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SCSL -2003-06-PT-040

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

Before: Judge Bankole Thompson
Designated Judge

Registrar: Mr. Robin Vincent

Date filed: 5 June 2003

THE PROSECUTOR

Against

ALEX TAMBA BRIMA

also known as (aka) TAMBA ALEX BRIMA aka GULLIT

CASE NO. SCSL – 2003 – 06 – PT

PROSECUTION RESPONSE TO DEFENCE MOTION FOR LEAVE TO ISSUE WRIT OF HABEAS CORPUS AD SUBJICIENDUM AND FOR AN ORDER FOR THE WRIT OF HABEAS CORPUS AD SUBJICIENDUM

Eustace Thompson
5-06-03 17:17hrs

Office of the Prosecutor:

Mr. Luc Côté, Chief of Prosecutions
Mr. James Johnson, Senior Trial Counsel
Mr. Abdul Tejan-Cole, Appellate Counsel

Defence Counsel:

Mr. Terrence Michael Terry

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

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INTRODUCTION

The Prosecution files this response to the "Defence Motion for Leave to Issue a Writ of Habeas Corpus, ad Subjiciendum as well as for the Order of the Writ of Habeas Corpus ad Subjiciendum releasing the Applicant herein from his present unlawful detention pursuant to Rule 54 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone and under the Habeas Corpus Acts of 1640 and 1816" (the "Defence Motion"), filed on behalf of the Accused on 28 May 2003 (RP 624-741).

For the reasons given below, the Prosecution submits that the Defence Motion should be rejected on the ground that neither the Statute nor the Rules of Procedure and Evidence (the "Rules") of the Special Court make provision for "a writ of habeas corpus", and that a "a writ of habeas corpus" is unknown in the procedures of the Special Court. Alternatively, for the further reasons given below, if the Court were to decide that the

Defence Motion should be dealt with as a motion under Rule 72 or Rule 73 challenging the lawfulness of the Accused's detention, the Prosecution submits that the Defence Motion should be rejected on its merits.

BACKGROUND

1. On 7 March, 2003 the designated Judge approved the Indictment against the Accused herein pursuant to Rule 47(H) of the Rules, and at the request of the Prosecutor, issued a warrant for the arrest of the Accused and ordered the transfer of the Accused and the detention of the Accused in the Special Court Detention Facility.
2. On 15 March 2003 the Accused made his initial appearance before the designated Judge, who ordered his detention on remand until further order of the Court.
3. The Defence Motion now seeks various forms of relief from the Special Court, to wit:
   (1) leave to issue a Writ of Habeas Corpus Ad Subjiciendum;
   (2) an Order for a Writ of Habeas Corpus Ad Subjiciendum;
   (3) an Order for the Release of the Accused; and
   (4) an Order setting aside or vacating the Order dated 7 March 2003 granting the Prosecution request for a Warrant to be issued for the Arrest of the Accused and the Order Approving the Indictment.

THE DEFENCE MOTION SHOULD BE REJECTED AS SEEKING A REMEDY WHICH DOES NOT EXIST IN THE PROCEDURE OF THE SPECIAL COURT

4. The Defence Motion relies on certain provisions of Sierra Leone national law, namely the Habeas Corpus Acts of 1640 and 1816, sections 17 and 170 of the 1991 Constitution of Sierra Leone, and section 74 of the Courts Act 1965 of Sierra Leone. However, these provisions are not applicable to the Special Court.

The Special Court does not form part of the judiciary of Sierra Leone nor is it a Sierra Leonean Court.[1] The Special Court is not bound by any national law.[2]

5. Section 10 of the Special Court Agreement, 2002 (Ratification) Act 2002 states that "(T)he Special Court shall exercise the jurisdiction and powers conferred upon it by the Agreement...." and section 11(2) provides that "(T)he Special Court shall not form part of the Judiciary of Sierra Leone." Article 1.2 of the Agreement between the United Nations and the Government of Sierra Leone states that "(T)he Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone." The jurisdiction of the Special Court, unlike the Superior Court of Judicature of Sierra Leone whose jurisdiction is inclusive and unlimited, is circumscribed by the provisions of Article 1 of the Statute of the Court. It follows that the Special Court cannot exercise the jurisdiction conferred on the Courts of Sierra Leone by Sections 17(3), 125 and 134 of the Constitution of Sierra Leone 1991; nor are the provisions of section 74 of the Courts Act 1965 or section 170(1) of the Constitution of Sierra Leone 1991 applicable to proceedings before the Special Court.
6. The Special Court has its own Statute and Rules and Procedure of Evidence which apply to its proceedings. The Prosecution submits that the Statute and Rules of Procedure and Evidence (the "Rules") of the Special Court do not make provision for a "writ of habeas corpus".
7. The Prosecution fully accepts that in the legal system of the Special Court, a detained individual has the right to have recourse to an independent judicial officer for review of the detaining authority's acts, and that this right allows a detainee to have the legality of his or her detention reviewed by the judiciary.[3] This is a fundamental right and is enshrined in international human rights norms.[4]
8. However, the procedural mechanism in the legal system of the Special Court by which a detained person can challenge the legality of his or her detention is not a

