Chambers, the Requesting States argues that the requirements of Rule 108*bis* support a rule of precedent since this provision limits interlocutory appeals by States to decisions concerning "issues of general importance relating to the powers of the Tribunal". The Requesting State submits that if the Appeals Chamber's decisions under Rule 108*bis* have no precedential effect on the Trial Chambers, there would be no purpose in reviewing matters of general importance.[31] It submits further that the importance of a uniform interpretation of the law is recognised in both common and civil law systems and that a number of international tribunals have informally adopted a rule of precedent.[32] It also emphasises the importance of consistent judicial decision-making for "a young and unprecedented institution" like the Tribunal.[33]

23. In its challenge to the Binding Order on the ground that it does not meet the mandatory and cumulative criteria laid down in the Judgement, the Requesting State relies on the following four arguments.

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[30] *Merits Brief*, paras. 29 to 42.
[31] *Ibid.*, paras. 29 to 32.
[32] *Ibid.*, paras. 33 to 39.
[33] *Ibid.*, para. 40.

24. First, the Requesting State submits that the requirement that a binding order must identify specific documents and not broad categories has not been met. The material sought must be identified with enough specificity so that the individual documents can be separated from all other materials pertaining to the same individual and subject-matter and it must be possible to discern from the face of the request the precise number of documents sought.[34] For instance, requests 1, 4, 6 to 18, and 29 to 40 contained in the Binding Order do not, to the extent required, identify a particular document by title, date and author, nor do they attempt to identify a specific document through description, as allowed in exceptional circumstances. Rather, contends the Requesting State, these requests seek entire categories of documents.[35]

25. Second, the Judgement requires that, while the prosecution is entitled to request documents, these must be deemed relevant to the trial. If the materials sought are not specifically identified, the Trial Chamber cannot make an accurate determination as to whether each of those documents meets the criterion of relevance. Since the criterion of specificity is not here satisfied, it is impossible that all of the requested documents in the Binding Order can be deemed relevant to the trial.[36]

26. Third, the Requesting State contends that the Binding Order does not meet the requirement that a request for documents not be unduly onerous.[37] The Judgement establishes without exception that a party cannot request hundreds of documents and thereby rejects any rule that would allow the parties to engage in third-party discovery under Article 29(2). Since many of the requests in the Binding Order do not meet the standard of specificity, the Requesting State will have to engage in an extensive government-wide search in order to ensure compliance with the requests. Such

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[34] *Ibid.*, para. 43.
[35] *Ibid.* para. 46.
[36] *Ibid.*, para. 56.
[37] *Ibid.*, para. 57.

identification and collection of categories of documents would unduly and unfairly tax its resources.[38]

27. Fourth, the Requesting State claims that the Judgement states that the Trial Chamber shall set reasonable and workable deadlines after consulting the requested State. The Binding Order fails to meet this requirement since it was issued in response to an *ex parte* request by the Prosecution. Consequently, the Requesting State has not been consulted regarding the establishment of deadlines, with which it has to comply.[39]

(b) The Prosecution

28. The Prosecution agrees with the contention of the Requesting State that "the special need for unification of the Tribunal's jurisprudence and judicial economy justify the adoption of the rule of *stare decisis* for the decisions of law made by the Appeals Chamber".[40] The Prosecution contends, however, that the Requesting State's restrictive interpretation of the criteria laid down in the Judgement is erroneous and that a reasonable construction of these criteria leads to the conclusion that the Binding Order is indeed consistent with the Judgement. The Prosecution's submission in response may be summarised as follows.

29. First, the Prosecution claims that the Judgement does not prohibit the use of categories as such, but the use of broad categories. Therefore, if the description of the categories contains enough specific features to enable adequate identification of the documents required, the criterion for specificity is satisfied.[41]

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[38] *Ibid.*, paras. 58 to 59.
[39] *Ibid.*, 62.
[40] *Prosecution's Response,* para. 21
[41] *Ibid.*, para. 22 to 27.

30. Second, the Prosecution submits that on the basis of the materials provided to the Trial Chamber, it has satisfied itself that the requested documents are relevant to the trial of the accused. The requirement of relevancy in the Judgement has, therefore, been met. The Requesting State lacks *locus standi* to raise the issue of relevancy of the documents sought before the Tribunal.[42]

31. Third, the Prosecution argues that the Judgement does not prohibit requests for hundreds of documents as contended by the Requesting State.[43] Instead, the prohibition, which flows from the requirement that requests cannot be unduly onerous, is restricted to those situations where the identification, location and scrutiny of the requested documents by the relevant authorities would be overly taxing and not strictly justified by the exigencies of trial.[44]

32. Fourth, in respect of the Requesting State's contention that the deadline established by the Binding Order is unreasonable, the Prosecution submits that it does not dispute the procedural right of the Requesting State to move Trial Chamber III in order to object to the deadline imposed or to seek an extension.[45]

### 3. Discussion and Findings

33. In the Binding Order, the Trial Chamber characterised the criteria established by the Judgement to be "mandatory and cumulative". Consequently, it considered itself to be clearly bound by them. The Appeals Chamber, therefore, takes the view that it is unnecessary in the present case to address the argument of the Requesting State that the criteria are binding on the Trial Chambers as the law of the Tribunal, either through a rule of precedent, *stare decisis*, or through some similar means.

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[42] *Ibid.*, para 28.
[43] *Ibid.*, para 25, quoting Separate Opinion of Judge Shahabuddeen, *The Prosecutor v. Bla{ki}*, Case No.: IT 95-14-T, T. Ch. II, 21 July 1998, Order to the Republic of Croatia for the Production of Documents.

34. The Appeals Chamber instead turns to the challenge by the Requesting State to the Binding Order on the ground that it does not meet the mandatory and cumulative criteria in the Judgement where the Appeals Chamber considered the permissible content of binding orders; more specifically whether binding orders "can be broad in scope or whether they must indeed be specific".[46] It held that a binding order for the production of documents must -

> (i) identify specific documents and not broad categories. In other words, documents must be identified as far as possible and in addition be limited in number. . . . [W]here the party requesting the order for the production of documents is unable to specify the title, date and author of documents, or other particulars, this party should be allowed to omit such details provided it explains the reasons therefore, and should still be required to identify the specific documents in question in some appropriate manner. [. . .]
>
> (ii) set out succinctly the reasons why such documents are deemed relevant to the trial; if that party considers that setting forth the reasons for the request might jeopardise its prosecutorial or defence strategy it should say so and at least indicate the general grounds on which its request rests;
>
> (iii) not be unduly onerous. As already referred to above, a party cannot request hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial; and
>
> (iv) give the requested State sufficient time for compliance; this of course would not authorise any unwarranted delays by that state. Reasonable and workable deadlines could be set by the Trial Chamber after consulting the requested State.[47]

35. In the present request for review, the Requesting State asserts that the Binding Order is inconsistent with the requirements established by the Appeals Chamber. Accordingly, the above criteria have to be interpreted and the requests contained in the Binding Order reviewed.

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[44] *Ibid.* See also paras. 29 to 34.
[45] *Ibid.*, para 35.
[46] *Judgement.*, para. 32.
[47] *Ibid.*

36. As a starting point, the Appeals Chamber observes that the criteria were adopted in the context of a finding that the Tribunal possesses the power pursuant to Article 29(2) of the Statute to issue binding orders for the production of documents to States and that such a power is crucial to the Tribunal being able to carry out its mandate of prosecuting and adjudicating cases of a very complicated nature which "sprawl over wide areas of law and fact".[48] The Appeals Chamber further notes that above criteria are not expressed in absolute terms and that they cannot be applied in the abstract. Rather, they can only be understood in conjunction with Article 29(2) and the purpose served by that provision.

37. The first criterion relates to the requirement of specificity. The contentious issue is the extent to which requests can be made for the production of documents identified solely by category. The Requesting State submits that the material sought must be identified with sufficient specificity so that the individual documents can be separated from all other materials pertaining to the same individual and subject-matter and that it must be possible to discern from the face of the request the precise number of documents sought. On this basis, the Requesting State challenges, in particular, requests 1, 4, 6 to 18, and 29 to 40. The Prosecution contends, on the other hand, that the criterion of specificity does not prohibit the use of categories, as such, providing the description of the categories contains enough specific features to enable adequate identification of the documents required.

38. The underlying purpose of the requirement of specificity is to allow a State, in complying with its obligation to assist the Tribunal in the collection of evidence, to be able to identify the requested documents for the purpose of turning them over to the requesting party. The question then is whether "documents which are only identifiable as members of a class, however clearly defined this may be and however readily the identification of its content may be made",[49] fall afoul of the requirement of specificity. The requirement of specificity clearly prohibits the use of *broad* categories, which, of course, in itself is a

[48] *The Prosecutor v. Bla{ki}*, Case No.: IT-95-14-T, T. Ch. II, 21 July 1998, Order to the Republic of Croatia for the Production of Documents, Separate Opinion of Judge Shahabuddeen, p. 5.
[49] *Ibid.*, p. 3.

relative term. It does not, as correctly asserted by the Prosecution, prohibit the use of categories as such.

39. After having reviewed the requests contained in the Binding Order, especially requests 1, 4, 6 to 18 and 29 to 40, the Appeals Chamber finds that the Binding Order is not inconsistent with the criterion of specificity. Although, a requested category of documents has to be "defined with sufficient clarity to enable ready identification" of the documents falling within that category.[50]

40. The second criterion states that the requested documents have to be relevant to the trial of the accused. The Appeals Chamber takes the view that it falls squarely within the discretion of the Trial Chamber to determine whether the documents sought are relevant to the trial. Furthermore, the State from whom the documents are requested does not have *locus standi* to challenge their relevance. Having found that the criterion of specificity has indeed been met, the Appeals Chamber rejects the argument of the Requesting State that the Trial Chamber, because of lack of specificity, was unable to accurately determine the relevance of the documents sought.

41. The third criterion states that a binding order must not be unduly onerous. This criterion must be read together with the clearly illustrative statement that "a party cannot request hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial".[51] Contrary to the assertion of the Requesting State, this criterion does not automatically exclude all requests that involve the production of hundreds of documents. As noted above,[52] this criterion is relative. It entails the striking of a balance between the need, on the one hand, for the

[50] *Ibid.*, p. 4.
[51] *Judgement*, para. 32.
[52] *Supra*, para. 36.

Tribunal to have the assistance of States in the collection of evidence for the purpose of prosecuting persons responsible for serious violations of international humanitarian law and the need, on the other hand, to ensure that the obligation upon States to assist the Tribunal in the evidence collecting process is not unfairly burdensome. Since the task with which the Security Council has entrusted the Tribunal is far from an easy one, the obligation which rests upon all Member States of the United Nations to "carry out the decisions of the Security Council"[53] by rendering assistance to the Tribunal pursuant to Article 29(2) of the Statute, for instance by complying with an order of a Trial Chamber for the production of evidence, will at times undoubtedly be onerous. Considering the nature of the complex charges heard by the Tribunal, it is hard to see how that can be avoided. Consequently, the crucial question is not whether the obligation falling upon States to assist the Tribunal in the evidence collecting process is onerous, but whether it is *unduly* onerous, taking into account mainly whether the difficulty of producing the evidence is not disproportionate to the extent that process is "strictly justified by the exigencies of the trial".[54]

42. In light of the foregoing, and after a review of the requests in the Binding Order, the Appeals Chamber concludes that the criterion that a binding order must not be unduly onerous has been satisfied.

43. The fourth criterion states that a State shall be given sufficient time for compliance with a binding order. As previously discussed,[55] it does not follow from this requirement that a State is entitled to be heard prior to the issuance of the binding order. It simply sets out the obvious in the sense that a State must be given a reasonable time-frame in which to comply. It follows from the statement that "[r]easonable and workable deadlines *could* be set by the Trial Chamber after consulting the requested State",[56] and that it falls within the discretion of the Trial Chamber to do so. The fact that the Binding Order was issued pursuant to an *ex parte* request by the Prosecution and that, consequently, the Requesting

[53] Article 25 of the Charter of the United Nations.
[54] *Judgement*, para. 32.
[55] *Supra*, para. 19.
[56] *Judgement*, para. 32. (Emphasis added.)

State was not consulted before the deadline for compliance was set, does not render the Binding Order inconsistent with this criterion. In addition, the procedure established in Rule 108*bis* does not preclude a State from moving the Trial Chamber for an extension of time for compliance, should the State deem the deadline to be unreasonable or unworkable.

44. In conclusion, the Appeals Chamber finds the Binding Order not to be inconsistent with the criteria enunciated by the Appeals Chamber in the Judgement.

## III. DISPOSITION

For the foregoing reasons, the Appeals Chamber **AFFIRMS** the Binding Order and **REINSTATES** the execution of that Order.

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

Gabrielle Kirk McDonald
Presiding Judge

Dated this ninth day of September 1999
At The Hague,
The Netherlands.

**[Seal of the Tribunal]**

**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 10.

*Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium),* I.C.J. 14 February 2002; Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, Dissenting Opinion of Judge Al-Khasawneh, Dissenting opinion of Judge van den Wyngaert.

INTERNATIONAL COURT OF JUSTICE

YEAR 2002

2002
14 February
General List
No. 121

14 February 2002

# CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

# (DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

*Facts of the case — Issue by a Belgian investigating magistrate of "an international arrest warrant* in absentia *" against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.*

* *

*First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a "legal dispute" between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.*

*Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.*

*Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.*

*Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.*

*Subsidiary argument of Belgium* — Non ultra petita *rule — Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that question in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.*

* *

*Immunity from criminal jurisdiction in other States and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law rules — Nature of the functions exercised by a Minister for Foreign Affairs — Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability — No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private capacity".*

*No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity — Distinction between jurisdiction of national courts and jurisdictional immunities — Distinction between immunity from jurisdiction and impunity.*

*Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs — Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs — Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium — International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.*

* *

*Remedies sought by the Congo — Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo — Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.*

**JUDGMENT**

*Present:* *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Judges* ad hoc BULA-BULA, VAN DEN WYNGAERT; *Registrar* COUVREUR.

In the case concerning the arrest warrant of 11 April 2000,

*between*

the Democratic Republic of the Congo,

represented by

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals,

Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic,

Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain,

Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),

Mr. Pierre d'Argent, *Chargé de cours*, Catholic University of Louvain,

Mr. Moka N'Golo, *Bâtonnier*,

Mr. Djeina Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice,

as Counsellor,

*and*

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs,

as Agent;

43. The Court would recall the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Asylum, Judgment, I.C.J. Reports 1950*, p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

* *

44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot, and that the Application is admissible. Thus, the Court now turns to the merits of the case.

*

* *

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

* *

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

* *

56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that "[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose", or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity *rationae materiae* to be accorded in respect of prosecution for an international crime". As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State", the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Qaddafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson's statement that "[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . .". According to the Congo, the French Court of Cassation adopted the same position in its *Qaddafi* judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State".

As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

*

* *

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

* *

56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that "[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose", or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity *rationae materiae* to be accorded in respect of prosecution for an international crime". As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State", the Court explicitly recognized the existence of such exceptions.

**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 11.

*Prosecutor v. Kolundzija*, "Decision Rejecting Prosecutor's Request for Leave to Amend Indictments", ICTY-95-8-I and ICTY-98-30-PT, Confirming Judge, 6 July 1999

e

**UNITED NATIONS**

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

Case Nos.: IT-95-8-I and IT-98-30-PT

Date: 6 July 1999

Original: English

**Before:** **Judge Lal Chand Vohrah**

**Registrar:** **Mrs. Dorothee de Sampayo Garrido-Nijgh**

**Decision:** **6 July 1999**

**THE PROSECUTOR**

**v.**

**DRAGAN KOLUND@IJA**

# DECISION REJECTING PROSECUTOR'S REQUEST FOR LEAVE TO AMEND INDICTMENTS

**Office of the Prosecutor:**
**Mr. Dirk Ryneveld**
**Mr. Kapila Waidyaratne**

**I, Lal Chand Vohrah**, Judge of the International Tribunal for the Former Yugoslavia ("the International Tribunal"), in Chambers,

**NOTING** the original indictment against, *inter alia*, the accused Dragan Kolund`ija and Zoran @igi} in the Keraterm camp case, Case No. IT-95-8-I ("the Keraterm Indictment") confirmed by me on 21 July 1995,

**NOTING** the original indictment against, *inter alia*, the accused Miroslav Kvo~ka, Mladen Radi}, Milojica Kos and Zoran @igi} in the Omarska camp case, Case No: IT-95-4-I ("the Omarska Indictment"), confirmed by Judge Karibi-Whyte on 13 February 1995,

**NOTING** the order of 9 November 1998, together with its corrigendum of 12 November 1998, in which (1) the Prosecutor was granted leave to amend the Omarska Indictment as it related to the accused Miroslav Kvo~ka, Mladen Radi}, Milojica Kos and Zoran @igi} and the Keraterm Indictment as it related to the accused Zoran @igi} by way of, *inter alia*, consolidating the charges against the four accused into one single indictment (Case No.: IT-98-30-I), and (2) this indictment was confirmed (the "IT-98-30 indictment"),

**NOTING** the Prosecutor's request for leave to amend the Keraterm Indictment and the IT-98-30 Indictment ("the Prosecutor's Request") "for the purpose of withdrawing Dragan Kolund`ija (Kulund`ija) from the Keraterm camp indictment and to join him as an accused to the indictment in the pending trial against Miroslav Kvo~ka, et al. [Mladen Radi}, Milojica Kos and Zoran @igi}]"[1] pursuant to Sub-rule 50(A)(ii) of the Rules of Procedure and Evidence ("the Rules"), filed on 17 June 1999,

**CONSIDERING** that the main function of the reviewing Judge pursuant to Rules 47 and 50 is to determine whether the Prosecutor has established a *prima facie* case against a suspect or an accused and that this function is performed in *ex parte* proceedings according to the well-settled practice of the International Tribunal,[2]

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[1] Prosecutor's Request for Leave to Amend Indictments IT-95-8-PT and IT-98-30-PT, p. 3.
[2] See for instance Order on the Prosecutor's Requests for the Assignment of a Confirming Judge, The Prosecutor v. Meakic and Others and Sikirica and Others (Case Nos.: IT-95-4-PT, IT-95-8-PT), Judge McDonald, 28 Aug. 1998, p. 3; and various orders pursuant to *ex parte* proceedings in the following cases: The Prosecutor v. Milan Kova~evi} (Case No: IT-97-24-PT); The Prosecutor v. Blagoje Simi} and Others (Case No.: IT-95-9-PT); The Prosecutor v. Goran Jelisi} and Ranko ^e{i} (Case No.: IT-95-10-PT); The Prosecutor v. Dragoljub Kunarac (Case No.: IT-96-23-PT); and The Prosecutor v. Tihomir Bla{ki} (Case No.: IT-95-14-T).