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1 See Article 8 of the Statute and Section 11(2) of the Special Court (Ratification) Act.

2 See *the Prosecutor v Kanyabashi, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings*, Case No. ICTR-96-15-I, Trial Chamber, 23 May 2000.

3 See *Prosecutor v. Barayagwiza, Decision*, Case No. ICTR-97-19-AR72, Appeals Chamber, 3 November 1999, para. 88.

4 *Ibid.*

"writ of habeas corpus". As a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") has observed, a *writ of habeas corpus* is one of the old forms of prerogative writ available in certain common law countries, under which documents were issued in the name of the Sovereign by which the named defendant was ordered to carry out a particular action and which, if the action was not carried out, led to proceedings in a court of generally civil (not criminal) jurisdiction, unless otherwise provided by statute. That Trial Chamber held that the ICTY has no power to issue writs in the name of any Sovereign or other head of state, and is not a court of civil jurisdiction which can hear the proceedings commenced by such a writ. It found that while the ICTY has both the power and the procedure to resolve a challenge to the lawfulness of a detainee's detention, the appropriate procedure for asserting that right in the legal system of the ICTY is by way of motion – pursuant to Rule 72 of the Rules of Procedure and Evidence ("Rules") if the application amounts to a challenge to jurisdiction, or pursuant to Rule 73 if it does not. In that case, the Trial Chamber treated a Defence request for the issue of a *writ of habeas corpus* as a wrongly entitled motion by the Accused under Rule 73 seeking to challenge the lawfulness of his detention.[5]

9. The Prosecution submits that this reasoning is equally applicable to the Rules of the Special Court for Sierra Leone, the wording of which is in material respects identical to that of the Rules of the International Criminal Tribunal for Rwanda ("ICTR") and the ICTY. While the *right* of a detainee to have the legality of his or her detention reviewed by the judiciary is universally applicable, the technical procedure of "*habeas corpus*", which exists in certain legal systems but not others, is not the procedure for giving effect to this right in the legal system of the Special Court. In the legal system of the Special Court, this right can be given effect by Rule 72 and Rule 73 of the Rules. The Prosecution submits that it is not desirable for technical procedures from national legal systems to be incorporated

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[5] *Prosecutor v. Brdanin, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radovan Brdanin*, Case No. IT-99-36-PT, Trial Chamber, 8 December 1999, paras. 2-7.

into the legal system of the Special Court, which should apply the provisions of its own Statute and Rules.

10. Accordingly, the Prosecution submits that the Defence Motion should be rejected on the ground that neither the Statute nor the Rules make provision for "a writ of habeas corpus", and that a "a writ of habeas corpus" is unknown in the procedures of the Special Court.
11. Alternatively, if the Court were to decide that the Defence Motion should be dealt with as a motion under Rule 72 or Rule 73 challenging the lawfulness of the Accused's detention, the Prosecution submits that the Defence Motion should be rejected on its merits, for the reasons given below.

THE DEFENCE MOTION SHOULD BE REJECTED ON ITS MERITS

12. The arguments advanced in the Defence Motion are not clearly articulated. The Prosecution submits that the burden is on a party seeking a procedural remedy from the Court to establish its entitlement to that right.[6] The burden is thus on the Accused to establish the factual and legal criteria upon which he claims that his detention is unlawful. Where a party seeks a remedy from the Court, but does not clearly articulate the reasons on which the request is based, the request should for that reason alone be rejected.
13. The Defence Motion essentially advances two main arguments (or two "planks" as they are referred to in the Defence Motion). These are (1) that the Prosecution did not comply with the conditions precedent as envisaged by Rule 47 when submitting the Indictment for confirmation; and (2) that the Indictment did not "on its merits satisfy the litmus test laid down under ... Rule 47", and that for this reason the designated Judge lacked jurisdiction or acted in excess of jurisdiction in confirming the Indictment. The Defence Motion also appears to advance additional arguments that (3) the Indictment is flawed *ex facie* because it "erroneously ... disclosed that the applicant herein joined the Sierra Leone (SLA)