**CONSIDERING** that the Prosecutor's Request in substance constitutes a request for joinder of accused persons charged in separate indictments,

**CONSIDERING** that Rule 48 provides that "persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried" and that there is no specific provision in the Rules that sets out the procedure by which accused persons charged in separate indictments may be joined,

**CONSIDERING**, however, that the practice of the International Tribunal and the International Criminal Tribunal for Rwanda ("the ICTR") has been for the Prosecutor to request by way of motion before the Trial Chambers in *inter partes* proceedings for accused persons charged in separate indictments to be joined,[3]

**CONSIDERING** that the case against the accused Miroslav Kvo~ka, Mladen Radi}, Milojica Kos and Zoran @igi} (Case No.: IT-98-30-PT) has reached the stage where a pre-trial conference has been held and a pre-trial brief has been filed pursuant to Rule 73*bis*, and that the initial appearances of all four accused were held over a year ago,[4]

**FINDING**, therefore, that I, as the confirming Judge, am not competent to consider the Prosecutor's Request in *ex parte* proceedings pursuant to Sub-rule 50(A),

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[3] Decision on Motion for Joinder of Accused and Concurrent Presentation of Evidence, Prosecutor v. Kova~evi}, Kvo~ka, Radi}, Zigi} (Case No.: IT-97-24-PT, IT-95-4-PT, IT-95-8-PT) T. Ch. II, 14 May 1998; Decision on Appeal Against Oral Decision of Trial Chamber II of 28 September 1998, Joint and Separate Opinion of Judge McDonald and Judge Vohrah and Dissenting Opinion of Judge Shahabuddeen, Nsengiyumva v. The Prosecutor (Case No.: ICTR-96-12-A), A. Ch. 3 June 1999; Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, Joint Separate and Concurring Opinion of Judge Wang Tieya and Judge Rafael Nieto-Navia and Dissenting Opinion of Judge Shahabuddeen , Kanyabashi v. The Prosecutor (Case No.: ICTR-96-15-A), A. Ch. 3 June 1999. Furthermore, the Rules of Procedure and Evidence of the ICTR were recently amended by the adoption of Rule 48*bis*, which specifically provides that "[t]he Prosecutor may join confirmed indictments of persons accused of the same or different crimes committed in the course of the same transaction, for the purposes of a joint trial, with leave granted by a *Trial Chamber* pursuant to Rule 73. (Emphasis added.)

[4] The Prosecution filed its pre-trial brief on 9 April 1999. The Defence is due to file their pre-trial brief by 3 Sept. 1999 and on the same date the Prosecution is due to submit the list of the witnesses it intends to call during trial, see Scheduling Order, Prosecutor v. Miroslav Kvo~ka and Others (Case No.: IT-98-30-PT), T. Ch. III, 8 June 1999.

For the foregoing reasons **REJECT** the Prosecutor's Request.

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

Lal Chand Vohrah

Dated this sixth July 1999
At The Hague
The Netherlands

**[Seal of the Tribunal]**

**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 12.

*Prosecutor v. Milutinovic et al.*, "Decision on Application by Dragoljub Ojdanic for Disclosure of Ex Parte Submissions". ICTY-99-37-I (Confirming Judge), 8 November 2002

UNITED
NATIONS

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

Case: IT-99-37-I

Date: 8 November 2002

Original: English

**BEFORE A JUDGE OF THE TRIBUNAL**

**Before:** Judge David Hunt, Confirming Judge

**Registrar:** Mr Hans Holthuis

**Decision of:** 8 November 2002

**PROSECUTOR**

**v**

**Milan MILUTINOVIĆ, Nikola ŠAINOVIĆ & Dragoljub OJDANIĆ**

# DECISION ON APPLICATION BY DRAGOLJUB OJDANIĆ FOR DISCLOSURE OF *EX PARTE* SUBMISSIONS

**Counsel for the Prosecutor:**

Ms Carla del Ponte
Mr Geoffrey Nice

**Counsel for the Defence:**

Mr Tomislav Višnjić, Mr Vojislav Seležan & Mr Peter Robinson for Dragoljub Ojdanić

1. In May 1999, and pursuant to Rule 28(A) of the Rules of Procedure and Evidence ("Rules"), I was designated by the President of the Tribunal as a duty judge to determine an application by the Prosecutor to review an indictment brought against Slobodan Milošević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić and Vlajko Stojiljković.[1] My decision confirming the indictment was given on 24 May 1999.[2] In June 2001, as the case had not at that stage been assigned to a Trial Chamber, I determined an application by the Prosecutor for leave to amend that indictment and to confirm the indictment as amended.[3] My decision was given on 29 June 2001.[4] On that day, Slobodan Milošević was transferred into the custody of the Tribunal, and the President thereafter assigned the case to Trial Chamber III.[5]

2. Dragoljub Ojdanić ("applicant") was transferred into the custody of the Tribunal on 25 April 2002. He has now sought an order from me as the confirming judge "disclosing all *ex parte* submissions, written and oral, made by the Prosecutor in connection with confirmation of the indictment(s) in his case".[6] He requests that this material be made public.[7] It is true that only the prosecution was represented before me during the two confirmation hearings. This was necessarily the case, because the first hearing (in May 1999) was in advance of the commencement of the proceedings by the filing of an indictment, and the second hearing (in June 2001) was in advance of any accused being transferred into the custody of the Tribunal. In that sense only could those hearings be described as *ex parte* in nature. They were not *ex parte* in the usual sense that a party was *excluded* from the hearing.

3. The first application was, however, heard *in camera*, because the Prosecutor was seeking an order pursuant to Rule 53 that there be no public disclosure of the indictment, the accompanying material or the confirmation and orders made for a period of about seventy-two

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1 Trial Chamber III, to which this case is now assigned, has granted leave to the prosecution to amend the indictment, by deleting from it both the charges against Slobodan Milošević (as those charges are now part of a new indictment [IT-02-54] upon which he is presently standing trial) and the charges against Vlajko Stojiljković (who is now deceased): (Substituted) Decision on Motion to Amend Indictment, 5 Sept 2002, pp 2-3.

2 Decision on Review of Indictment and Application for Consequential Orders, 24 May 1999 ("First Decision").

3 This was pursuant to Rule 50(A)(ii).

4 Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, 29 June 2001 ("Second Decision").

5 Ordonnance du Président Relative à l'Attribution d'une Affaire à une Chambre de Première Instance, 29 June 2001, p 2.

6 General Ojdanić's Application for Disclosure of *Ex Parte* Submissions, 31 Oct 2002 ("Motion"), par 1.

7 *Ibid*, par 4.

hours. This was to enable steps to be taken to protect persons who were then within the territories of the former Federal Republic of Yugoslavia and of the Republic of Serbia – staff members of the Office of the Prosecutor, members of a United Nations fact-finding mission and staffs of other United Nations and Governmental agencies and of humanitarian agencies – against whom there was a serious risk of reprisals and intimidation if the indictment were to be disclosed immediately.[8] The second application was also heard *in camera*, as the Prosecutor was seeking an order that the supporting material which accompanied both indictments should not be made public until the arrest of all of the accused.

4. It is recognised by the Rules that a hearing may take place *in camera*.[9] A hearing *in camera* was originally one conducted in the judge's private room, which is often called the judge's Chambers (latin, *camera*), rather than in a courtroom. It now means no more than a hearing in the absence of the public, as provided in Rule 79 ("Closed Sessions"). It does not necessarily mean an *ex parte* hearing, and closed sessions are frequently conducted *inter partes* during the course of trials in order to protect confidential information from becoming public.

5. At the first hearing, an order was made by me that, with a stated exception, there was to be no disclosure of the indictment, the review and confirmation of the indictment, the arrest warrants or "the Prosecutor's application dated 22 May 1999" during the period ending at 12 noon (The Hague time) on Thursday, 27 May 1999, unless otherwise ordered, and that there was to be no disclosure of the supporting material forwarded by the Prosecutor with the indictment until the arrest of all of the accused.[10] The only orders made in relation to disclosure at the second hearing were that the last of those orders made previously (that the supporting material forwarded by the Prosecutor with the indictment was not to be disclosed until the arrest of all of the accused) was to be continued, and that it was to apply also to the additional supporting material forwarded in relation to the amended indictment.[11] The disclosure referred to in each of those orders meant *public* disclosure.[12] An accused who has appeared before the

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[8] First Decision, pars 30-33.
[9] See, for example, Rule 66(C).
[10] First Decision, p 12. The reference to "the Prosecutor's application dated 22 May 1999" would appear to a wrongly dated reference to the originating document, the "Presentation of an Indictment for Review and Application for Warrants of Arrest and for Related Orders", which is dated 23 May 1999. That was the first document filed.
[11] Second Decision, par 9(iii).
[12] The order at the second hearing expressly refers to all orders as being concerned with "public disclosure".

Tribunal is entitled to have all of the supporting material disclosed to him within thirty days of that appearance.[13]

6. As is usual, there was no transcript taken of either of the *in camera* hearings, both of which took place in my private room in the Tribunal building. A document entitled "Minute of Review of the Indictment", dated and filed 24 May 1999, contains a note of submissions made by the Prosecutor on 24 May 1999. It has been endorsed "Under Seal" – no doubt in order to protect it from disclosure during that seventy-two hour period of non-disclosure to the public. To that document I will return. No such Minute was prepared in relation to the second hearing. The only record I have in relation to the submissions made by counsel appearing for the Prosecutor on 29 June 2001 related to the agreement on her behalf, as a term of the confirmation, to include, in the description of the individual responsibility of each of the accused, a passage along these lines:

> By using the word "committed" in this indictment, the Prosecutor does not intend to suggest that any of the accused physically perpetrated any of the crimes charged, personally.

The contemporaneous (public) record appears in another decision, to which the agreement was relevant.[14] The phrase appeared in the amended indictment filed thereafter.[15]

7. The applicant relies upon a statement made by Mr Nice, Principal Trial Counsel for the prosecution at the trial, that:

> When confirmation of the original indictment, the amended indictment and the second amended indictment was sought in May 1999, June 2001 and October 2001, respectively, there were no "explanatory" filings (annotated indictment, memorandum or other) made to the confirming Judge(s). However, certain documents drafted with the goal of assisting the Confirming Judge(s) during the confirmation process were filed *ex parte*. These documents were intended to be guides for the Judge(s) at the confirmation stage, and were not intended to be part of the supporting material for the Indictment(s).[16]

A document was provided to me by the Prosecutor at the first hearing, in May 1999, which identified the particular statements upon which the Prosecutor relied for specific allegations in

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[13] Rule 66(A)(i).

[14] *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision Varying Decision on Form of Further Amended Indictment, 2 July 2001, par 2; Leave to appeal refused: Decision on Application for Leave to Appeal Against the Decision of 2 July 2001, 31 July 2001.

[15] Amended Indictment, 29 June 2001, par 16.

[16] Letter to counsel for the applicant, 11 July 2002, Annex C to General Ojdanić's Motion to Require Full Compliance with Rule 66(A)(i) and for Unsealing of *Ex Parte* Materials, 23 July 2002 ("Motion to Trial Chamber"), p 3.

the indictment. A copy of the amended indictment was provided to me by counsel appearing for the Prosecutor at the second hearing, in June 2001, which identified in red the amendments which had been made to the original indictment, and which also identified by a series of numbers the particular statements upon which the Prosecutor relied for specific allegations in the additional material in the amended indictment.[17] This document was filed on a "confidential" basis, which means only that it may not be disclosed to the public without an order. On each occasion, there was an originating process filed: the "Presentation of an Indictment for Review and Application for Warrants of Arrest and for Related Orders" dated 23 May 1999, and the "Motion for Leave to File an Amended Indictment and Confirmation of the Amended Indictment" dated 26 June 2001.[18]

8. The applicant argues that, as the circumstances in which those hearings were conducted *in camera* no longer exist, disclosure of the submissions made by or on behalf of the Prosecutor during those hearings "will promote transparency in the work of the Tribunal",[19] and "will promote accountability of the Prosecutor and act as a deterrent to misleading or irresponsible statements to the confirming judge".[20] I do not believe that I am being unduly cynical when I express doubt that these are the true reasons for this application. If the true (but unstated) reason is to use the information sought in order to challenge the validity of the proceedings,[21] the applicant should note that both indictments which I confirmed have now been replaced by the Second Amended Indictment. In any event, I did not regard myself as being in any way limited by the documents provided to me by the Prosecutor for my assistance. The confirmation in each case was based solely upon the supporting material supplied.

9. The applicant has also referred, darkly, to the particular need for transparency in the present case because "the timing of the indictment during NATO's bombardment of the Federal

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[17] It is perhaps unnecessary for me to determine whether this was indeed, contrary to Mr Nice's assertion, an "annotated" indictment.

[18] The application for the confirmation of the second amended indictment, which took place in October 2001, was determined by Trial Chamber III. It was not determined by me, and any application in relation to the submissions made by the prosecution in that confirmation hearing should be made to Trial Chamber III.

[19] Motion, par 10.

[20] *Ibid*, par 11.

[21] Compare the lack of success in such endeavours in *Prosecutor v Brđanin*, IT-99-36-PT, Decision on Motion to Dismiss Indictment, 5 Oct 1999; Interlocutory appeal dismissed as improperly filed: Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed Under Rule 72, 16 Nov 1999; *Prosecutor v Brđanin*, IT-99-36-PT, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, 8 Dec 1999; Leave to appeal refused: Decision on Application for Leave to Appeal, 23 Dec 1999.

Republic of Yugoslavia raised questions about the politicalisation [*sic*] of the Tribunal".[22] I draw his attention to what I said on this issue in the First Decision.[23] What I said was intended to make it clear that the timing of the presentation of indictments is a matter for the Prosecutor and not the Tribunal, and that the Tribunal was *not* acting on a political basis. I do not propose to debate the veiled, but unfounded, suggestion to the contrary now made by the applicant.

10. The Prosecutor's first response is that, as the confirming judge, I am *functus officio* as the Trial Chamber is "seized of all matters in the case".[24] Secondly, the Prosecutor submits that the Motion before me is an abuse of process, in that the applicant "seeks a review of the Trial Chamber's Decision by remitting the matter to the Confirming Judge".[25] Thirdly, the Prosecutor says that there is no basis under the Tribunal's Statute or Rules for the disclosure to the accused of any material before the confirming judge other than the supporting material which accompanied the indictment (and which is dealt with by Rule 66(A)(i)).[26]

11. The applicant recently sought from Trial Chamber III orders to the Prosecutor:

> [...] to fully comply with Rule 66(A)(i) by disclosing to General Ojdanić all supporting materials which accompanied the indictment(s) including (A) pleadings and other documents submitted by the Prosecutor which accompanied the indictment(s); and (B) materials pertaining to each co-accused [...] [and] for disclosure of *ex parte* submissions made in connection with the confirmation of the indictment(s) and regulating future *ex parte* submissions.[27]

The Trial Chamber ordered the Prosecutor to disclose to the applicant all of the supporting material which accompanied the indictment when confirmation was sought, including material

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[22] Motion, par 10.

[23] Paragraph 35 reads: "No submission has been made that the impact of such disclosure on the current attempts to resolve the armed conflict in the Kosovo Province is a relevant matter to be considered in determining whether it is in the interests of justice to order non-disclosure. The safety of those personnel involved in the attempts to resolve that armed conflict is a legitimate consideration in relation to the interests of justice, but the possible political and diplomatic consequences of the indictment are not the same thing. There is a clear and substantial distinction to be drawn between what may be relevant to the well known and accepted discretion of prosecuting authorities as to whether an indictment should be presented and what may be relevant to this Tribunal's discretion as to whether an order should be made for the non-disclosure of that indictment once it has been presented and confirmed. In view of the opinion which I have already expressed, that a non-disclosure order for a short period is justified to enable security measures to be taken in relation to those at risk of intimidation or reprisals, it is unnecessary for me to determine whether the impact of the public disclosure of the indictment upon the peace process itself is also a consideration which is relevant to the exercise of my discretion to make a non-disclosure order pursuant to Rule 53. It is sufficient for me to say that such impact is not a matter which I have considered in determining the application made for non-disclosure in this case."

[24] Prosecution's Response to "General Ojdanić's Application for Disclosure of *Ex Parte* Submissions", 6 Nov 2002 ("Response"), pars 5-8.

[25] *Ibid*, par 6.

[26] *Ibid*, par 9.

[27] Motion to Trial Chamber, par 31.

relating to the co-accused, or to apply to the Trial Chamber for leave not to disclose certain material.[28] It refused all the other relief sought. In relation to the material before me when confirming the first and second indictments other than the supporting material, however, the Trial Chamber did not refuse relief on the merits. It ruled that, as the proceedings for the confirmation of an indictment are by their very nature *ex parte*, it was within the sole control of the confirming judge to determine what material should be made public pursuant to Rule 53.[29]

12. In its context of ordering the Prosecutor to comply with Rule 66, that particular ruling concerning the material remaining within the sole control of the confirming judge must be interpreted as being limited to any material used in the review process other than the supporting material. Clearly, once the case has been assigned to a Trial Chamber, further orders in relation to the supporting material forwarded with the indictment for review fall within the jurisdiction of that Trial Chamber,[30] and the confirming judge has no further responsibility in relation to the disclosure of that material. The applicant has not sought to have me deal with the supporting material in any way. The Prosecutor's submission that the applicant is seeking to have me review the Trial Chamber's decision is therefore misconceived. I reject the Prosecutor's second submission.