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[6] See *Prosecutor v. Tadic, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence*, Case No. IT-94-1-A, Appeals Chamber, 15 October 1998, paras. 52, 53.

in 1985 and rose to the rank of Staff Sergeant"; (4) that the arrest warrant of 7 March 2003 did not on its true reading order the arrest of the Accused; (5) that the arrest warrant of 7 March 2003 was not served on the Accused; and (6) that in consequence the rights of the Accused have been grossly violated.

14. As to argument (1) referred to in paragraph 13 above (the argument that the Prosecution did not comply with the conditions precedent as envisaged by Rule 47), the Prosecution submits that the Defence Motion in no way establishes how the requirements of that Rule were not met. Rule 47(B) provides that:

> "The Prosecutor, if satisfied in the course of an investigation that a suspect has committed a crime or crimes within the jurisdiction of the Special Court, shall prepare and submit to the Registrar an indictment for approval by the aforementioned Judge."

15. Whether the Accused did or did not commit the crimes with which he is charged is a matter to be determined by the Trial Chamber following the trial—that is not the issue here. At the pre-trial stage, the Trial Chamber will not determine contentious issues requiring decisions on the merits of the evidence at trial,[7] and at the pre-trial stage, the Defence cannot allege facts to contradict the allegations in the indictment—these are matters for evidence at trial, and should not be raised at the preliminary motions stage.[8] At this stage of the proceedings, the only question is whether the Prosecution was *satisfied* at the time of preparing and

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[7] See *Prosecutor v. Kunarac, Decision on Defence Preliminary Motion on the Form of the Amended Indictment*, Case No. IT-95-23-PT, Trial Chamber II, 21 October 1998; *Prosecutor v. Bagambiki et al., Decision on the Defence Motion on Defects in the Form of the Indictment*, Case No. ICTR-97-36-(I), Trial Chamber II, 24 September 1998, para. 5; *Prosecutor v. Krstic, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Counts 7-8*, Case No. IT-98-33-PT, Trial Chamber I, 28 January 2000, pp. 3-4; *Prosecutor v. Naletilic and Martinovic, Decision on Defendant Vinko Martinovic's Objection to the Indictment*, Case No. IT-98-34-PT, Trial Chamber I, 15 February 2000, paras. 5-8; *Prosecutor v. Delalic et al. (Celebici), Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment)*, Case No. IT-96-21-AR72.5, Bench of the Appeals Chamber, 6 December 1996, para. 38; *Prosecutor v. Delalic et al. (Celebici), Decision on Motion by the Accused Esad Landzo Based on Defects in the Form of the Indictment*, Case No. IT-96-21-T, Trial Chamber, 15 November 1996, paras. 9- 11; *Prosecutor v. Delalic et al. (Celebici), Decision on Motion by the Accused Zejnil Delalic Based on Defects in the Form of the Indictment*, Case No. IT-96-21-T, Trial Chamber, 2 October 1996, paras. 7-8.

[8] See *Prosecutor v. Nyiramashuko and Ntahobali, Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of Indictment*, Case No. ICTR-97-21-I, Trial Chamber I, 4 September 1998, paras. 19-20.

submitting the Indictment that the Accused has committed a crime or crimes within the jurisdiction of the Special Court.

16. The Defence Motion does not show that this was not the case, and this argument must accordingly be rejected.

17. The Defence Motion goes even further, by suggesting that the Prosecution acted in bad faith in submitting the indictment, and by alleging "prosecution lawlessness". No basis whatever is advanced for these allegations, and in making these allegations, the Defence Motion is frivolous. In this respect, the Prosecution draws the Court's attention to Rule 46(C).

18. As to argument (2) referred to in paragraph 13 above (the argument that the Indictment did not "on its merits satisfy the litmus test laid down under ... Rule 47"), the Prosecution submits that the Defence Motion similarly in no way establishes how the requirements of that Rule were not met. Rule 47(E) provides that:

> "The designated Judge shall review the Indictment and accompanying material to determine whether the indictment should be approved. The Judge shall approve the Indictment if he is satisfied that:
>
> (i) the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and
>
> (ii) that the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularized in the indictment."

19. In response to this argument, paragraphs 15-16 above apply *mutatis mutandis*. The issue at this stage is not whether the indictment actually charges the suspect with a crime or crimes within the jurisdiction of the Special Court (which may be an issue to be determined at the preliminary motions stage under Rule 72(B)(i), or to be determined in the final judgement of the Trial Chamber). Nor is the issue at this stage whether the allegations in the Indictment are proven, this being a matter pertaining to the merits of the case which is to be determined at trial. There is no

provision in the Rules which permits a Trial Chamber or designated Judge at the pre-trial stage to review the actual decision made by the confirming Judge, by way of appeal or in any other way.[9] The only issue at this stage is whether the designated Judge was *satisfied* of the matters referred to in Rule 47(E). The Defence Motion in no way establishes that the designated Judge was *not* so satisfied.

20. As to argument (3) referred to in paragraph 13 above (the argument that the Indictment is flawed *ex facie* because it "erroneously ... disclosed that the applicant herein joined the Sierra Leone (SLA) in 1985 and rose to the rank of Staff Sergeant"), the Prosecution submits that the question whether or not a fact pleaded in the Indictment is correct is a matter pertaining to the merits of the case, which can only be determined by the Trial Chamber after hearing all of the evidence in the case. Again, paragraphs 15-16 and 19 above apply *mutatis mutandis* to this Defence argument. The Indictment in this case on its face meets the requirements of the Rules (in particular, Rule 47(C)). The Defence Motion in no way establishes any *ex facie* invalidity. The Prosecution will also rely on the transcripts of the proceedings at the initial hearing exhibited to the Accused's affidavit as "TAB3" and "TAB4" respectively in which he is recorded as having acknowledged that he is Tamba Alex Brima who is the very person charged in the Indictment confirmed by the designated Judge. The Prosecution therefore submits that the averments contained in and the attachments exhibited to the

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[9] See *Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagasora and 28 Others*, Case No. ICTR 98-37-A, Appeals Chamber, 8 June 1998; *Prosecutor v. Brdanin, Decision on Motion to Dismiss Indictment*, Case No. IT-99-36-PT, Trial Chamber II, 5 October 1999; *Prosecutor v. Brdanin and Talic, Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed Under Rule 72*, Case No. IT-99-36-AR72, Appeals Chamber, 16 November 1999; *Prosecutor v. Brdanin, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brdanin*, Case No. IT-99-36-PT, Trial Chamber II., 8 December 1999, paras. 12-15; *Prosecutor v. Talic, Decision on Motion for Release*, Case No. IT-99-36-PT, Pre-Trial Judge, 10 December 1999, at esp. para. 17; *Prosecutor v. Nahimana, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment*, Case No. ICTR-96-11-T, Trial Chamber, 24 November 1997, esp. para. 19; *Prosecutor v. Bagambiki et al., Decision on the Defence Motion on Defects in the Form of the Indictment*, Case No. ICTR-97-36-I, Trial Chamber, 24 September 1998, esp. para. 5; *Prosecutor v. Ntagerura, Decision on Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment*, Case No. ICTR-96-10-I, Trial Chamber, 28 November 1997, esp. para. 11.

affidavit of Ayo Max-Dixon filed in support of the Defence Motion are irrelevant to the determination of the Defence Motion.

21. As to argument (4) referred to in paragraph 13 above (the argument that the arrest warrant of 7 March 2003 did not on its true reading order the arrest of the Accused), the Prosecution submits that this argument is unfounded. The relevant provisions of the Rules (in particular, Rule 47(H) and Rule 55) prescribe no specific wording of a warrant of arrest. The warrant of arrest in this case complied with the requirements of those Rules.

22. The warrant of 7 March 2003 is clearly and unambiguously entitled "Warrant of Arrest and Order for Transfer and Detention". It cannot plausibly be suggested that a document so entitled does not order the arrest of the person to whom it relates. The language contained in the warrant confirms this, ordering the Registrar, *inter alia,* "(A) to address this Warrant of Arrest ... to the national authorities of Sierra Leone in accordance with Rule 55"; "(C) to cause to be served on the Accused, at the time of his arrest ... a certified true copy of the Warrant of Arrest"; and "(D) to remand the Accused, into the custody of the Special Court Detention Facility ...". The Prosecution submits further, that the use of the definite article "this" and not "the" in Order (A) above is sufficient proof that the designated Judge intended by that Order to issue a warrant for the arrest of the Accused. Thus the cumulative effect of the language used in the Warrant for Arrest is to effectuate the arrest of the Accused.