13. It is anything but clear just how far the confirming judge retains control of any material used in the review process other than the supporting material once the case has been assigned to a Trial Chamber, after which time the confirming judge has no further contact with the case. Prior to the amendment of Rule 50 in July 2000 to permit the Trial Chamber itself to grant leave to amend an indictment which was already before it, the confirming judge did retain some contact with the case up until the presentation of evidence in the trial commenced. That is no longer the situation. In my respectful opinion, the Trial Chamber to which the case has been assigned does have power to deal with this issue itself, just as it clearly has power at that stage to vary any orders made by the confirming judge (other than the confirming order itself).[31] This must be so, as the confirming judge may no longer be a judge of the Tribunal by the time the

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[28] Decision on Defence Motion to Require Full Compliance with Rule 66(A)(i) and for Unsealing of *Ex Parte* Materials, 18 Oct 2002 ("Trial Chamber Decision"), p 4.

[29] *Ibid*, p 4. Rule 53(A) provides that a judge or a Trial Chamber may, in exceptional circumstances and in the interests of justice, order the non-disclosure to the public of any documents or information until further notice. Rule 53(B) permits the judge confirming the indictment to order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.

[30] Rule 66(A).

[31] *Prosecutor v Hadžihasanović et al*, IT-01-47-PT, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 Oct 2001.

accused is transferred into the custody of the Tribunal and the case is assigned to a Trial Chamber.

14. I am nevertheless satisfied that I also retain power to deal with matters which were before me where they do not deal with Rule 66 material. And, whether for reasons of deference or comity or anything else, the fact is that the Trial Chamber has invited the applicant to apply to me as the confirming judge to deal with the issue. It would be ludicrous to accede to the Prosecutor's submission that I have no power to deal with it, thus forcing the applicant to appeal against the Trial Chamber's decision that only I have the power to do so. The Rules of Procedure and Evidence were intended to be the servants and not the masters of the Tribunal's procedures,[32] and an acceptance of the Prosecutor's submission would produce such a bizarre situation as to destroy public confidence in the administration of justice. Accordingly, I reject the Prosecutor's first submission.

15. The Prosecutor claims that her third submission – namely, that there is no basis under the Tribunal's Statute or Rules for the disclosure to the accused of any material before the confirming judge other than the supporting material which accompanied the indictment – has already been upheld by the Trial Chamber.[33] The issue here, of course, is *not* whether there is a specific provision in either the Statute or the Rules which permits the disclosure of the material before me as the confirming judge other than the supporting material which accompanied the indictment. The Tribunal's powers are not limited to those which are specifically provided in the Statute and the Rules. The Tribunal also has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done.[34] In any event, the Prosecutor's claim that her submission has already been upheld by the Trial Chamber is not supported by a proper reading of the Trial Chamber's Decision.

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[32] *Kendall v Hamilton* (1879) 4 App Cas 504 at 525, 530-531. In *The Matter of an Arbitration Between Coles and Ravenshear* [1907] 1 KB 1, Sir Richard Henn Collins, the Master of the Rolls, said in the Court of Appeal (at 4): "Although I agree that a Court cannot conduct its business without a code of procedure, I think that 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."

[33] Response, par 9.

[34] *Prosecutor v Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, par 13, following *Prosecutor v Blaškić*, IT-95-14-AR108*bis*, Judgment on Request of Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997 ("*Blaškić Subpoena Decision*), footnote 27 (par 25), and *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999 ("*Tadić* Conviction Appeal Judgment"), par 322.

16. The application for disclosure of the submissions made by the Prosecutor before the confirming judge was put upon two bases before the Trial Chamber: first, that such submissions constituted part of the supporting material which accompanied the indictment in the confirmation process and thus fell within Rule 66(A)(i);[35] and, secondly, that the applicant was entitled to them as part of his right to a fair and public hearing under Article 21 of the Tribunal's Statute.[36] The Trial Chamber rejected both arguments,[37] in my respectful opinion correctly so. The Trial Chamber did, however, expressly state that the confirming judge retained control of the confirmation process,[38] thereby inviting the applicant to apply to me as the confirming judge for the relief sought. It is against that background that other statements made by the Trial Chamber in its decision must be interpreted.

17. There appear to be two relevant passages in the Trial Chamber's Decision. The first is in these terms:[39]

> **CONSIDERING** therefore that there is no obligation upon the Prosecution to disclosure [*sic*] material other than that 'upon which the charges are based', which material has been identified by the prosecution and provided to the accused [...].

That statement is clearly directed only to the obligations of disclosure under Rule 66(A). The second passage is in these terms:[40]

> **CONSIDERING** that, contrary to the argument advanced by the Defence, Article 21, paragraph 2, of the Statute does not grant the accused any right to disclosure, and that there is no right of access under the Statute or the Rules to material that is not supporting material [...].

Insofar as that statement is limited to the absence of any specific provision in either the Statute or the Rules giving such a right of disclosure, it is literally correct. But the Prosecutor seeks to find in it support for her submission that the applicant is not entitled to relief because there is no such specific provision in the Statute or the Rules permitting such access. That is not what the Trial Chamber was saying. The Trial Chamber was concerned only with the arguments which the applicant had placed before it. It was not being asked to order access to material pursuant to a power which the Tribunal possesses as part of its inherent jurisdiction, and that statement should not be interpreted as going beyond the issues which the Trial Chamber had to determine. If it

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[35] Motion to the Trial Chamber, pars 6, 10.
[36] *Ibid*, par 19.
[37] Trial Chamber Decision, pp 3, 4.
[38] *Ibid*, p 4.
[39] Trial Chamber Decision, p 3.
[40] *Ibid*, p 4.

were to be taken literally, as the Prosecutor seems to be submitting, the statement would be clearly wrong.

18. Trial Chambers and the Appeals Chamber have for some years now regularly ordered access to be given to accused persons to material in the possession of the prosecution or confidential material tendered in other cases where a legitimate forensic purpose has been demonstrated for such access. Although such applications involve an application pursuant to Rule 75(D) for the variation of protective measures ordered in relation to confidential material, the access is granted despite the absence of any specific provision in either the Statute or the Rules which permit it. In a recent decision, the Appeals Chamber said:[41]

> Access to confidential material may be granted whenever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case. A party is always entitled to seek material from *any* source to assist in the preparation of his case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown.

I do not interpret the second quoted statement of the Trial Chamber as denying access by an accused to material beyond that referred to in Rule 66(A). If I am wrong in my interpretation of that statement, then I would, with the greatest of respect to the Trial Chamber, entirely disagree with it.

19. Before considering whether the Prosecutor's third submission should nevertheless be upheld even though the Trial Chamber has not supported it, it is necessary to point out that, other than the Minute still under seal, there is no order presently in effect which prevents the disclosure to the applicant of anything which happened during either of the *in camera* hearings before me, although there may be references in what happened to the source of Rule 70 material (which cannot be subject to disclosure unless the provider agrees). What the Prosecutor is saying, therefore, is that an accused person who, as of necessity, is not present at the time the indictment against him is being confirmed, but who has not been *excluded* from being present (as in the usual *ex parte* situation), *cannot* be given access to the material presented during the confirmation process – in relation to which no order has been made that it is *not* to be disclosed to him – unless it falls within the terms of Rule 66(A)(i). Such a proposition has only to be stated to demonstrate its illogicality.

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[41] *Prosecutor v Blaškić*, IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the Prosecutor v Blaškić, 16 May 2002, par 14.

20. Had the confirmation proceedings taken place at a time when the applicant was available to attend the hearing (for example, if he had been in custody in relation to another indictment), it need not, in my view, have been necessary for those proceedings to have been conducted *ex parte*, although it would still be appropriate for them to be conducted *in camera* where an order is sought for the non-disclosure to the public of the supporting material. There is nothing inherent in the characteristics of a confirmation hearing which requires the accused to be actively *excluded* from it. That is recognised by the provisions of Rule 50(A), prior to its amendment in July 2000, which expressly gave the accused the opportunity to be heard during the confirmation of an indictment which had been amended after the presentation of evidence had commenced.[42] The Prosecutor's third submission is accordingly rejected.

21. The issue then arises as to whether the Prosecutor would have been entitled to a order expressly *excluding* the applicant from the confirmation hearings if he had been available to attend at that time. There are many occasions where *ex parte* applications (in the sense of a hearing in which a party has been *excluded* from the hearing) *are* appropriate, but they are warranted only where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.[43]

22. Such applications are to some extent justified by Article 20.1 of the Tribunal's Statute, which requires that a trial is to be fair and to be conducted with due regard for the protection of victims and witnesses.[44] Sight should not, however, be lost of the accompanying requirement that the trial also be conducted with full respect for the rights of the accused. The Tribunal's

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[42] Prior to that amendment, and once the presentation of evidence had commenced, Rule 50(A) permitted the Prosecutor to amend the indictment only with the leave of the Trial Chamber and after having heard the parties. If a confirmation was necessary, this was to be performed by the Trial Chamber, and this was done in the presence of the accused. Prior to the amendment to Rule 50(A) in November 1999, a further confirmation by the Trial Chamber was always required. The present Rule 50(A) provides that an indictment amended after the assignment of the case to a Trial Chamber need no longer be confirmed – which is a recognition that an application to amend an indictment by pleading additional charges or material facts involves the same process as a confirmation.

[43] *Prosecutor v Simić et al*, IT-95-9-PT, Decision on (1) Application by Stevan Todorović to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 Feb 2000 ("*Simić* Case"), par 39; *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 Oct 2000 ("*Brđanin & Talić* Case") par 11.

[44] See also Article 22 ("Protection of victims and witnesses").

Rules refer expressly or by necessary implication to various circumstances in which *ex parte* proceedings are appropriate. Rule 47 requires the prosecution to submit an indictment to a confirming judge for review before an arrest warrant may be issued. As I have already said, this is ordinarily an *ex parte* application as a matter of necessity. Rule 50 requires the prosecution to return to the confirming judge in order to obtain leave to amend the indictment whenever leave to amend is sought (and if further confirmation is required) at any time before the case is assigned to a Trial Chamber. This is also ordinarily an *ex parte* procedure, for the same reason.[45] Rule 54*bis* enshrines the procedure first discussed in the *Blaškić Subpoena Decision*[46] for hearing a State *in camera* and *ex parte* to enable submissions to be made in relation to national security interests concerning the issue of a subpoena. Rule 66(C) permits the prosecution to provide the Trial Chamber (and only the Trial Chamber) with information which should otherwise be disclosed to the defence but which is sought to be kept confidential. Rule 69 permits the Trial Chamber to consult with the Tribunal's Victims and Witnesses Section before determining the nature of the protective measures to be provided for a witness. This is clearly intended to be on an *ex parte* basis. As a matter of practice, and in accordance with common sense, applications by either party for protective orders are determined on the basis of some material provided to the Trial Chamber *ex parte* where the persons to be protected would otherwise be identified.[47] Rule 77 permits any party to bring to the notice of a Trial Chamber the conduct of a person which may be in contempt of the Tribunal, with a view to an investigation of that conduct and/or prosecution. Such a procedure recognises that the notification to the Trial Chamber will ordinarily be *ex parte*. Rule 108*bis* has been amended to remove the previous entitlement of the party in the proceedings who was not a party to an application pursuant to Rule 54*bis* to be heard in a State Request for Review of the decision made in that application.

23. But those provisions of the Rules do not exhaust the circumstances in which it may be appropriate to communicate with a judge or a Chamber *ex parte,* or for the judge or the Chamber to deal with a matter *ex parte*. It is neither possible nor appropriate to define the circumstances

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[45] *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 20 May 1999, par 11; *Prosecutor v Talić*, Case IT-99-36-PT, Decision on Motion for Release, 10 Dec 1999, par 9.

[46] *Prosecutor v Blaškić*, Case IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997, at par 68.

[47] The respondent to an application for protective measures is nevertheless entitled to have the arguments advanced to justify the protective measures sought set out in such a way that the basis for the application is disclosed as far as possible without revealing the identity of the particular witness for whom the protection is sought: *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 Oct 2000, par 14.

in which such motions are appropriate by any limiting definition. The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in the circumstances already stated: where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.[48]

24. The fact that applications had been made for the indictments to be confirmed has already been made public, in the Decisions which I gave and which were made public at the time. The Prosecutor has not sought to argue that disclosure *to the accused* of the information conveyed during the confirmation process would be prejudicial to her or to any person – the sources of Rule 70 material of course excepted. Whatever the true reason may be for this application, nothing which has been put forward by the Prosecutor persuades me that it would be inappropriate to permit the disclosure *to the applicant* of the material which I have described, other than references to Rule 70 material which identify its source. Indeed, the document accompanying the original indictment, entitled "Presentation of an Indictment for Review and Application for Warrants of Arrest and for Related Orders" and dated 23 May 1999, is available on the ICTY Intranet, so that it is already available to the applicant. The other material should similarly be made available to the applicant and to his co-accused who has appeared before the Tribunal (Nikola Šainović).

25. That does not mean that the material is to be made public. Because the material presented to me identifies the supporting material which accompanied the indictments and which remains the subject of orders that it not be made public until the arrest of all the accused, and because there is one accused who has not yet appeared before the Tribunal (Milan Milutinović), it would not be appropriate for that material to be made public. It will remain confidential, in that disclosure will be limited to the parties. As the purpose for which the Minute prepared in relation to the first hearing was endorsed "Under Seal" no longer applies, that document is to be unsealed, but disclosure of that document, too, will be limited to the parties and thus remain confidential, for the same reason.

[48] See, generally, *Simić* Case, pars 38-43; *Brđanin & Talić* Case, pars 8-11.

**Disposition**

26. The following orders are made:

(1) The Registrar is directed to disclose to both accused who have appeared before the Tribunal (Nikola Šainović and Dragoljub Ojdanić), on a confidential basis, all material placed before me by the Prosecutor during the confirmation hearings in relation to the original indictment (in May 1999) and the amended indictment (in June 2001), other than the supporting material accompanying the indictments.

(2) Such material consists of the documents which I have described in par 7 of this Decision.

(3) If any of this material has not been filed, the Prosecutor is directed to file that material on a confidential basis so that these orders may be complied with.

(4) The Registrar is directed also to unseal the Minute of Review of Indictment, filed on 24 May 1999 "Under Seal", and to disclose it to both accused who have appeared before the Tribunal, on a confidential basis.

(5) Prior to the Registrar executing those directions, the Prosecutor is entitled to redact from such material anything which identifies the source of Rule 70 material.

(6) The Prosecutor must carry out that redaction within seven days of this Decision, and the Registrar is to execute those directions within seven days thereafter.

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

Dated this 8th day of November 2002
At The Hague
The Netherlands

Judge David Hunt

**[Seal of the Tribunal]**

**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 13.

*The Prosecutor v. Radovan Karadzic and Ratko Mladic*, "Decision Rejecting The Request Submitted By Mr Medvene and Mr Hanley III Defence Counsels for Radovan Karadzic," ICTY-95-5-T, and ICTY-95-18-T, Trial Chamber, 5 July 1996

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**IN THE TRIAL CHAMBER**

**Before:**
**Judge Claude Jorda, Presiding**
**Judge Elizabeth Odio Benito**
**Judge Fouad Riad**

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

**Order of:**
**5 JULY 1996**

**THE PROSECUTOR**

**v.**

**RADOVAN KARADZIC**
**RATKO MLADIC**

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# DECISION REJECTING THE REQUEST SUBMITTED BY MR. MEDVENE AND MR. HANLEY III DEFENCE COUNSELS FOR RADOVAN KARADZIC

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**The Office of the Prosecutor:**

**Mr. Eric Ostberg**
**Mr. Mark Harmon**

**TRIAL CHAMBER I** of the International Criminal Tribunal for the former Yugoslavia,

**PURSUANT** to Article 21 of the Statute and Rule 61 of the Rules of Procedure and Evidence (Rules),

**CONSIDERING** the application filed with the Registry by Mr. Medvene and Mr. Hanley III, appointed on 1 July by the accused Radovan Karadzic as "President of the Republika Srpska" to represent him before the International Criminal Tribunal,

**HAVING HEARD** the comments of Mr. Medvene and Mr. Hanley III at the hearing today,

**HAVING HEARD** the Prosecutor at the hearing,

**CONSIDERING** that Mr. Medvene and Mr. Hanley III are requesting that they be present in the courtroom and that they have access to all the documents submitted to the Judges of this Trial Chamber by the Prosecutor as part of these proceedings,

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**CONSIDERING** that the access to the relevant documents and case-files which the Prosecutor submits during the Rule 61 proceedings could only be admitted as part of a trial following an initial appearance of the accused in person, pursuant to Rule 66 of the Rules; that the accused will at that time enjoy the other rights guaranteed to him by the provisions of Article 21 of the Statute;

**CONSIDERING** that the Rule 61 proceedings could not be interpreted as a trial;

**CONSIDERING** that these proceedings fully guarantee the rights of the accused; that the accused has, in fact, been notified of the indictments prior to these proceedings and that, in addition, he has the right to appear, accompanied by his counsel, before the Tribunal; that if such is the case, the nature of the proceedings change and become *inter partes*, accompanied with all the guarantees inherent in an equitable trial;

**CONSIDERING**, however, that the request, as supplemented at the hearing by Mr. Medvene and Mr. Hanley, to attend the proceedings pursuant to Rule 61 in the physical absence of the accused may therefore be interpreted in this case as verifying the conditions under which the indictment was served on their client since the conditions cannot in and of themselves lead to the issuance of an international warrant of arrest as provided by this Rule;

**CONSIDERING** that the confirming Judges in their public orders of 18 June 1996 considered that all the reasonable steps in respect of information for the accused Radovan Karadzic have been taken in accordance with Rule 61 (A) of the Rules as demonstrated by the Prosecutor;

**CONSIDERING**, furthermore, that on 27 June, the Trial Chamber gave leave for the two indictments against Radovan Karadzic to be read in public in the presence of Mr. Igor Pantelic who had been appointed by the accused;

**THAT** the presence of Mr. Igor Pantelic on 27 June more than sufficiently demonstrates that Radovan Karadzic had been properly informed of the charges against him;

**THAT** it therefore appears that the fact that Radovan Karadzic had received all the information could not be challenged in any manner whatsoever;

**CONSIDERING**, however, that the Trial Chamber, in its wish to permit the designated Counsels to inform their client of the conduct of the public hearings, specifically as regards the conditions under which the indictments and warrants and related warrants of arrest were served, considers that they must be granted the status of observer;

**FOR THE FOREGOING REASONS**

**TAKES NOTE** of the application filed by Mr. Medvene and Mr. Hanley III on behalf of Radovan Karadzic;

**REJECTS** the request of Mr. Medvene and Mr. Hanley III to be present continuously in the courtroom during the Rule 61 proceedings and to have free access to the documents and case-files which the Prosecutor submits;

**STATES** that Mr. Medvene and Mr. Hanley II shall then be escorted to the public gallery where a seat will be reserved for them as observers throughout the proceedings.