23. As to argument (5) referred to in paragraph 13 above (the argument that the arrest warrant of 7 March 2003 was not served on the Accused), the Prosecution submits that this is not correct. The Prosecution relies on paragraph 8 of the annexed Declaration dated 31 May 2003 of Morie Lengor, an investigator in the Office of the Prosecutor. The Prosecution submits that in this case there was full compliance with the requirements of Rule 52 (A) and (B) and Rule 55 (C) of the Rules.

24. As to argument (6) referred to in paragraph 13 above (the argument that the rights of the Accused have been grossly violated), the Prosecution submits that it follows from the submissions above that no violation of the rights of the Accused

have been established by the Defence Motion. The rights of the Accused are fully guaranteed by the Statute and Rules of the Special Court, in particular, Article 17 of the Statute. The Defence Motion does not suggest that Article 17 of the Statute has not been complied with.

CONCLUSION

25. The Court should therefore dismiss the Defence Motion.

Freetown, 5 June 2003.

For the Prosecution,

Luc Côté
Chief of Prosecutions

James Johnson
Senior Trial Counsel

Abdul Tejan-Cole
Appellate Counsel

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INVESTIGATOR'S DECLARATION

31 May 2003

Accused Alex Tamba Brima aka Tamba Alex Brima aka Gullit

I, MORIE LENGOR, Investigator in the Office of the Prosecutor, Special Court for Sierra Leone affirmatively state as follows:

1. I work as an Investigator in the Office of the Prosecutor and I have due authority to make this statement.

2. I am also a professionally trained Policeman of the rank of Assistant Commissioner in the Sierra Leone Police Force where I have been working as a Policeman since 1980.

3. I have considerable experience in detecting and investigating crimes, having worked in the Criminal Investigations Department of the Sierra Leone Police Force for about 15 years during my career as a policeman.

4. Since November 2002, I have been working in the Office of the Prosecutor, Special Court for Sierra Leone, where my duties include investigating crimes against international humanitarian Law and Sierra Leonean Law committed within the territory of Sierra Leone from 30th November 1996, during the period of armed conflict in Sierra Leone.

5. The mandate of the investigations, as set forth in the Statute of the Special Court for Sierra Leone, is to investigate and prosecute those who bear the greatest responsibility for crimes within the jurisdiction of the Special Court.

6. On 10 March 2003 I was present for the transfer of Accused from the custody of the Sierra Leone Police to the Special Court Detention Unit at Bonthe Island. Prior to 10 March 2003, the Accused had been arrested and detained at the Jui Police Station in Hastings, by the Sierra Leone Police for charges under the jurisdiction of Sierra Leone Law. At about 1400 hours at the Bonthe detention facility Mr Oliver Somasa, a senior Assistant Commissioner of Police, told the accused in my presence that he was not

obliged to say anything unless he wished to do so but that whatever he said would be taken down in writing and might be given in evidence.

7. After the accused was cautioned by Mr Somasa I introduced myself and informed him of his transfer and detention for crimes within the jurisdiction of the Special Court for Sierra Leone. I read to him his rights under Article 17 and Rules 42 and 43 and the Indictment in English, and on his request, explained in Krio the areas he said he did not understand.

8. I also served on the accused by handing over to him copies of the following documents:
   (a) Warrant of Arrest and Order for Transfer and Detention under Rule 47 of the Rules Of Procedure and Evidence of the Special Court for Sierra Leone, signed by Judge Thompson on 7 March 2003, for the transfer of Alex Tamba Brima;
   (b) A copy of the Rights of the Accused Article 17 of the SCSL Statute, Rules 42 and 43 of the SCSL Rules of Procedure and Evidence);
   (c) A copy of the Statute of the Special Court;
   (d) A copy of the approved indictment and ;
   (e) An acknowledgement of Receipt by an Accused.