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

_____
Claude Jorda
Presiding Judge of Trial Chamber I

Dated this fifth day of July 1996
At The Hague
The Netherlands

**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 14.

*Prosecutor v. Milutinovic et al.* (Indictment) ICTY-99-37

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA**

**THE PROSECUTOR OF THE TRIBUNAL**

**AGAINST**

**SLOBODAN MILOSEVIC**
**MILAN MILUTINOVIC**
**NIKOLA SAINOVIC**
**DRAGOLJUB OJDANIC**
**VLAJKO STOJILJKOVIC**

# INDICTMENT

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, pursuant to her authority under Article 18 of the Statute of the Tribunal, charges:

**SLOBODAN MILOSEVIC**
**MILAN MILUTINOVIC**
**NIKOLA SAINOVIC**
**DRAGOLJUB OJDANIC**
**VLAJKO STOJILJKOVIC**

with **CRIMES AGAINST HUMANITY** and **VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR** as set forth below:

## BACKGROUND

1. The Autonomous Province of Kosovo and Metohija is located in the southern part of the Republic of Serbia, a constituent republic of the Federal Republic of Yugoslavia (hereinafter FRY). The territory now comprising the FRY was part of the former Socialist Federal Republic of Yugoslavia (hereinafter SFRY). The Autonomous Province of Kosovo and Metohija is bordered on the north and north-west by the Republic of Montenegro, another constituent republic of the FRY. On the south-west, the Autonomous Province of Kosovo and Metohija is bordered by the Republic of Albania, and to the south, by the Former Yugoslav Republic of Macedonia. The capital of the Autonomous Province of Kosovo and Metohija is Pristina.

2. In 1990 the Socialist Republic of Serbia promulgated a new Constitution which, among other things, changed the names of the republic and the autonomous provinces. The name of the Socialist Republic of Serbia was changed to the Republic of Serbia (both hereinafter Serbia); the name of the Socialist Autonomous Province of Kosovo was changed to the Autonomous Province of Kosovo and Metohija (both hereinafter Kosovo); and the name of the Socialist Autonomous

57. Under the FRY Act on the Armed Forces of Yugoslavia, as Supreme Commander of the VJ, **Slobodan MILOSEVIC** also exercises command authority over republican and federal police units subordinated to the VJ during a state of imminent threat of war or a state of war. A declaration of imminent threat of war was proclaimed on 23 March 1999, and a state of war on 24 March 1999.

58. In addition to his *de jure* powers, **Slobodan MILOSEVIC** exercises extensive *de facto* control over numerous institutions essential to, or involved in, the conduct of the offences alleged herein. **Slobodan MILOSEVIC** exercises extensive *de facto* control over federal institutions nominally under the competence of the Assembly or the Government of the FRY. **Slobodan MILOSEVIC** also exercises *de facto* control over functions and institutions nominally under the competence of Serbia and its autonomous provinces, including the Serbian police force. **Slobodan MILOSEVIC** further exercises *de facto* control over numerous aspects of the FRY's political and economic life, particularly the media. Between 1986 and the early 1990s, **Slobodan MILOSEVIC** progressively acquired *de facto* control over these federal, republican, provincial and other institutions. He continues to exercise this *de facto* control to this day.

59. **Slobodan MILOSEVIC's** *de facto* control over Serbian, SFRY, FRY and other state organs has stemmed, in part, from his leadership of the two principal political parties that have ruled in Serbia since 1986, and in the FRY since 1992. From 1986 until 1990, he was Chairman of the Presidium of the Central Committee of the League of Communists in Serbia, then the ruling party in Serbia. In 1990, he was elected President of the Socialist Party of Serbia, the successor party to the League of Communists of Serbia and the Socialist Alliance of the Working People of Serbia. The SPS has been the principal ruling party in Serbia and the FRY ever since. Throughout the period of his Presidency of Serbia, from 1990 to 1997, and as the President of the FRY, from 1997 to the present, **Slobodan MILOSEVIC** has also been the leader of the SPS.

60. Beginning no later than October 1988, **Slobodan MILOSEVIC** has exercised *de facto* control over the ruling and governing institutions of Serbia, including its police force. Beginning no later than October 1988, he has exercised *de facto* control over Serbia's two autonomous provinces -- Kosovo and Vojvodina -- and their representation in federal organs of the SFRY and the FRY. From no later than October 1988 until mid-1998, **Slobodan MILOSEVIC** also exercised *de facto* control over the ruling and governing institutions of the Montenegro, including its representation in all federal organs of the SFRY and the FRY.

61. In significant international negotiations, meetings and conferences since 1989, **Slobodan MILOSEVIC** has been the primary interlocutor with whom the international community has negotiated. He has negotiated international agreements that have subsequently been implemented within Serbia, the SFRY, the FRY, and elsewhere on the territory of the former SFRY. Among the conferences and international negotiations at which **Slobodan MILOSEVIC** has been the primary representative of the SFRY and FRY are: The Hague Conference in 1991; the Paris negotiations of March 1993; the International Conference on the Former Yugoslavia in January 1993; the Vance-Owen peace plan negotiations between January and May 1993; the Geneva peace talks in the summer of 1993; the Contact Group meeting in June 1994; the negotiations for a cease fire in Bosnia and Herzegovina, 9-14 September 1995; the negotiations to end the NATO bombing in Bosnia and Herzegovina, 14-20 September 1995; and the Dayton peace negotiations in November 1995.

62. As the President of the FRY, the Supreme Commander of the VJ, and the President of the Supreme Defence Council, and pursuant to his *de facto* authority, **Slobodan MILOSEVIC** is responsible for the actions of his subordinates within the VJ and any police forces, both federal and republican, who have committed the crimes alleged in this indictment since January 1999 in the province of Kosovo.

63. **Milan MILUTINOVIC** was elected President of Serbia on 21 December 1997, and remains President as of the date of this indictment. As President of Serbia, **Milan MILUTINOVIC** is the

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head of State. He represents Serbia and conducts its relations with foreign states and international organisations. He organises preparations for the defence of Serbia.

64. As President of Serbia, **Milan MILUTINOVIC** is a member of the Supreme Defence Council of the FRY and participates in decisions regarding the use of the VJ.

65. As President of Serbia, **Milan MILUTINOVIC**, in conjunction with the Assembly, has the authority to request reports both from the Government of Serbia, concerning matters under its jurisdiction, and from the Ministry of the Internal Affairs, concerning its activities and the security situation in Serbia. As President of Serbia, **Milan MILUTINOVIC** has the authority to dissolve the Assembly, and with it the Government, "subject to the proposal of the Government on justified grounds," although this power obtains only in peacetime.

66. During a declared state of war or state of imminent threat of war, **Milan MILUTINOVIC**, as President of Serbia, may enact measures normally under the competence of the Assembly, including the passage of laws; these measures may include the reorganisation of the Government and its ministries, as well as the restriction of certain rights and freedoms.

67. In addition to his *de jure* powers, **Milan MILUTINOVIC** exercises extensive *de facto* influence or control over numerous institutions essential to, or involved in, the conduct of the crimes alleged herein. **Milan MILUTINOVIC** exercises *de facto* influence or control over functions and institutions nominally under the competence of the Government and Assembly of Serbia and its autonomous provinces, including but not limited to the Serbian police force.

68. In significant international negotiations, meetings and conferences since 1995, **Milan MILUTINOVIC** has been a principal interlocutor with whom the international community has negotiated. Among the conferences and international negotiations at which **Milan MILUTINOVIC** has been a primary representative of the FRY are: preliminary negotiations for a cease fire in Bosnia and Herzegovina, 15-21 August 1995; the Geneva meetings regarding the Bosnian cease fire, 7 September 1995; further negotiations for a cease fire in Bosnia and Herzegovina, 9-14 September 1995; the negotiations to end the NATO bombing in Bosnia and Herzegovina, 14-20 September 1995; the meeting of Balkan foreign ministers in New York, 26 September 1995; and the Dayton peace negotiations in November 1995. **Milan MILUTINOVIC** was also present at the negotiations at Rambouillet in February 1999.

69. As the President of Serbia, and a member of the Supreme Defence Council, and pursuant to his *de facto* authority, **Milan MILUTINOVIC** is responsible for the actions of any of his subordinates within the VJ and within any police forces who have committed the crimes alleged in this indictment since January 1999 within the province of Kosovo.

70. **Colonel General Dragoljub OJDANIC** was appointed Chief of the General Staff of the VJ on 26 November 1998. He remains in that position as of the date of this indictment. As Chief of the General Staff of the VJ, **Colonel General Dragoljub OJDANIC** commands, orders, instructs, regulates and otherwise directs the VJ, pursuant to acts issued by the President of the FRY and as required to command the VJ.

71. As Chief of the General Staff of the VJ, **Colonel General Dragoljub OJDANIC** determines the organisation, plan of development and formation of commands, units and institutions of the VJ, in conformity with the nature and needs of the VJ and pursuant to acts rendered by the President of the FRY.

72. In his position of authority, **Colonel General Dragoljub OJDANIC** also determines the plan for recruiting and filling vacancies within the VJ and the distribution of recruits therein; issues regulations concerning training of the VJ; determines the educational plan and advanced training of

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**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 15.

*Prosecutor v. Milosevic*, ICTY-99-37(Kosovo), ICTY-01-51 (Bosnia), ICTY-02-50 (Croatia), "Decision on Preliminary Motions", Trial Chamber, November 8, 2001

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IN THE TRIAL CHAMBER

**Before:**
**Judge Richard May, Presiding**
**Judge Patrick Robinson**
**Judge Mohamed Fassi Fihri**

**Registrar:**
**Mr. Hans Holthuis**

**Decision of:**
**8 November 2001**

**PROSECUTOR**

**v.**

**SLOBODAN MILOSEVIC**

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# DECISION ON PRELIMINARY MOTIONS

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**The Office of the Prosecutor:**
**Ms. Carla Del Ponte**
**Mr. Daniel Saxon**
**Mr. Dirk Ryneveld**
**Ms. Julia Baly**
**Ms. Cristina Romano**
**Mr. Daryl A. Mundis**
**Mr. Milbert Shin**

**The Accused:**
**Slobodan Milosevic**

***Amici Curiae:***
**Mr. Steven Kay**
**Mr. Branislav Tapuskovic**
**Mr. Michaïl Wladimiroff**

## I. INTRODUCTION

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is seized of two motions filed by the accused on 9 and 30 August 2001 (together "the Motions").[1] The Office of the Prosecutor ("Prosecution") filed its responses on 16 August and 13 September 2001.[2] On 19 October 2001, the *amici curiae* appointed at the request of the Trial Chamber filed a brief elaborating upon those issues that had been raised by the accused in the Motions,[3] to which the Prosecution responded on 26 October 2001.[4] Both parties and the *amici curiae* were heard by the Trial Chamber on 29 October 2001.

2. On 30 October 2001, the Trial Chamber rendered an oral decision denying the Motions and indicated that a written decision would follow. The Trial Chamber now issues its written reasons for its ruling.

3.This Decision deals with all the arguments, written and oral, raised by the accused , the Prosecution, and the *amici curiae*. Although some of the arguments have been dealt with before in the International Tribunal, the Chamber has considered all of them very carefully. Indeed, any judicial body is bound to take seriously a challenge to the legality of its foundation. The Chamber notes the arguments of the *amici curiae* that the accused, who is defending himself, should be given "the benefit of arguments that are not explicitly raised by him, but which are inherent to the point of his objections and arguments".[5] There is obvious merit in that submission. However, in determining whether a particular submission qualifies as a preliminary motion within the terms of Rule 72 of the Rules of Procedure and Evidence of the

International Tribunal ("Rules"), the Chamber is bound by the provisions of that Rule and the International Tribunal's jurisprudence in relation to its interpretation.[6]

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## II. DISCUSSION

### 1. The question of the binding effect of decisions of the Appeals Chamber

4. Notwithstanding the decision of the Appeals Chamber in the *Aleksovski* case[7] that decisions of the Appeals Chamber are binding on Trial Chambers, the *amici curiae* have submitted that "the case law of the Appeals Chamber is not *eo ipso* binding, but rather a matter of guidance for the Trial Chamber." However, although that clearly is not the case,[8] the Chamber considers it right that the issues raised in the motion on which the Appeals Chamber has ruled in the *Tadic Jurisdiction Appeal*[9] should be fully considered, and that it should give its own reasons for its conclusions .

### 2. Illegal foundation of the International Tribunal

(a) Constitutionality

5. The accused has argued that the International Tribunal is an illegal entity because the Security Council lacked the power to establish it. The *amici curiae* have supported these arguments, and have additionally asked that the arguments of the accused on the constitutionality of the International Tribunal be extended to include those arguments set out in paragraphs 27, 32, 41, 43, 44 and 55 of the *Tadic Jurisdiction Appeal*. The Chamber accedes to that request. The basis of the challenge to the constitutionality of the International Tribunal is that the Security Council is not empowered under Chapter VII of the Charter of the United Nations to establish an international criminal court.

6. The relevant provision is Article 41 of the Charter, which empowers the Security Council to adopt measures not involving the use of armed force to give effect to its decisions in order to discharge its obligation under Article 39 to maintain or restore international peace and security. Article 41 lists certain measures which may be taken by the Security Council. It is perfectly clear that the list is not exhaustive and that it is open to the Security Council to adopt any measure other than those specifically listed, provided it is a measure to maintain or restore international peace and security.

7. In the Chamber's view, the establishment of the International Tribunal with power to prosecute persons responsible for serious violations of international humanitarian law in the former Yugoslavia, and with the obligation to guarantee fully the rights of the accused, is, in the context of the conflict in the country at that time, pre-eminently a measure to restore international peace and security. Indeed, the role of the International Tribunal in promoting peace and reconciliation in the former Yugoslavia is highlighted in Security Council resolution 827 which established it.[10] The Appeals Chamber in the *Tadic Jurisdiction Appeal* arrived at the same conclusion and concluded that "the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41".[11] Accordingly, the Chamber dismisses this ground.

8. The accused argues that the creation of an ad hoc court targeting one country "corrupts justice and law"; that an ad hoc court "violates the most basic principles of all law" and "that an international court established to prosecute acts in a single nation and primarily, if not entirely, one limited group is pre-programmed to persecute , incapable of equality".[12]

9. Human rights bodies have, on several occasions, pronounced on the legitimacy of ad hoc tribunals.[13] The decisions of these bodies establish that there is nothing inherently illegitimate in the creation of an ad hoc judicial body, and that the important question is whether that body is established by law, in the sense that, as it is stated in the *Tadic Jurisdiction Appeal*, it "should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights".[14]

10. The International Tribunal meets this requirement in that the rights of the accused , comparable to those in the International Covenant on Civil and Political Rights ("ICCPR"), are entrenched in the International Tribunal's Statute, in particular , in Article 21.

11. Accordingly, this ground is dismissed.

(b) Independence

12. The challenge to the constitutionality of the International Tribunal on the basis of a lack of independence has been developed by the *amici curiae* in paragraph 10 of the *Amici* Brief. They contend that the accused is arguing that the International Tribunal lacks independence because of the "apparent lack of independence of the Prosecutor in the decision to issue an indictment against him in the first place".[15] The Prosecution contends that the *amici curiae* have failed to demonstrate a lack of prosecutorial independence. It submits that to be urged by the Security Council in this way no more compromises its independence than when it is periodically urged by non-governmental organizations and other groups to commence investigations into crimes that fall within the jurisdiction of the International Tribunal. In effect, the Prosecution submits that "encouraging" does not equate to "instructing".[16]

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13. Article 16, paragraph 2, of the Statute states:

> The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

14. Quite clearly, if it can be established that the Prosecutor has not acted independently , there would be a breach of that Article, and that would be particularly the case if there was *mala fides* on the part of the Prosecutor in indicting the accused .

15. In this case, there is not a scintilla of evidence advanced either by the accused or by the *amici curiae* to support the contention of any *mala fides* or abuse of power on the part of the Prosecutor in issuing an indictment against the accused. Certainly, the fact that the Security Council urged the Prosecutor to "begin gathering information related to the violence in Kosovo that may fall within its jurisdiction";[17] and that the accused was indicted by the Prosecutor following her investigations cannot vitiate the independence of the Prosecutor. That is no different from a government in a domestic jurisdiction setting a prosecutorial policy. In this regard, Article 18 , paragraph 1, of the Statute obliges the Prosecutor to:

> initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

What would impugn her independence is not the initiation of investigations on the basis of information from a particular source, such as the Security Council, but whether, in assessing that information and making her decision as to the indictment of a particular person, she acts on the instructions of any government, any institution or any person. There is no suggestion that the Prosecutor acted upon the instructions of any government, any body, or any person in her decision to indict the accused . Accordingly, this ground is dismissed.