9. I did these things in the presence of Mr Oliver Somasa and Inspector Brima Michael Conteh, who is attached to Bonthe Prisons Department. The accused accepted all the above mentioned documents, but refused to sign the Acknowledgement of Receipt. I recorded the service on the spot at about 1545 hours on another copy of the Acknowledgment of Receipt stating therein the accused's refusal to sign the acknowledgement Receipt. Both Mr Somasa and Inspector Conteh also signed the Acknowledgement. I herewith attach a copy of the Acknowledgement of Receipt bearing the signatures of Mr.Somasa, Inspector Conteh and myself as attachment to this declaration.

10. I was present in court on Monday the 17th of March 2003 when the accused appeared and the Judge asked him whether he had been served with a copy of the indictment and the accused answered in the affirmative.

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11. My attention has been drawn to a Defence Motion for Bail or for Provisional Release, numbered SCSL-2003-06-PT-5D and the Affidavit of the accused in support thereof.

12. The assertion by the accused in paragraphs 10 and 11 of his Affidavit is not true; both the Warrant and Order for Transfer and the Indictment were part of the documents I served the accused on the 10th of March 2003, over a month before the stated 11th of April 2003 visit by Junior Counsel in the Chambers of the accused's Solicitor.

13. The Sierra Leone police are emerging from a crisis and are greatly constrained in human and other resources, and as of today recruitments are on going to raise the police to its pre-war strength to be able to effectively police the whole country including the very porous and volatile borders. The United Nations military drawdown programme is likely to exacerbate the problem.

14. One example of this current inability to effectively police the country and its borders is the earlier escape from police arrest of Johnny Paul Koroma. Despite diligent efforts by the Sierra Leone Police, he has evaded capture. This is also further evidence of the inability of the Sierra Leone Police, at this state of its rebuilding, to capture those who wish to evade the police.

15. I also have knowledge that, since the indictment and issuance of a Warrant of Arrest for Mr Koroma, he has not submitted himself to the Court, notwithstanding both national and international efforts to make him amendable to the law. The accused, whom I have reason to believe is a close confidant and colleague of Mr Koroma, could seek refuge with the fugitive Mr Koroma.

16. During our investigations potential witnesses personally expressed to me fear of reprisals not only from the accused persons but also from their relatives, friends and associates.

17. These fears expressed are genuine and, in my opinion, are well founded, especially considering that many of the potential witnesses live in remote areas without any police presence or other semblance of security, such as Kono where the accused was born and said he had a home in paragraph 21 of his affidavit.

18. In my view there is likelihood that, if released on bail, the accused would tamper or interfere with potential witnesses and other evidence, especially now that he knows the specifics of his indictment.

19. In view of the above described situation, it is unlikely that the police would be able to provide effective surveillance on the accused, which I believe would be necessary to ensure his presence at trial and to ensure that he would not tamper or interfere with witnesses and evidence.

20. Furthermore, during our investigations many victims countrywide of the crimes for which the accused is indicted openly expressed to me their desire to seek revenge against the perpetrators of these crimes and now that the accused has been indicted as one of those who bear the greatest responsibility for those crimes, I have reason to believe that he would be in danger if he is let out on bail.

21. For all the reasons discussed above, I believe that it is essential to ensure the accused's presence for trial, for the safety and security of witnesses, and for his own personal safety, that the accused not be released on bail.

I, MORIE LENGOR, affirm that the information contained herein is true to the best of my knowledge and belief. I understand that wilfully and knowingly making false statements in this declaration could result in proceedings before the Special Court for giving false testimony. I have not wilfully and knowingly made any false statements in this declaration.

Morie Lengor
Senior Investigator, Task Force 1
Office of the Prosecutor
Special Court for Sierra Leone