16. Allied to those arguments is the submission of the *amici curiae* that in order to avoid the "criticisms of self determination of validity", the International Tribunal should seek an advisory opinion on the question of its competence from the International Court of Justice. In this regard, the Prosecution argues that the International Tribunal is not competent to request an advisory opinion from the Court. Furthermore , it submits that the Appeals Chamber in the *Tadic Jurisdiction Appeal* held that the International Tribunal was competent to adjudicate issues concerning its own jurisdiction.[18]

17. The Chamber rejects the argument of the *amici curiae* and, in doing so, asserts that it need have no sensitivity concerning its jurisdiction to determine its own competence for, as the Appeals Chamber said in the *Tadic Jurisdiction Appeal*, the jurisdiction of a judicial body to determine its own jurisdiction "is a necessary component in the exercise of the judicial function".[19] Accordingly, the Chamber finds no merit in that submission.

### 3. Fair trial and protection of human rights

(a) Allegation of bias

18. The *amici curiae* contend that the accused, in arguing that the International Tribunal is either incapable of providing him with a fair trial or of protection of his fundamental human rights, is "implicitly asserting bias".[20] In any event, the accused himself has argued in relation to the International Tribunal that "the very psychology of the enterprise is persecutorial. Few judges appointed to serve on a Tribunal created under such circumstances will feel free to acquit any but the most marginal, or clearly mistaken accused, or to create an appearance of objectivity."[21]

19. The Chamber construes this argument as an allegation of bias on the part of the International Tribunal, and hence on the part of the Chamber itself. Although not falling within the ambit of Rule 72, the Chamber must consider an argument that the accused will not receive a fair trial on the ground that its members are biased . In the *Furundzija Appeal Judgement*, the Appeals Chamber held, in relation to a ground of appeal alleging bias, that the Appellant

> could have raised the matter, if he considered it relevant, before the Trial Chamber , either pre-trial or during trial. On this basis, the Appeals Chamber could find that the Appellant has waived his right to raise the matter now and could dismiss this ground of appeal.[22]

20. The only basis advanced by the accused for the allegation of bias is that mentioned above.[23]

21. In *Furundzija,* the Appeals Chamber held that there were three ways in which bias on the part of a Judge could be established. First by proof of actual bias . Secondly, if the Judge has some interest, material or otherwise, in the matter being litigated. Thirdly, if a reasonable observer, properly informed, would reasonably apprehend bias.[24]

22. In the circumstances of this case it is only the third criterion that would be relevant: nothing has been advanced, either by the accused or

by the *amici curiae*, on the basis of which a reasonable observer, properly informed, would reasonably apprehend bias on the part of the Chamber. This ground is, therefore , dismissed.

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(b) Alleged violation of the accused's right to privacy and freedom of expression

23. The *amici curiae* contend that a ban on any communication between the accused and the media violates his right to privacy and his freedom of expression . They also contend that, without a proper showing of grounds, this can easily be understood to be an expression of lack of independence of the International Tribunal .[25] The Prosecution contends that the accused's arguments in this respect are not jurisdictional in nature as they relate to the Rules of Detention[26] concerning communication matters.[27]

24. Not even the most liberal interpretation of Rule 72 could bring this submission within the scope of that Rule. It is not a preliminary motion. However, even if it were, such restrictions as are placed on an accused person in detention in relation to his freedom of expression fall squarely within the category of permissible limitations under the ICCPR, that is, that they are provided by law and are necessary for a variety of public interest considerations, including public order.[28] The European Convention on Human Rights provides for similar limitations on the right to freedom of expression. It states that the exercise of these freedoms may be subject to "such formalities, conditions, restrictions or penalties as are prescribed by law" and are necessary for a number of public interest considerations, including the prevention of disorder or crime.[29] Moreover, it must be noted that Principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides:

> A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, *subject to reasonable conditions and restrictions as specified by law or lawful regulations*.[30] (Emphasis added.)

25. Accordingly, this ground is dismissed.

4. The contention that the accused is not amenable to the jurisdiction of the International Tribunal because of his former status as President of the Federal Republic of Yugoslavia and because of his illegal surrender by the Government of the Republic of Serbia in violation of domestic law

(a) Lack of competence by reason of his status as former President

26. The Chamber observes that this argument has not been raised explicitly by the accused . In the passage cited by the *amici curiae*, what is stated is that the International Tribunal "does not have jurisdiction over the person of President Milosevic".[31] The Chamber will, however, deal with the argument, since it has been raised by the *amici curiae*. The Prosecution has argued that Article 7, paragraph 2, of the Statute reflects customary international law and notes, in particular, that the International Criminal Tribunal for Rwanda convicted Jean Kambanda, the former Prime Minister of Rwanda, for his role in the genocide that occurred in that State in 1994.[32]

27. Article 7, paragraph 2, of the Statute provides that

> the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

The *amici curiae* say that the accused must be understood to be denying the validity of that Article.

28. There is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law.

29. The history of this rule can be traced to the development of the doctrine of individual criminal responsibility after the Second World War, when it was incorporated in Article 7 of the Nuremberg Charter[33] and Article 6 of the Tokyo Tribunal Charter.[34] The customary character of the rule is further supported by its incorporation in a wide number of other instruments, as well as case law.

30. As for instruments, the following may be mentioned: Article IV of the Convention for the Prevention and the Punishment of the Crime of Genocide;[35] Principle III of the Nuremberg Principles;[36] Article 6 of the Statute of the International Criminal Tribunal for Rwanda;[37] Article 6, paragraph 2, of the Statute of the Special Court for Sierra Leone;[38] Article 27 of the Rome Statute of the International Criminal Court ("ICC");[39] and Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind .[40]

31. Particular mention must be made of the Rome Statute of the ICC which, although not yet in force, has been signed by 139 States and now has 43 of the 60 ratifications required for its entry into force. This is a multilateral instrument of the greatest importance, which, even at this stage, has attracted fairly widespread support. The Chamber also attaches particular significance to the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, prepared in 1996 . The Chamber cites these two modern instruments as evidence of the customary character of the rule that a Head of State cannot plead his official position as a bar to criminal liability in respect

of crimes over which the International Tribunal has jurisdiction.

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32. Moreover, case law also confirms the rule: in the Nuremberg Judgement, it was said:

> The principle of international law, which under certain circumstances, protects the representative of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings ... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.[41]

33. More recently in the *Pinochet* case,[42] the House of Lords held that Senator Pinochet was not entitled to immunity in respect of acts of torture and conspiracy to commit torture, alleged to have been committed in his capacity as a Head of State. In particular, Lord Millett stated:

> In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence.

34. Accordingly, this ground is dismissed.

(b) Lack of competence by reason of his unlawful surrender

35. This ground is usefully developed by the *amici curiae* in paragraph 15 . The argument is that the accused was unlawfully surrendered to the International Tribunal for the following reasons:

> (a) The International Tribunal sent the arrest warrants to the authorities of the Federal Republic of Yugoslavia, not to the government of the Republic of Serbia. However, it was the latter that transferred the accused to the International Tribunal . That government had no power to act in such a manner.
>
> (b) The Serbian government had no international obligation to cooperate with the International Tribunal.
>
> (c) Article 18 of the Federal Constitution does not provide for the extradition or transfer of Yugoslav citizens to an international body.
>
> (d) In the circumstances set out in (a), (b) and (c) above, his transfer is an abuse of process in that the procedures of the Federal Republic of Yugoslavia were bypassed and he was unlawfully transferred to the International Tribunal.

36. As to this matter, the Prosecution argues that it is a well-established principle of law that States may not rely on their national legislation to defeat their international obligations. In this regard, the Prosecution notes that the Federal Republic of Yugoslavia was under an international obligation, pursuant to Articles 9, paragraph 1, and 29 of the Statute to transfer the accused to the International Tribunal.[43]

37. Article 9, paragraph 4, of the ICCPR provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

38. This provision is not reflected in the International Tribunal's Statute. However , as one of the fundamental human rights of an accused person under customary international law, it is, nonetheless, applicable, and indeed, has been acted upon by this International Tribunal.

39. In *Barayagwiza*,[44] the Appeals Chamber of the International Criminal Tribunal for Rwanda stressed the importance of the right of the accused to invoke that provision, which in some common-law jurisdictions is called *habeas corpus*.

40. One of the essential features of the right of an accused person to challenge the legality of his detention is that such a challenge should be heard as promptly as possible. For that reason, the Chamber will treat this motion as the proceedings by which the accused is challenging the legality of his detention. The Chamber is in a position to do this because the challenge has been raised by the accused , and it has heard arguments on this question from all the parties, as well as the *amici curiae*.

41. At the hearing, the Prosecution contended that the Federal Republic of Yugoslavia "has no executing power; that is, all transfers, all decisions by the police or any binding measures taken are carried out by the Republic of Serbia [...] which executes and carries out the arrests and transfers, which is the case of the other accused who came from Belgrade."[45]

42. Rule 58 provides:

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> The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned .

43. The question that arises here is whether that Rule is applicable, since the obligation under Article 29 was that of the Federal Republic of Yugoslavia, and not the Republic of Serbia.

44. The arrest warrants of the International Tribunal dated 24 May 1999 and 22 January 2001 were directed to the authorities of the Federal Republic of Yugoslavia, and were not issued to the government of the Republic of Serbia. The last dated arrest warrant was received by personal service on the Federal Minister of Justice in Belgrade on 6 April 2001. On 3 May, the President of the District Court in Belgrade announced that the Indictment, dated 22 May 1999, and the Decision on the Review of the Indictment , dated 24 May 1999, had been served on the accused. On 21 May 2001, the Minister of Justice confirmed to the Registrar of the International Tribunal that the Indictment had been served on the accused. The accused was then being held in custody in connection with a charge against him under the criminal law of the Republic of Serbia, which was unrelated to the charges in the Indictment issued by the International Tribunal . Before any further steps could be taken by the Federal Republic of Yugoslavia , then seized of the matter, the Serbian authorities transferred the accused to the custody of the International Tribunal on 28 June 2001.

45. The purpose of Rule 58 is to ensure that domestic procedures relating to the surrender and transfer of a person, from a State in respect of whom a request for arrest and transfer has been made, are not used as a basis for not complying with the request. The importance of complying with requests under Article 29 cannot be overstressed. The significance of this legal obligation is highlighted in the Report of the Secretary-General who said that "the establishment of the International Tribunal on the basis of a Chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision" and that "an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations."[46]

46. That being the case, the Rule should be given an interpretation that takes full account of its purpose. Accordingly, the Chamber holds that, notwithstanding the fact that the surrender was made by the government of the Republic of Serbia, rather than the Federal Republic of Yugoslavia to whom the request was made, the provisions of Rule 58 apply and, consequently, the transfer was effected in accordance with the provisions of the Statute.

47. Article 27 of the Vienna Convention on the Law of Treaties is also relevant. It provides:

> a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The Statute of the International Tribunal is interpreted as a treaty. The Federal Republic of Yugoslavia has an obligation under the Statute to comply with the request to arrest and transfer the accused and, therefore, cannot rely on its internal law , namely the division of power as between the federal government and its States as a justification for failure to comply. Although it is the accused, and not the Federal Republic of Yugoslavia that is seeking to rely on the internal constitutional system of the Federal Republic of Yugoslavia, it follows that if the Federal Republic of Yugoslavia itself cannot rely on internal laws, then, *a fortiori,* neither can the accused. Accordingly, this ground is dismissed.

48. The *amici curiae* have expressly raised the doctrine of abuse of process . This doctrine was considered by the Appeals Chamber in the *Barayagwiza* case. Two points must be noted about that doctrine as it has developed in the case law of certain jurisdictions and also in the International Tribunal's jurisprudence . The first is that, if there is an abuse of process, it does not lead to a lack of jurisdiction on the part of the International Tribunal; what it raises is the question whether, assuming jurisdiction, the International Tribunal should exercise its discretion to refuse to try the accused. Secondly, the International Tribunal will exercise its discretion to refuse to try the accused if there has been an egregious breach of the rights of the accused.

49. As to the first, the case of *R. v. Horseferry Road Magistrates' Court, Ex parte Bennett* makes it clear that:

> A court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) *because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.*[47]

50. As to the second, paragraph 74 of the *Barayagwiza Appeal Decision* stressed that the discretionary power to dismiss a charge is exercised "in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity".

51. In light of that jurisprudence, the Chamber holds that the circumstances in which the accused was arrested and transferred - by the government of the Republic of Serbia, to whom no request was made, but which is a constituent part of the Federal Republic of Yugoslavia, to whom the request for arrest and transfer was made - are not such as to constitute an egregious violation of the accused's rights. It should

be noted that, in *Barayagwiza*, the Appeals Chamber did find an abuse of process but that was on the basis that he was detained for 11 months without being notified of the charges against him.[48] Consequently , the doctrine of the abuse of process is inapplicable, and this ground is dismissed .

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5. Territorial jurisdiction

52. The *amici curiae* contend that the limitation on the territorial jurisdiction of the International Tribunal to the former Yugoslavia is discriminatory. This is a restatement of earlier arguments relating to the ad hoc nature of the International Tribunal and selective prosecutions. Those issues have already been addressed in paragraphs 9, 10, 13, 14 and 15 above. Accordingly, this ground is dismissed.

53. Accordingly, all the Motions are dismissed.

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

Richard May
Presiding

Dated this eighth day of November 2001
At The Hague
The Netherlands

**[Seal of the Tribunal]**

1 - The accused initially filed a motion with the Registry dated 9 August 2001. *See Prosecutor v. Slobodan Milosevic*, Case No. IT-99-37-PT, Preliminary Protective Motion, 9 Aug. 2001 ("Preliminary Motion"). At the request of the accused, only those arguments set forth in paragraph 8 of the Preliminary Motion have been considered. Thereafter, on 30 August 2001, the accused filed an untitled document which sets forth his arguments relating, primarily, to the illegality of the International Tribunal ("Milosevic Motion").
2 - *Prosecutor v. Slobodan Milosevic*, Case No. IT-99-37-PT, Prosecution's Response to the "Preliminary Protective Motion" filed 9 August 2001, 16 Aug. 2001 ("Prosecution Response to Preliminary Motion"); Prosecution's Response to the "Presentation on the Illegality of the ICTY" filed by the accused Slobodan Milosevic on 30 August 2001, 13 Sept. 2001 ("Prosecution Response to Milosevic Motion").
3 - *Prosecutor v. Slobodan Milosevic*, Case No. IT-99-37-PT, *Amici Curiae* Brief on Jurisdiction, 19 Oct. 2001 ("Amici Brief").
4 - *Prosecutor v. Slobodan Milosevic*, Case No. IT-99-37-PT, Prosecution's Response to the "*Amici Curiae* Brief on Jurisdiction" filed 19 October 2001, 26 Oct. 2001 ("Prosecution Response to *Amici*").
5 - *Amici* Brief, para. 6.
6 - In this regard, the Chamber has taken into consideration the arguments of the Prosecution that, while an accused who is defending himself may be entitled to wide latitude in construing his arguments under Rule 72, there must be some limit on the issues that an accused may raised in challenging jurisdiction under that Rule. See Prosecution Response to *Amici*, para. 3.
7 - *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 Mar. 2000 ("Aleksovski Appeal Judgement").
8 - In this regard, the Chamber has noted the Prosecution's submissions at paragraph 6 of the Prosecution Response to *Amici* in which it recalled the Appeals Chamber finding in the *Aleksovski* case that "a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on the Trial Chambers." *Aleksovski Appeal Judgement*, para. 113.
9 - *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995 ("*Tadic Jurisdiction Appeal*").
10 - U.N. Doc. S/RES/827 (1993). In this resolution the Security Council determines that the situation in the former Yugoslavia "continues to constitute a threat to international peace and security" and further states that it is convinced that "in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would [...] contribute to the restoration and maintenance of peace".
11 - *Tadic Jurisdiction Appeal*, para. 36.
12 - Milosevic Motion, pp. 4 and 5.
13 - *See, e.g.,* paragraph 4 of the General Comment of the Human Rights Committee on Article 14 of the ICCPR where it is stated: "[T]he Covenant does not prohibit [military or special courts which try civilians], nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14", H.R. Comm. 43rd Sess., Supp. No. 40 at para. 4, U.N. Doc. A/43/40 (1988); *Cariboni v Uruguay*, H.R. Comm. 159/83, 39th Sess., Supp. No. 40, U.N. Doc. A/39/40; Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 Mar. 1973, at 1; Inter-Am C.H.R., Annual Report 1973, OEA/Ser. P, AG/doc. 409/174, 5 Mar. 1974 at 2-4 (as cited in the *Tadic Jurisdiction Appeal*, para. 45).
14 - *Tadic Jurisdiction Appeal*, para. 45.
15 - *Amici* Brief, para. 10.
16 - Prosecution Response to *Amici*, para. 9.
17 - Security Council resolution 1160, S/RES/1160 (1998), para. 17.
18 - Prosecution Response to *Amici*, paras 21 and 22.
19 - *Tadic Jurisdiction Appeal*, para. 18.
20 - *Amici* Brief, pp. 7-8.
21 - Milosevic Motion, pp. 6 and 7.

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22 - *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundz'ija Appeal Judgement*"), para. 174.
23 - *See supra*, paragraph 18.
24 - *Furundzzija Appeal Judgement*, para. 189.
25 - *Amici* Brief, para. 11.
26 - Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, IT/38/Rev. 8.
27 - Prosecution Response to *Amici*, para. 10.
28 - *See* Article 19(3) of the ICCPR.
29 - Article 10(2) of the European Convention on Human Rights.
30 - Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988.
31 - Preliminary Motion, p. 5.
32 - Prosecution Response to *Amici*, paras 12 and 13.
33 - Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.S. 279.
34 - Charter of the International Military Tribunal for the Far East, Vol. 2, *The Records of the International Military Tribunal for the Far East* (R. John Pritchard ed.).
35 - Paris, 9 Dec. 1948, 78 U.N.T.S. 277.
36 - Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, G.A.O.R., 5th session, Supp. No. 12, U.N. doc. A/1316 (1950).
37 - Security Council resolution 955 establishing the International Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994).
38 - U.N. Doc. S/2000/915, 4 Oct. 2000.
39 - U.N. Doc. A/CONF. 183/9, 17 July 1998.
40 - International Law Commission, text adopted by the Commission at its forty-eighth session, from 6 May to 26 July 1996, G.A.O.R., 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 ("Report of the International Law Commission").
41 - Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10; *see* Report of the International Law Commission, commentary (3) to article 7.
42 - Decision of the House of Lords dated 24 March 1999, *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, (2000) 1 AC 147, (1999) 2 All ER 97, (1999) 2 WLR 827, (1999) 1 LRC at 588 – 89.
43 - Prosecution Response to *Amici*, paras 15 – 16.
44 - *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 Nov. 1999 ("*Barayagwiza Appeal Decision*"). This case was overturned by the Appeals Chamber on a review on grounds that do not in any way affect the validity of the Chamber's rulings as to the significance of the right of an accused to *habeas corpus*.
45 - Motion Hearing, 29 Oct. 2001, Transcript pages 62–63.
46 - Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), U.N. Doc. S/25704, paras 125 and 126.
47 - Decision of the House of Lords dated 24 June 1993, (1994) 1 AC 42, (1993) 3 All ER 138, (1993) 3 WLR 90, cited in the *Barayagwiza Appeal Decision*, para. 75 (emphasis supplied).
48 - *Barayagwiza Appeal Decision*, para. 86.

**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 16.

Security Council Resolution 1315 (2000) (U.N. Doc S/RES/1315)

United Nations S/RES/1315 (2000)

Security Council

Distr.: General
14 August 2000

# Resolution 1315 (2000)

## Adopted by the Security Council at its 4186th meeting, on 14 August 2000

*The Security Council*:

*Deeply concerned* at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity,

*Commending* the efforts of the Government of Sierra Leone and the Economic Community of West African States (ECOWAS) to bring lasting peace to Sierra Leone,

*Noting* that the Heads of State and Government of ECOWAS agreed at the 23rd Summit of the Organization in Abuja on 28 and 29 May 2000 to dispatch a regional investigation of the resumption of hostilities,

*Noting also* the steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process, as required by Article XXVI of the Lomé Peace Agreement (S/1999/777) to contribute to the promotion of the rule of law,

*Recalling* that the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law,

*Reaffirming* the importance of compliance with international humanitarian law, and *reaffirming further* that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law,

*Recognizing* that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

*Taking note* in this regard of the letter dated 12 June 2000 from the President of Sierra Leone to the Secretary-General and the Suggested Framework attached to it (S/2000/786, annex),

*Recognizing further* the desire of the Government of Sierra Leone for assistance from the United Nations in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace,

*Noting* the report of the Secretary-General of 31 July 2000 (S/2000/751) and, in particular, *taking note* with appreciation of the steps already taken by the Secretary-General in response to the request of the Government of Sierra Leone to assist it in establishing a special court,

*Noting further* the negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone,

*Acknowledging* the important contribution that can be made to this effort by qualified persons from West African States, the Commonwealth, other Member States of the United Nations and international organizations, to expedite the process of bringing justice and reconciliation to Sierra Leone and the region,

*Reiterating* that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region,

1. *Requests* the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution, and *expresses* its readiness to take further steps expeditiously upon receiving and reviewing the report of the Secretary-General referred to in paragraph 6 below;

2. *Recommends* that the subject matter jurisdiction of the special court should include notably crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone;

3. *Recommends further* that the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone;

4. *Emphasizes* the importance of ensuring the impartiality, independence and credibility of the process, in particular with regard to the status of the judges and the prosecutors;

5. *Requests*, in this connection, that the Secretary-General, if necessary, send a team of experts to Sierra Leone as may be required to prepare the report referred to in paragraph 6 below;

6. *Requests* the Secretary-General to submit a report to the Security Council on the implementation of this resolution, in particular on his consultations and negotiations with the Government of Sierra Leone concerning the establishment of the special court, including recommendations, no later than 30 days from the date of this resolution;

7. *Requests* the Secretary-General to address in his report the questions of the temporal jurisdiction of the special court, an appeals process including the advisability, feasibility, and appropriateness of an appeals chamber in the special court or of sharing the Appeals Chamber of the International Criminal Tribunals for the Former Yugoslavia and Rwanda or other effective options, and a possible alternative host State, should it be necessary to convene the special court outside the seat of the court in Sierra Leone, if circumstances so require;

8. *Requests* the Secretary-General to include recommendations on the following:

(a) any additional agreements that may be required for the provision of the international assistance which will be necessary for the establishment and functioning of the special court;

(b) the level of participation, support and technical assistance of qualified persons from Member States of the United Nations, including in particular, member States of ECOWAS and the Commonwealth, and from the United Nations Mission in Sierra Leone that will be necessary for the efficient, independent and impartial functioning of the special court;

(c) the amount of voluntary contributions, as appropriate, of funds, equipment and services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations;

(d) whether the special court could receive, as necessary and feasible, expertise and advice from the International Criminal Tribunals for the Former Yugoslavia and Rwanda;

9. *Decides* to remain actively seized of the matter.

**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 17.

Antonio Cassese, *International Law* (2001: Oxford University Press) pp 72-75, 259-260

# INTERNATIONAL LAW

ANTONIO CASSESE

OXFORD
UNIVERSITY PRESS

The problem of the proper role and weight of intergovernmental organizations in international affairs chiefly arose after the Second World War, when many organizations were created and granted sweeping powers.

International institutions were set up in various fields. These include: (a) political relations — for example, the United Nations, which has universal scope; the Organization of American States, the Council of Europe, the Organization of African Unity, and the League of Arab States, all of which are regional in character; (b) military relations — for example, NATO and the former Warsaw Pact Organization; (c) economic co-operation — for example, the IMF, the World Bank, and the WTO (at the universal level); the EU (which also has a political dimension), at the regional level; (d) cultural relations — for example, UNESCO; (e) social co-operation — for example, ILO, FAO. At present there are more than 400 intergovernmental organizations.

Usually, these organizations consist of a permanent secretariat, an assembly in which all member States take part when it meets periodically, and a governing body made up of a limited number of member States, and entrusted with managerial tasks.

Of course, not all international organizations possess international legal personality. What is the test for determining whether or not they are international subjects? In its Advisory Opinion of 1949 on *Reparation for Injuries Suffered in the Service of the United Nations* the ICJ outlined two criteria.

First, it must be shown that the member States, in setting up the organization and entrusting certain functions to it, with the attendant duties and responsibilities, intended to clothe it 'with the competence required to enable these functions to be effectively discharged'.[9] In other words, it must be proved that the founding fathers intended to put into being an autonomous body, capable of occupying 'a position in certain respects in detachment from its Members'.[10] This *intention* can be inferred from various elements. For instance, it may be deduced from, among other things, the fact that decisions of the principal organs of the organization must not be taken (or must not always be taken) unanimously but can be adopted by a majority vote. That intention may also be spelled out by the draftsmen in the text of the charter or statute of the organization. In this respect, it may suffice to mention Article 4.1 of the 1998 Statute of the International Criminal Court (ICC), which states: 'The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.'

Second, it is necessary for the organization *in actual fact to enjoy the autonomy* from member States and the effective capacity necessary for it to act as an international subject. In the ICJ's words, it is necessary to show that the organization 'is in fact exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane'.[11]

In 1985 the Italian Court of Cassation insisted upon this requirement in *Cristiani* v. *Istituto italo-latino-americano*.[12] The Court held that international legal personality is based on the effective position of an entity in the international community: the organization needs to constitute a 'collective unity detached from the member States'; it must consist of 'social organs' that are distinct from the organs of each member State and that in addition do not act as joint organs of those States; rather, they must act as organs proper to the organization.



Once this twofold test is met, it may be considered that international organizations possess international rights and obligations deriving from international customary rules.

As for organizations that do not satisfy the above tests, it may be said that they act on behalf of all the member States. They are organs common to all those States, with the consequence that acts they perform may be legally attributed to all such States. By the same token, any wrongful act perpetrated by one of the organs or officials of the organization is the responsibility of all the member States.

What are the international rights and duties conferred or, respectively, imposed on such organizations by international customary, that is *general*, rules? It is impossible to give a definite answer, for it is to a large extent left to the instituting States to decide in each case how to structure the international entity, and to what extent to grant to it powers and obligations that are then effectively exercised and discharged in practice. As the ICJ put it in *Reparation for Injuries*, 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights'.[13] Bearing this caveat in mind, it may be noted that the international practice which evolved after the Second World War shows that at least a handful of international rules do confer rights on organizations in relation to non-member States on condition that the former are sufficiently autonomous from the member States and have a structure enabling them to act in the international field. Among the rights that we may safely regard as belonging to international bodies, the following should be mentioned.

(1) *The right to enter into international agreements with non-member States on matters within the organization's province.* Treaties concluded by the organization have all the legally binding effects of international treaties proper—provided, of course, that this was the intention of the parties to the agreement.

In fact, organizations have concluded numerous treaties covering a host of matters: headquarters agreements, conventions on privileges and immunities of international civil servants and members of international organs, treaties relating to activities performed by the organization concerned (for instance, those on technical assistance entered into by the UN), agreements with other organizations for the co-ordination of their fields of action, etc.

(2) *The right to immunity from jurisdiction of State courts for acts and activities performed by the organization.* Domestic courts of many States have held that disputes relating to employment with international organizations cannot be submitted to States' jurisdiction, for they concern activities falling within the purview of the organization concerned.

More generally, international organizations have the right to claim immunity from the jurisdiction as well as execution of national courts, with regard to activities performed to attain the goals laid down in the organization's statutes or constitution. The

rationale for this immunity is that otherwise States could interfere with or affect the functioning of the organization; for instance the State where the organization is headquartered could seize or impound its assets.

(3) *The right to protection for all the organization's agents acting in the territory of a third State in their official capacity as international civil servants.* The ICJ in its Advisory Opinion on *Reparation for Injuries* (1949) authoritatively upheld this right.

On 17 September 1948, the UN Mediator, a Swede, Count Folke Bernadotte, and the UN Observer, a Frenchman, Colonel André Sérot, were assassinated by a Jewish terrorist organization while on an official mission for the UN. The murder took place in the eastern part of Jerusalem (then under Israeli control) after Israel had proclaimed its independence, and before it was admitted to UN membership. The Israeli authorities tried to discover and bring to justice the perpetrators and instigators of the crime but, as the Israeli representative stated to the UN GA on 5 May 1948, 'the results of the investigations had been disappointingly negative'.[14] The Government of Israel admitted that 'failure had been reported in the functioning of its security system in the past' but 'could not admit that any conclusions could be drawn from that event with respect to its present capacity to fulfil its international obligations'. Whatever the reasons behind its stance (it has been contended that it made a point of honouring its international obligations because it was keen to enter the UN), the fact remains that Israel declared itself to be ready to make reparation for its failure to protect the two UN agents and to punish their killers.

(4) *The right to bring an international claim* with a view to obtaining reparation for any damage caused by member States or by third States to the assets of the organization or to its officials acting on behalf of the organization. The ICJ upheld this right too in the same case. The Court held unanimously that the organization could bring an international claim for damage caused to its assets, and held by a large majority (eleven to four) that the organization could also bring a claim for reparation due in respect of the damage caused to an agent of the organization (so-called *functional* protection). Accordingly, the organization may bring claims on behalf of its agents, even where the offending State is the national State of the victim. The Court correctly implied that this right was *procedural* in character and presupposed the violation of a *substantive* right of the Organization, that is, the right to respect for and protection of its agents by any State in whose territory the agents performed their official functions.

The Court's majority adopted a very progressive stand on another issue. Instead of endorsing the traditional view whereby States alone can put forward claims on behalf of their nationals injured abroad (the so-called *diplomatic* protection), the Court held that when an individual acts on behalf of an organization, the organization may also exercise protection of its agents qua individuals. This view, needless to say, greatly privileged the *functional* bond as opposed to *national* allegiance. Some felt that this view actually undermined the authority of States over their citizens and constituted a dangerous precedent. Socialist countries, in particular, strongly resented and criticized the Court.

Despite the existence of these various rights, organizations do not always have the capacity to enforce them when member or non-member States breach them. True, organizations have the right to seek remedies before international bodies (provided of course that the defendant State has accepted the competence of such organs). However, in cases of non-compliance by States either with their own obligations or with international decisions concerning their wrongful acts, international organizations are often unable to enforce the law. They only have the power to suspend the delinquent member State from participation or voting, or to expel it from the organization. With regard to non-member States, organizations may perhaps invoke the general rules on State responsibility (see **Chapter 9**).



## 4.4 NATIONAL LIBERATION MOVEMENTS

The emergence of organized groups fighting on behalf of a whole 'people' against colonial powers is a characteristic feature of the aftermath of the Second World War. Liberation movements arose first in Africa, then in Asia; they then mushroomed in Latin America and—to a lesser extent—in Europe. Africa, however, has been the principal home of liberation movements. Along with the gradual expansion of the liberation phenomenon from Africa to other continents, the movements also broadened their objectives, invoking new goals, in addition to anti-colonialism, namely struggles against racist regimes and alien domination. Struggles of this type were prevalent from the 1960s until the 1980s. At present they seem to be on the wane. Consequently, this class of international subjects is dwindling.

Algeria was the first country to witness the emergence of a liberation movement (the FLN, in 1954). Other African movements were: PAIGC (African Party for the Independence of Guinea and Cape Verde), FRELIMO (Liberation Front of Mozambique), the three movements in Angola (MPLA, UNITA, and FLNA), the two movements which fought in Zimbabwe (ZAPU and ZANU); those fighting against South Africa (ANC: African National Congress, and PAC: Pan African Congress); SWAPO (South West Africa People's Organization), in Namibia; POLISARIO, struggling against Morocco in Western Sahara (annexed by Morocco in 1975), and others.

In the Middle East the PLO was founded in 1969. In Asia the FNLV actively participated in the struggle against South Vietnam from 1960 to 1974; FRETILIN sprang up in Timor in 1975 to fight against Indonesian rule. In Latin America similar movements emerged.

Many of these movements and the peoples of which they constituted the organized structure eventually acquired statehood (for instance, in Algeria, Zimbabwe, Comores, Seychelles, Angola, Mozambique, Vietnam, Eritrea). The ANC became an integral part of the new government in South Africa. In East Timor a new State is in the process of emerging. The PLO has been gradually given control over the Gaza Strip and parts of the West Bank, as the 'Palestinian Authority'. On the other hand, POLISARIO is still seeking independence in Western Sahara; a ceasefire signed in 1991 under UN auspices put an end to the guerrilla war that had started in 1976; however, UN-sponsored diplomatic efforts to hold a referendum on self-determination have led nowhere, for there still are many bones of contention involved in the question of how to hold the referendum.

State, in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement. (6) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State. (7) The sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or the State's substantial involvement therein.

This crime too requires criminal intent (*dolus*). It must be shown that the perpetrator intended to participate in aggression and was aware of the scope, significance, and consequences of his action.

**(b) Judicial versus political appraisal of aggression**

In the area of aggression, involving both State responsibility and individual criminal liability, courts trying persons accused of this crime may legitimately take a judicial approach different from the political stand international political bodies such as the UN SC or the GA may prefer. It follows that there may be cases where one of those bodies does not consider that it is faced with aggression, whereas a national or international court may find that the contrary is true and consequently that the individuals involved in aggression are criminally responsible. This consequence is quite understandable, in an area politically so charged. However, national or international courts should not be bound by any decision taken by a political body, and vice versa. Of course, it remains true that whenever the SC or the GA concludes that in a particular instance acts committed by a State amount to aggression, it will be easier for a national or international court to find that aggression was perpetrated and therefore to pronounce on the issue of whether the individuals involved are criminally liable.

### 12.2.6 TERRORISM

**(a) General**

For more than thirty years States have debated in the UN the question of punishing terrorism. However, they have been unable to agree upon a definition of this crime. Third World countries staunchly clung to their view that this notion could not cover acts of violence perpetrated by the so-called freedom fighters, that is, individuals and groups struggling for the realization of self-determination. In consequence, the majority of UN members preferred to take a different approach, namely to draw up conventions prohibiting individual sets of well-specified acts. In this way the thorny question of hammering out a broad and general definition was circumvented. The Conventions at issue are those of 1963, 1970, and 1971 on the hijacking of aircraft, the Convention of 1973 on crimes against internationally protected persons including diplomatic agents, the 1979 Convention on the taking of hostages. In addition, in 1971 the USA and various Latin or Central American countries plus Sri Lanka agreed upon a Convention for the prevention and punishment of acts of terrorism.[50] However, condemnation of terrorism increased. In addition, it is probable that many States became



convinced that the First Additional Protocol of 1977 provided an acceptable solution to the problem of avoiding labelling 'freedom fighters' as terrorists (Article 44.3 of the Protocol granted, on certain conditions, legal status as combatants, and prisoner of war status in case of capture, to fighters who are not members of the armed forces of a State and who normally do not carry their arms openly). All this led to the formation of broad agreement on the general definition of terrorism. This agreement was laid down in a resolution passed by consensus by the UN GA (resolution 49/60, adopted on 9 December 1994). In the annexed Declaration it contains a provision (paragraph 3) stating that:

'Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them'.