PROSECUTION'S INDEX OF AUTHORITIES

1. The Prosecutor v Kanyabashi, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings, Case No. ICTR-96-15-I, Trial Chamber, 23 May 2000.
2. Prosecutor v. Barayagwiza, Decision, Case No. ICTR-97-19-AR72, Appeals Chamber, 3 November 1999.
3. Prosecutor v. Brdanin, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radovan Brdanin, Case No. IT-99-36-PT, Trial Chamber, 8 December 1999
4. Prosecutor v. Tadic, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, Case No. IT-94-1-A, App. Ch., 15 October 1998.
5. Prosecutor v. Kunarac, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Case No. IT-95-23-PT, T. Ch. II, 21 October 1998
6. Prosecutor v. Bagambiki et al., Decision on the Defence Motion on Defects in the Form of the Indictment, Case No. ICTR-97-36-(I), T. Ch. II, 24 September 1998, para. 5;
7. Prosecutor v. Krstic, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Counts 7-8, Case No. IT-98-33-PT, T. Ch. I, 28 January 2000, pp. 3-4;
8. Prosecutor v. Naletilic and Martinovic, Decision on Defendant Vinko Martinovic's Objection to the Indictment, Case No. IT-98-34-PT, T. Ch. I, 15 February 2000, paras. 5-8;
9. Prosecutor v. Delalic et al. (Celebici), Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment), Case No. IT-96-21-AR72.5, Bench of the Appeals Chamber, 6 December 1996, para. 38;
10. Prosecutor v. Delalic et al. (Celebici), Decision on Motion by the Accused Esad Landzo Based on Defects in the Form of the Indictment, Case No. IT-96-21-T, T. Ch., 15 November 1996, paras. 9- 11;
11. Prosecutor v. Delalic et al. (Celebici), Decision on Motion by the Accused Zejnil Delalic Based on Defects in the Form of the Indictment, Case No. IT-96-21-T, T. Ch., 2 October 1996, paras. 7-8. (To be provided)
12. See Prosecutor v. Nyiramashuko and Ntahobali, Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of Indictment, Case No. ICTR-97-21-I, T. Ch. I, 4 September 1998, paras. 19-20. (To be provided)
13. Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagasora and 28 Others, Case No. ICTR 98-37-A, App. Ch., 8 June 1998; (To be provided)
14. Prosecutor v. Brdanin, Decision on Motion to Dismiss Indictment, Case No. IT-99-36-PT, T. Ch. II, 5 October 1999;
15. Prosecutor v. Brdanin and Talic, Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed Under Rule 72, Case No. IT-99-36-AR72, App. Ch., 16 November 1999;
16. Prosecutor v. Talic, Decision on Motion for Release, Case No. IT-99-36-PT, Pre-Trial Judge, 10 December 1999, at esp. para. 17;

17. Prosecutor v. Nahimana, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, Case No. ICTR-96-11-T, T. Ch., 24 November 1997, esp. para. 19;
18. Prosecutor v. Ntagerura, Decision on Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, Case No. ICTR-96-10-I, T. Ch., 28 November 1997, esp. para. 11.

International Criminal Tribunal for Rwanda
Trial Chamber II

THE PROSECUTOR
v.

JOSEPH KANYABASHI

ICTR-96-15-I

Decision of: 23 May 2000

Original: English

DECISION ON THE DEFENCE EXTREMELY URGENT MOTION ON **HABEAS CORPUS** AND FOR STOPPAGE OF PROCEEDINGS

The Office of the Prosecutor: Carla Del Ponte, Japhet Mono, Andra Mobberley

Defence Counsel for the Accused: Michel Marchand, Michel Boyer

Before: Presiding Judge Laïty Kama, Judge William H. Sekule, Judge Pavel Dolenc
Registrar: Dr. Agwu U. Okali

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judge Laïty Kama, Presiding, Judge William H. Sekule and Judge Pavel Dolenc, as designated by the President;

CONSIDERING the indictment submitted by the Prosecutor against Joseph Kanyabashi, on 11 July 1996, confirmed by Judge Yakov Ostrovsky on 15 July 1996, and subsequently amended on 12 August 1999 for the crimes of genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto;

BEING SEIZED of a Defence motion, filed on 25 February 2000, entitled """""Extremely Urgent Motion on **Habeas Corpus** and for Stoppage of Proceedings (objection based on lack of jurisdiction)" (the "Motion");

CONSIDERING the Prosecutor's Response to the Motion filed on 10 April 2000;

HAVING HEARD the parties at a hearing on 13 April 2000;

CONSIDERING the provisions of the Statute of the Tribunal ("the Statute") and the Rules of Procedure and Evidence (the "Rules");

RECALLING the Chamber's decision in this case of 18 June 1997 on the Defence motion on jurisdiction, the Appeals Chamber's decision of 21 January 2000 rejecting the notice of appeal, and the oral decision of the Chamber of 29 February 2000 denying a request for an extension of the time limit provided for under Rule 72(A).

SUBMISSIONS OF THE PARTIES

Submissions of the Defence

1. The Defence submits, in the Motion, that the Chamber should reject the charges as a remedy following the violation of several of the Accused's fundamental rights.