This provision sets out an acceptable definition of terrorism. Three main elements seem to be required: (1) The acts must constitute a criminal offence under most national legal systems (for example, murder, kidnapping, arson, etc.). (2) They must be aimed at spreading terror among the public or particular groups of persons. (3) They must be politically motivated. It would seem that terrorist acts, if they fulfil these conditions and in addition are very serious or large scale, may be regarded as international crimes.

The general revulsion against this crime, as evinced by statements and declarations of very many States, warrants the conclusion that any State is legally entitled to bring to trial the alleged authors of such acts of terrorism who happen to be on its territory.

**(b) Objective and subjective elements of the crime**

The objective elements of the crime of terrorism may substantially be inferred from the various treaties on the matter, referred to above.

As for *mens rea*, State practice, national legislation as well as the conventions mentioned above all point in the same direction, namely the requirement that there should be a criminal intent to perpetrate the acts, and kill or injure persons, or destroy property, as well as the intent to spread terror.

## 12.3 INTERNATIONAL CRIMES AND IMMUNITY FROM JURISDICTION

Often persons accused of international crimes claim that they are immune from criminal jurisdiction for they acted as State officials (heads of State, foreign ministers, etc.).

As we saw above (5.2.2(4)), all State officials are entitled to claim immunity from

the civil and criminal jurisdiction of foreign States for acts or transactions performed in their official capacity (so-called *functional* immunities, which entail exemption from the *substantive* legislation of the receiving State and apply even after the State official has relinquished his position). However this privilege does not apply when they are accused of international crimes, and they may be brought to justice for such crimes. The removal of immunities was first applied in the case of war crimes to members of the army of belligerents and other lawful combatants; then, by virtue of the London Agreement of 8 August 1945, it was extended to senior State officials, and made applicable to war crimes, crimes against peace, and crimes against humanity. The cancellation of immunities was then reaffirmed in the Statutes of the ICTY, the ICTR, and the ICC. As these treaty rules or provisions of 'legislative' acts adopted by the SC have been borne out by State practice, it is safe to contend that they have turned into customary law.

However, in the *Qaddafi* case, contrary to what the *Chambre d'accusation* of the Paris Court of Appeal held on 20 October 2000,[51] on 13 March 2001 the Court of Cassation held that no customary rule has evolved on the matter, with specific reference to the international crime of terrorism.[52] This last decision has been rightly criticized in the legal literature.[53] In contrast, the removal of immunities for official acts performed by heads (or former heads) of State was affirmed by the Brussels *Juge d'instruction* on 6 November 1998 in his order in *Pinochet* and by the House of Lords in *Pinochet*.[54]

One should not however confuse the *functional* immunity discussed so far with the *personal* immunities and privileges that heads of State, foreign ministers, and other members of cabinet, as well as diplomatic agents, enjoy when on missions abroad. These immunities cover acts and transactions pertaining to the private life of State officials and terminate with the cessation of the official's functions. They include exemption from criminal jurisdiction and are due to foreign officials whenever they are on official missions (whereas they do not cover the private life of officials when they are abroad for private purposes). This distinction was rightly made by the Belgian *juge d'instruction*, Damien Vandermeersh, in his indictment against the former Foreign Minister of the Congo, which subsequently gave rise to an international dispute, brought before the ICJ as the *Congo* v. *Belgium* case.[55]

## 12.4 PROSECUTION AND PUNISHMENT BY STATE COURTS

### 12.4.1 LEGAL GROUNDS OF JURISDICTION

Traditionally States bring to trial before their courts alleged perpetrators of international crimes on the strength of one of three principles: *territoriality* (the offence has been perpetrated on the State territory), *passive nationality* (the victim is a



national of the prosecuting State), or *active nationality* (the perpetrator is a national of the prosecuting State). Normally the territoriality principle is preferred, both for ideological reasons (need to affirm the territorial sovereignty) and because the territory where the alleged crime has been committed is the place where it is easier to collect evidence (it is therefore considered the *forum conveniens*, or the adequate place of trial, as was restated in *Eichmann*).[56] This principle was also considered as the most appropriate as long ago as 1764, by Cesare Beccaria.

In his *Crimes and Punishments* he wrote that 'There are those who think, that an act of cruelty committed, for example, at Constantinople, may be punished at Paris; for this abstracted reason, that he who offends humanity, should have enemies in all mankind, and be the object of universal execration; as if the judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men. The place of punishment can certainly be no other, than that where the crime was committed; for the necessity of punishing an individual for the general good subsists there, and there only'.[57]

In more recent years, the so-called principle of universality has also been upheld, whereby any State is empowered to bring to trial persons accused of international crimes regardless of the place of commission of the crime, or the nationality of the author or of the victim. This principle has been upheld in two different versions. According to the most widespread version, only the State where the accused is in custody can prosecute him or her (so-called *forum deprehensionis*, or jurisdiction of the place where the accused is apprehended).

This class of jurisdiction is accepted, at the level of customary international law, with regard to piracy (but see *infra*, 12.4.2). At the level of treaty law it has been upheld with regard to *grave breaches* of the 1949 Geneva Conventions and the First Additional Protocol of 1977, *torture* (under Article 7 of the 1984 Torture Convention), as well as *terrorism* (see the various UN-sponsored treaties on this matter)[58] and *international drug trafficking*.[59] These treaties, however, do not confine themselves to granting the power to prosecute and try the accused. They also oblige States to do so, or alternatively to extradite the defendant to a State concerned (the principle of *aut prosequi et judicare, aut dedere*). This version of the principle of universality is also upheld by the national legislation of some States, such as Austria (Article 65.1.2 of the Penal Code), Germany (at least under the traditional construction of Articles 6.9 and 7.2 of the Penal Code; see however below) and Switzerland (see Articles 108 and 109 of the Military Penal Code, with regard to war crimes, and Article 6 bis of the Criminal Code, which has been held to be applicable to such crimes as torture).[60]

Under a different version of the universality principle, a State may prosecute persons accused of international crimes regardless of their nationality, the place of commission of the crime, the nationality of the victim, and even of whether or not the accused is in custody in the forum State.

This principle is upheld in such national legislations as that of Spain (in particular, with regard to genocide, war crimes, crimes against humanity, and terrorism; see Article 23 of the Law on Judicial Powers of 1985),[61] as well as Belgium (see the Laws of 1993 and 1999).[62] In addition, under the interpretation of the German Penal Code the German Supreme Court

**PROSECUTION INDEX OF AUTHORITIES**

**ANNEX** 18.

Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, The Statute of the International Criminal Court (May 2002), para. 3.46

The Parliament of the Commonwealth of Australia

# Report 45

## The Statute of the International Criminal Court

Joint Standing Committee on Treaties

May 2002

ISBN

# Contents

> The ICC will have jurisdiction whenever it decides that the domestic institutions are not 'genuinely' prosecuting the accused. A no-bill based on insufficiency of evidence, or an acquittal or a light sentence in an Australian court, could easily be treated as showing ineffective domestic jurisdiction entitling the ICC to prosecute.[27]

2.32 The National Civic Council (WA) was likewise suspicious of a principle it saw as being 'uncertain' in application.[28]

2.33 The Council for the National Interest expressed similar concerns, stating that the principle is a 'beguiling falsehood' and suggesting that, as State Parties would be encouraged to ensure that their domestic legal regimes were consistent with the crimes described in the ICC Statute, the principle of complementarity would 'operate as an international supremacy clause instead of protecting national sovereignty.'[29]

2.34 The same argument was presented by the Festival of Light, which concluded that 'the notion of complementarity is a legal shadow' that would force State Parties to amend their national law so that it was consistent with the terms and conditions of the ICC Statute. By this process, complementarity 'instead of being a shield, becomes a sword.'[30]

## Concerns about constitutionality

2.35 A number of those who expressed concern about the impact of ratification of the ICC Statute on Australia's sovereignty also argued that ratification would be unconstitutional.

2.36 A number of specific claims were made:

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27 Professor Geoffrey de Q Walker, *Submission No. 228*, p. 5.

28 National Civic Council (WA), *Submission No. 1*, pp. 2-3.

29 See Council for the National Interest (WA), *Transcript of Evidence*, 19 April 2001, p. TR188 and Council for the National Interest (WA), *Submission No.19*, p. 3. In making this point, the Council referred to a *Manual for the Ratification and Implementation of the Rome Statute*. The Manual is not an official document of the Court. It has been prepared by a non-government organisation, the International Centre for Criminal Law and Criminal Justice Policy in Vancouver, Canada.

30 Festival of Light, *Submission No. 30*, p. 4. The Festival of Light, the Council for the National Interest (WA) and others developed this argument further to claim that the ICC will become a tool for 'social engineering', supplanting the policy decisions of democratically elected governments.

- that the ICC Statute, by prohibiting 'official capacity' as a defence against an ICC crime,[31] is inconsistent with section 49 of the Constitution (which provides powers, privileges and immunities for members of Parliament);
- that ratification would be an improper use of section 51(xxix) of the Constitution (which empowers Parliament, subject to the Constitution, to make laws with respect to external affairs);
- that ratification would be inconsistent with Chapter III of the Constitution (which vests Commonwealth judicial power in the High Court of Australia and such other federal courts as Parliament creates and in such other courts as it invests with federal jurisdiction);
- that the ICC's rules of procedure and evidence are not consistent with the implied rights to due process that recent judgements of the High Court have derived from Chapter III;
- that the failure of the ICC Statute to provide trial by jury is inconsistent with section 80 (which provides that trial on indictment of any offence against any law of the Commonwealth shall be by jury); and
- that the ICC Statute, by allowing the ICC scope to interpret and develop the law it applies and the Assembly of States Parties to amend the Statute,[32] delegates legislative power to the ICC (in breach of section 1 which vests the Commonwealth's legislative power in the Parliament).

2.37 Charles Francis QC and Dr Ian Spry QC submitted the argument in relation to section 49 of the Constitution, in a joint opinion. They argued

31 Article 27 of the ICC Statute provides that it 'shall apply equally to all persons without any distinction based on official capacity' and that 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.

32 Article 21 of the ICC Statute provides that 'the Court shall apply:

(a) in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) failing that, general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.

Article 121 of the Statute provides that amendments, including amendments to the Statute crimes, may be made after 7 years of operation. This article also allows State Parties not to accept any amendments in relation to crimes committed by their nationals or on their territory and to withdraw from the Statute following any amendment (see Articles 121(5) and (6)).

that the ICC Statute is 'clearly inconsistent' with section 49, which is intended to:

> ... prevent legislators from being sued or prosecuted for carrying out their functions. Therefore ratification of the ICC's attempted negation of this Constitutional protection is prevented by the Constitution.[33]

2.38 Francis and Spry also submitted that 'it is at least very doubtful' that the external affairs power in section 51(xxix) could be relied upon to support ratification of the ICC Statute.

> The range of the external affairs power has varied greatly according to changes in attitude amongst various High Court justices. Sir Garfield Barwick CJ, for example, accorded that power an extremely wide ambit, and his views have been followed generally by many other members of the Court. However, first, there have been a number of recent changes in the composition of the High Court, and it may well be that some of the new appointees do not favour the broader construction of the external affairs power, and, secondly, the ICC Statute represents a more extreme case than any comparable treaties that have been considered by the High Court.[34]

2.39 The Festival of Light likewise argued that section 51(xxix) has been interpreted 'so broadly in a series of judgements by the High Court that it has allowed Commonwealth legislation to override State legislation on matters otherwise outside Commonwealth power'. They called for the Constitution to be amended to restrict the capacity of the Parliament to make laws under the external affairs power.[35]

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33 Charles Francis QC and Dr I C Spry QC, *Submission No 18.2*, p. 1.

34 Charles Francis QC and Dr I C Spry QC, *Submission No. 18.2*, p. 2.

35 Festival of Light, *Submission No.30*, p. 4. The submission supports the proposal put by Dr Colin Howard (in Colin Howard, 'Amending the External Affairs Power' Ch1 in *Upholding the Australian Constitution*, Proceedings of the Fifth Conference of the Samuel Griffiths Society, Vol 5, April 1995, p. 3) that the following be added after the words 'external affairs' in the Constitution:

'provided that no such law shall apply within the territory of a State unless:

(a) the Parliament has power to make that law otherwise than under this sub-section; or

(b) the law is made at the request or with the consent of the State; or

(c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia'.

2.40 A number of other submitters were sympathetic with this view, asserting that the enactment of legislation to give domestic effect to the ICC would be 'another example' of the Commonwealth Parliament abusing the external affairs power. Many of those who put this view also said that the ICC Statute should not be ratified until after it had been submitted to a referendum.[36]

2.41 Concern that ratification of the ICC Statute would be in conflict with Chapter III was raised by a number of witnesses, including Geoffrey Walker, who submitted, among other points that:

> Criminal jurisdiction over Australian territory pre-eminently forms part of the judicial power of the Commonwealth: Huddart Parker & Co. v Moorehead (1909) 8CLR 353, 366. That judicial power may only be invested in courts established under Chapter III of the Constitution: Re Wakim: ex parte McNally (1999) 198 CLR 511, 542, 556, 558, 575. The proposed International Criminal Court fails to meet that standard because its judges would not satisfy the requirements of s.72 of the Constitution in relation to manner of appointment, tenure and removal ...
>
> Further, the ICC would not be a 'court' at all in the sense understood by the Constitution or the Australian people. It would have a full time staff of about 600 and would in fact exercise the powers of prosecutor, judge and jury. It would even determine appeals against its own decisions. ...
>
> As there would be no separation of powers except at a bureaucratic level, the judges' exercise of their functions would inevitably be affected by their close links with the investigation and prosecution roles of the ICC. ...
>
> The requirements of s.72 and of the separation of powers would be fatal to the validity of any legislation purporting to give the ICC jurisdiction over Australian territory.[37]

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36 These views were put, in whole or in part, in submissions from Woolcroft Christian Centre, A & L Barron, Andrew Anderson, Nadim Soukhadar, Michael Kearney, David Mira-Batemen, Marlene Norris, Annette Burke, Stewart Coad, Nic Faulkner, Malcolm Cliff, Joseph Bryant, Valeria Staddon, Michael Sweeney and Ken Lawson. It was also suggested in some submissions that Australia's treaty making power should be amended to require that all treaties be approved by a 75% majority of the Senate and by the Council of Australian Governments before ratification (see, for example, submissions from the Council for the National Interest (WA) and Gareth Kimberley).

37 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 2-3.

2.42 Francis and Spry also concluded that 'Chapter III does not permit ratification of the ICC Statute', asserting that:

> There are clearly substantial arguments that Chapter III (and especially section 71) merely enables the Commonwealth Parliament to confer jurisdiction upon Australian or at least that it does not enable the Commonwealth Parliament to confer upon foreign courts such as the proposed ICC extensive jurisdiction over Australian nationals and extensive powers to over-ride Australian courts.[38]

2.43 Professor George Winterton also expressed the view that any Commonwealth legislation seeking to implement the ICC Statute 'may contravene Chapter III'. The main themes in his argument were that:

- the power to try a person for a criminal offence is an exercise of judicial power (see *Chu Kheng Lim v Commonwealth* (1992) 176 CLR 1, 27);
- if the ICC's power to try offences under the ICC Statute is an exercise of the judicial power of the Commonwealth for the purposes of Australian law, it would contravene Chapter III because the ICC is neither a State court nor a federal court constituted in compliance with section 72 of the Constitution (see *Brandy v HREOC* (1995 183 CLR 245);
- when the ICC tries a person charged with having committed an offence in Australia, it is arguably exercising 'judicial functions within the Commonwealth' because it is exercising judicial functions in respect of acts which occurred in Australia (see *Commonwealth v Queensland* (1975) 134 CLR 298, 328);
- while the argument advanced by Deane J (in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 627) that Chapter III would not apply to an international tribunal because it exercises the judicial power of the international community rather than the Commonwealth is 'a plausible opinion which might commend itself to some current justices of the High Court', it is:

> ... surely arguable that the ICC would exercise *both* the judicial power of the international community *and*, insofar as it applies to

38 Charles Francis QC and Dr I C Spry QC, *Submission No 18.2*, p. 2. Similar views are put in National Civic Council (WA), *Submission No. 1*, pp. 1-2; Richard Egan (National Civic Council (WA), *Transcript of Evidence*, 19 April 2001, p. TR177; Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, p. TR155; and in submissions from Robert Downey, Catherine O'Connor and Davydd Williams.

> offences committed in Australia, as a matter of Australian domestic law, the judicial power of the Commonwealth. Insofar as Australian law is concerned, the ICC would be exercising jurisdiction conferred by Commonwealth legislation implementing the Statute, just as would an Australian court trying a defendant for a crime specified in art. 5 of the Statute ... It would seem anomalous for two tribunals exercising the same jurisdiction pursuant to the same legislation to be regarded as exercising the judicial power of different polities *for the purposes of Australian domestic law*;

- in the event that the ICC exercises its jurisdiction where a person has been acquitted of the same or a similar offence by an Australian court, any action by the Executive to arrest and surrender the person to the ICC may contravene the separation of judicial power which requires executive compliance with lawful decisions of courts exercising the judicial power of the Commonwealth.

> It would seem to be a contravention of Ch. III of the Constitution for the executive to arrest a person acquitted by a Ch. III court and surrender him or her for further trial by another court exercising authority derived from Commonwealth law (insofar as Australian law is concerned) for essentially the same offence.[39]

2.44 In submitting these views, Winterton admits to two caveats: first that the legal position will depend upon the specific terms of the legislation; and, second, that there is little or no direct legal authority in support of these arguments and that his observations are 'necessarily somewhat speculative'.[40]

2.45 Geoffrey Walker submits, as a separate claim, that one of the strongest trends in Australian constitutional law in recent years has been for the High Court to conclude that certain basic principles of justice and due process are entrenched within Chapter III and that the ICC's rules of procedure and evidence are inconsistent with these principles.

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39 Professor George Winterton, *Submission No. 231*, pp. 2-3. Nevertheless, Professor Winterton supported Australia's ratification of the ICC Statute, believing that 'international justice requires an International Criminal Court'. He was of the view that: 'since it is extremely unlikely under foreseeable circumstances that the ICC would be called upon to exercise its jurisdiction in respect of an art. 5 crime committed in Australia, the Committee may well conclude that the risk that Ch. III would be successfully invoked is minimal' (see *Submission No. 231*, p. 3).

40 Professor George Winterton, *Submission No. 231*, p. 3.

> ... procedural due process is a fundamental right protected by the Constitution, which mandates certain principles of open justice that all courts must follow ...
>
> This constitutional guarantee raises further doubts about whether the Parliament could validly confer jurisdiction on the ICC.[41]

2.46 Walker, Francis and Spry raised the further possibility that the absence of trial by jury from the ICC's procedures could infringe against the safeguard of trial by jury provided for in section 80 of the Constitution.[42]

2.47 Other constitutional issues raised by Geoffrey Walker concern the law-making capacity of the ICC and the Assembly of States Parties. Walker submitted that the provisions of the ICC Statute which allow the Court to apply general principles of law and 'principles as interpreted in its previous decisions' (see footnote 34 above) confer on the Court 'vast new fields of discretionary law making'.

> This wholesale delegation of law-making authority to a (putative) court encounters serious objections stemming from the separation of powers. ... They are exemplified in the Native Title Act Case, in which the High Court struck down a provision of the NTA that purported to bestow on the common law of native title the status of a law of the Commonwealth ... [in this decision the majority concluded that] 'Under the Constitution ... the Parliament cannot delegate to the Courts the power to make law involving, as the power does, a discretion or, at least, a choice as to what the law should be' (Western Australia v Cth (1995) 183 CLR 373, 485-87).[43]

2.48 Walker also expressed concern about the capacity of the Assembly of States Parties to amend the Statute crimes after a period of 7 years[44]. In his assessment, to give effect to this mechanism the Parliament would need to:

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41 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 6-7.

42 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 7-8 and Charles Francis QC and Dr I C Spry QC, *Submission 18.2*, p. 3. In his submission Professor Walker noted that the prevailing High Court opinion on section 80 is to limit the trial by jury guarantee to 'trial on indictment', a procedure which strictly speaking does not exist in Australia.

43 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 9-10.

44 Article 121 allows for amendments to be made by the Assembly of States parties or at a special review conference after 7 years. Adoption of amendments requires a two-thirds majority of States parties. If a State does not agree with the amendment the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory. Under Article 121(6) if an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from the Statute with immediate effect.

> ... delegate to the Assembly the power to make laws operating in Australian territory. That it cannot do: Parliament 'is not competent to abdicate its powers of legislation' or to create a separate legislature and endow it with Parliament's own capacity: Victorian Stevedoring and General Contracting Co. v Dignan (1931) 46 CLR 73, 121; Capital Duplicators Pty Ltd v ACT (no 1) (1992) 177 CLR 248; Re Initiative and Referendum Act (1919) AC 935, 945. This is because 'the only power to make Commonwealth law is vested in the parliament (Native Title Act case p 487).[45]

2.49 The Attorney-General has rejected the claims that ratification of the ICC Statute would violate Chapter III of the Constitution, describing them as false and misleading.[46]

> The ICC will exist totally independently of Chapter III of Constitution, it will not have power over any Australian Court and will not in any way affect the delivery of justice in Australia.
>
> Australia has been subject to the International Court of Justice for over 50 years and this has not violated our constitutional or judicial independence. The ICC will not have any effect on our constitution or interfere in any way with the independence of our judiciary.[47]

2.50 At the Committee's request, the Attorney-General's Department sought advice from the Office of General Counsel of the Australian Government Solicitor on a number of the constitutional concerns raised in submissions to our inquiry. The advice, issued with the authority of the acting Chief General Counsel, was as follows:

> The ICC will not exercise the judicial power of the Commonwealth when it exercises its jurisdiction, even when that jurisdiction relates to acts committed on Australian territory by Australian citizens. Ratification of the Statute will not involve a conferral of the judicial power of the Commonwealth on the ICC. Nor would enactment by the Parliament of the draft ICC legislation involve such a conferral.

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45 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, p. 10. Walker noted that the Government's proposed implementing legislation might seek to address this issue (see *Submission No. 228*, p. 10).

46 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5.

47 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5.

> ... The judicial power of the Commonwealth cannot be vested in a body that is not a Chapter III court. However, the draft ICC legislation does not purport to confer Commonwealth judicial powers or functions on the ICC. The legislation has been drafted on the basis that the powers and functions of the ICC have been conferred on it by the treaty establishing it.
>
> ... The judicial power exercised by the ICC will be that of the international community, not of the Commonwealth of Australia or of any individual nation state. That judicial power has been exercised on previous occasions, for example in the International Court of Justice and the International Tribunal for the Law of the Sea. Australia has been a party to matters before both of these international judicial institutions.
>
> ... Numerous respected United States commentators have considered the alleged unconstitutionality of ratification of the ICC Statute by the United States and, in relation to those arguments which are relevant in the Australian context, have resoundingly concluded that there is no constitutional objection to ratification. For example, Professor Louis Henkin (*Foreign Affairs and the United States Constitution* (2nd Ed) 1996 at p.269) has written that the ICC would be exercising international judicial power. It would not be exercising the governmental authority of the United States but the authority of the international community, a group of nations of which the United States is but one.
>
> Decisions of the ICC would not be binding on Australian courts, which are only bound to follow decisions of courts above them in the Australian court hierarchy. However, decisions of courts of other systems are often extremely persuasive in Australian courts. It is a normal and well established aspect of the common law that decisions of courts of other countries, such as the United Kingdom are followed in Australian courts. Similarly, were an Australian court called upon to decide a question of international law, it could well find decisions of international tribunals to be persuasive.[48]

2.51 Having reviewed this matter the Attorney-General reported that:

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48 Office of General Counsel, 'Summary of Advice', pp 1-2, attached to Attorney-General's Department, *Submission No. 232*.

> The Government has satisfied itself that ratification of the Statute and enactment of the necessary legislation will not be inconsistent with any provision of the Constitution.[49]

2.52 Justice John Dowd, on behalf of the International Commission of Jurists, agreed that the ICC 'would not exercise Commonwealth judicial power' and would, therefore, operate independently of Chapter III of the Constitution.

> [Chapter] III applies to Australian courts. The foreign affairs power applies to foreign affairs. What we are doing is setting up something extra-Australian in the power vested in the Commonwealth to do that. The Commonwealth uses that power in a whole range of matters and treaties for the protection of the world. Chapter III deals with our court system....
>
> Chapter III ... is to ensure that the [court] system in Australia has integrity and probity, it does not govern an international treaty [such as would establish] extradition and the International Criminal Court.[50]

2.53 Further argument in response to the constitutional concerns was put in written and oral evidence received from government officials, the Attorney-General and the Minister for Foreign Affairs. The key elements of this argument are reproduced below:

- 'the ICC is not going to be a domestic tribunal of Australia; it does not fit within the Constitution. It is an international tribunal established by the international community to try international crimes ... it operates within its own sphere, just as our courts operate within their own spheres';[51] and
- 'the ICC will have no authority over any Australian court and in particular will not become part of the Australian court system and will have no power to override decisions of the High Court or any other Australian court. As an international court, the ICC will not be subject to the provisions of Chapter III of the Constitution, which governs the exercise of judicial power of the Commonwealth. The High Court has

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49 The Hon Daryl Williams AM QC MP, 'The International Criminal Court - the Australian Experience', an address to the International Society for the Reform of Criminal Law, 30 August 2001, p. 7.

50 The Hon Justice John Dowd, *Transcript of Evidence*, 13 February 2001, p. TR 107.

51 Mark Jennings (Attorney-General's Department), *Transcript of Evidence*, 30 October 2001, p. TR25.

stated (in the Polyukhovich case) that Chapter III would be inapplicable to Australia's participation in an international tribunal to try crimes against international law. In this regard the ICC will be akin to the International Court of Justice or the International Criminal Tribunals for the former Yugoslavia and Rwanda.'[52]

2.54 The Australian Red Cross (through its National Advisory Committee on International Humanitarian Law) also argued firmly against those who claim ratification would be beyond the Commonwealth's constitutional authority. It referred to such claims as being 'manifestly flawed' and as 'being entirely devoid of legal substance'. The Red Cross submitted that:

> Those who make such naïve arguments fail to mention existing Commonwealth legislation such as the *International War Crimes Tribunals Act 1995* which, on the basis of the same argument must be ultra vires Commonwealth legislative competence - this of course, despite the fact that the validity of that particular legislation has never been challenged. It should also be noted that the *Extradition Act 1998* is predicated upon the notion that the Commonwealth Parliament is constitutionally competent to legislate in respect of the transfer of Australians, and others within our territorial jurisdiction, to foreign courts.
>
> Quite apart from the existence of valid Commonwealth legislation which exposes the fallacy of the argument, the High Court's interpretation of the scope of the External Affairs Power in Section 51(xxix) of the Constitution extends to both the abovementioned Act as well as to any new legislation in respect of the Rome Statute.[53]

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52 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 10. The advice from the Office of General Counsel mentioned above also cites the Polyukhovich case, saying Justice Deane concluded that international tribunals trying crimes against international law would be exercising international judicial power: 'Chapter III of the Constitution would be inapplicable, since the judicial power of the Commonwealth would not be involved' (see Office of General Counsel, 'Summary of Advice', p1, attached to Attorney-General's Department, *Submission No. 232*). Amnesty International endorses the view that Justice Deane's comments in the Polyukhovich case are relevant and aptly cited by the Government witnesses (see Amnesty International, *Submission No. 16.2*, p. 3). Geoffrey Walker noted that Justice Deane's remarks were *obiter dicta*; that is, were said by the way, rather than as part of the essential legal reasoning of the case before him at the time (see Professor Emeritus Geoffrey de Q. Walker, Submission No. 228, p. 3).

53 Australian Red Cross (National Advisory Committee on International Humanitarian Law) *Submission No. 26.1*, pp. 1-2.

2.55 As the Australian Red Cross pointed out, if the arguments about constitutional invalidity are correct, then they should apply to Australia's involvement in other War Crimes Tribunals. That argument made by the RC was not countered in evidence put to the Committee.

## The proposed implementing legislation and the ICC crimes

2.56 On 31 August 2001, the Attorney-General referred the following draft legislation to the Committee:

- *International Criminal Court Bill 2001*, (the ICC bill); and
- *International Criminal Court (Consequential Amendments Bill 2001*, (the consequential amendments bill).

The Committee then sought further public submissions from all parties who had previously had input to its review of the Statute to comment on any aspect of the proposed legislation.

2.57 As a result, a number of issues were raised concerning the proposed legislation. As with views on the Statute, there are a range of competing opinions relating to the impact and coverage of the legislation.

2.58 Organisations like the Australian Red Cross, the Australian Institute for Holocaust and Genocide Studies, the Castan Centre for Human Rights Law, Human Rights Watch and Amnesty International, who favour Australia's ratification of the Statute, indicated that in their view the legislation would be sufficient for the purpose of fulfilling Australia's obligations under the Rome Statute. In fact, Human Rights Watch contended that:

> By virtue of the comprehensive nature of this Bill, the likelihood of the ICC ever asserting jurisdiction in a case over which Australia would ordinarily exercise jurisdiction, is now extremely remote.[54]

2.59 The Australian Red Cross considered that while in several areas the legislation may need minor modifications:

> It is the general view of ARC that the Bills as drafted comprehensively provide for the national implementation of

54 Human Rights Watch, *Submission No. 23.1*, pp. 1-2.

offence in another country can be surrendered to face trial in that country. Australian citizens have also been exposed to the prospect of trial by foreign courts for war crimes, in accordance with the 1949 Geneva Conventions. There have been few arguments over the years that any of these arrangements jeopardise our national sovereignty or judicial independence.

3.39 In the event that the ICC acts in a way that corrupts the complementarity principle, thereby compromising the primacy of national judicial systems, Australia, like any other signatory, could always exercise its sovereign right to withdraw from the Statute (see the section "Withdrawal from the Statute" later in this Chapter).

## Concerns about constitutionality

3.40 The Parliament's capacity to enact legislation, pursuant to section 51(xxix), to give effect to international obligations is well-established in law and practice. Moreover, this power has been interpreted broadly by the High Court in a series of cases.[4]

3.41 Blackshield and Williams, in *Australian Constitutional Law and Theory*, noted that 'the view that s 51 (xxix) would authorise laws to implement the provisions of an international treaty has been expressed by constitutional authorities since the earliest years of federation.'[5]

3.42 Moens and Trone, in Lumb and Moens *The Constitution of Australia Annotated*, argued that recent decisions of the High Court have 'continued this expansive interpretation of the [external affairs] power', citing Mason J in *Commonwealth* v *Tasmania*:

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4 See Koowarta v. Bjelke-Peterson (153 CLR 168 (1982), discussing section 51 in relation to the *Racial Discrimination Act 1975*; Commonwealth v. Tasmania (158 CLR 1,172 (1983), 'As soon as it is accepted that the Tasmanian wilderness area is part of world heritage, it follows that its preservation as well as being an internal affair, is part of Australia's external affairs'; Polyukhovich v. Commonwealth (172 CLR 501, 528 (1991), 'Discussion of the scope of the external affairs power has naturally concentrated upon its operation in the context of Australia's relationships with other countries and the implementation of Australia's treaty obligations. However, it is clear that the scope of the power is not confined to these matters and that it extends to matters external to Australia.' (cited by Katherine Doherty and Timothy McCormack in 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation', *UC Davis Journal of International Law and Policy*, Vol 5, Spring 1999, No. 2, p. 157)

5 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory*, 2nd Edition, 1998, p. 685. Blackshield and Williams refer to decisions of the High Court in 1906, 1921 and 1936 and statements by Alfred Deakin as Attorney-General in 1902.

> ... it conforms to established principle to say that s 51(xxix) was framed as an enduring power in broad and general terms enabling the Parliament to legislate with respect to all aspects of Australia's participation in international affairs and of its relationship with other countries in a changing and developing world and in circumstances and situations that could not be easily foreseen in 1900.[6]

3.43 Lane, in *Commentary on the Australian Constitution*, summarised the effect of the High Court's interpretation as being that the subject of the Executive's international undertakings is 'virtually limitless' and that the test for validity of such action and its domestic implementation is simple:

> ... the simple test for validity is, is there a Commonwealth Government international commitment on any kind of matter, followed by the Commonwealth Parliament's action under s 51(xxix)? That is all.[7]

3.44 The Committee agrees with the conclusion drawn by Doherty and McCormack that it is:

> ... clear that the Federal Parliament has the requisite constitutional competence to introduce legislation to bring the *Rome Statute* crimes into Australian criminal law should it choose to do so.[8]

3.45 The remaining Constitutional arguments are, to varying degrees, plausible, but are not persuasive.

3.46 The most complete argument presented is that ratification of the ICC Statute would be inconsistent with Chapter III of the Constitution, which provides that Commonwealth judicial power shall be vested in the High Court of Australia and such other federal courts as the Parliament creates. However, the Committee accepts as reasonable the Attorney-General's submission (relying upon advice from the Australian Government Solicitor and referring to Justice Deane's dicta in Polyukhovich) that the ICC will not exercise the judicial power of the Commonwealth, even if it were to hear a case relating to acts committed on Australian territory by Australian citizens. The judicial power to be exercised by the ICC will be that of the international community, not of the Commonwealth of Australia. As noted by the Attorney, the international community's

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6 Gabriel Moens and John Trone, Lumb and Moens *The Constitution of the Commonwealth of Australia Annotated*, 6th Edition, 2001, p. 144

7 PH Lane, *Commentary on the Australian Constitution*, 2nd Edition, 1997, p. 301

8 Doherty and McCormack, 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation', *UC Davis Journal of International Law and Policy*, Vol 5, Spring 1999, No. 2, p. 161

judicial power has been exercised on previous occasions, for example in the International Court of Justice and the International Tribunal for the Law of the Sea. Australia has been party to matters before both these tribunals.

3.47 In summary, the Committee's view is that:

- while acknowledging that some of the evidence received presents an arguable case, the Committee is not persuaded that the High Court would find the Government's proposed implementing legislation to be invalid;
- it is reasonable for Parliament to proceed on the basis of properly considered advice from the Attorney-General that the proposed implementing legislation will not be in breach of the Constitution; and
- it is extremely unlikely that the matter will ever be tested by the High Court, as there is very little chance that an Australian national will ever be charged with a Statute crime for an offence committed in Australia *and* that the Australian judicial system will show itself to be unwilling or unable genuinely to carry out the investigation or prosecution.

3.48 The Committee does not accept that the legislation is likely to contravene the Constitution. In any case, the new laws could be tested in accordance with usual practice if there were any constitutional concerns.

3.49 It is of considerable importance that Australia be at the first assembly of the States Parties to take place after the Statute comes into force on 1 July 2002. That first meeting is likely to be held in September 2002 and is expected to settle the rules of procedure and evidence, the *Elements of Crimes* document, the timing and procedure for the election of judges, and the first annual budget. To participate in the first meeting of State Parties, Australia needs to deposit its instrument of ratification by 2 July 2002.[9] The Committee was advised by the Attorney-General's Department that ratification should not proceed until domestic legislation is in place. The Committee has carried out a thorough examination of the draft legislation during the course of this inquiry.

### Recommendation 5

3.50 The Committee recommends that the *International Criminal Court Bill* and the *International Criminal Court (Consequential Amendments) Bill*

9 Joanne Blackburn, *Transcript of Evidence*, 10 April 2002, p. TR239.