2. The Defence argues that the Accused was unlawfully detained in Belgium at the request of the Tribunal, from 13 February 1996 to 15 July 1996, because the "warrant of arrest" dated 24 January 1996, which was issued by the Prosecutor but not confirmed by a judge, was valid only for twenty days, as provided by Rule 40.

3. The Defence submits that the Accused was not informed promptly of the reason for his arrest at the behest of the Tribunal and was not informed speedily of the charges against him because the Prosecutor's "warrant of arrest" became ineffective on 13 February 1996. It is only on 12 August 1996 that the Accused was served with the warrant of arrest issued on 15 July 1996. The Defence also submits that after the confirmation of the indictment, he was questioned by investigators without being informed that he was no longer a suspect but an Accused, and that the Prosecutor hence was able to benefit from this violation to collect illegal statements by the Accused.

4. The Defence contends that the Accused was not transferred quickly to the seat of the Tribunal for his initial appearance before the Tribunal because the Prosecutor sought to extend the provisional detention. This was despite the fact that the Belgian Court of Cassation had ruled on deferral to the Tribunal on 15 May 1996. The transfer occurred only on 8 November 1996.

5. The Defence submits that the Registrar assigned to the Accused a Defence counsel who was unable to communicate with him because they shared no common language. Therefore, there was a violation of his right to counsel. Furthermore, the Accused did not have defence counsel of his own choosing.

6. The Defence asserts that the actions of the Tribunal prejudiced the fair nature of the proceedings because:

(a) The Prosecutor ought not to have requested the deferral;

(b) The Prosecutor's motion for joinder of the Accused's trial, which was dismissed by

both Judge Khan and the Appeals Chamber, jeopardised the rights of the Accused to a prompt and fair trial;

(c) In September 1998, the proceedings on the request for leave to amend the indictment and the motion for joinder of the accused should not have been joined;

(d) The Prosecutor did not act expeditiously as regards her obligation to disclose material;

(e) Two Affidavits filed in at least two separate cases by the Prosecutor violated the fair nature of the proceedings;

(f) The Victims and Witness Support Section Unit did not act with due diligence to protect defence witnesses.

7. The Defence maintains that the Chamber should apply two major principles of law, that is, the doctrine of abuse of procedure and the remedy applied in cases where there are violations of the rights of the Accused to trial without undue delay.

8. The Defence contends that the Accused was unable to act on the basis of Rule 72 because of time limits and because of violation of his right to defence counsel, and submits that the present motion is based on general principles of law.

9. The Defence submits that the Prosecutor's inability to ensure compliance with the fundamental rights of the Accused, since his arrest on 28 June 1995 until today, and her inability to determine when he shall be brought to trial, mandate that the Chamber grant the Motion for **habeas corpus** and a stay of the proceedings.

Submissions of the Prosecutor

10. The Prosecutor submits that the Accused misconceives the purposes of a writ of **habeas corpus**. The Accused erroneously wishes to use this writ to cause the rejection of the charges and the proceedings against him.

11. The Prosecutor asserts that it is instructive to note that the Motion also is subtitled "objection based on lack of jurisdiction". The Prosecutor submits that no provisions in the Rules relating to the alleged objections based on lack of jurisdiction are cited in support of this Motion because it does not qualify as such a motion under the Rule 72B(i).

12. The Prosecutor submits that the issues raised by the Accused are not tenable before the Chamber because there is not an issue relating to jurisdiction before this Chamber. In the absence of a jurisdictional issue, this Chamber must dismiss the Motion.

13. The Prosecutor contends that on 4 February 2000 after failing to impugn the jurisdiction of the Chamber, the Accused filed the Motion in an attempt to obtain undue advantage and a second opportunity to impugn the jurisdiction of this Chamber. Rather than accept the decision of 29 February 2000 of this Chamber, the Accused has filed this

Motion in a bid to re-litigate issues that already have been dealt with. Therefore, the Motion is not admissible under the doctrine of res judicata.

14. The Prosecutor maintains that the Motion cannot be considered a writ of **habeas corpus**, a writ which applies only in cases of detention or imprisonment without access to legal process. In the instant case the Accused had access to legal process ab initio.

15. The Prosecutor alleges that the Accused is abusing the process because he had ample time within which he could have entered his objections, but he did not. Pursuant to Rule 72(F) such failure amounts to a waiver of his rights and, as such, the Motion constitutes an abuse of process.

16. The Prosecutor asserts that the remedy sought by the Accused is disproportionate to the set of circumstances that he has set out in this Motion. Although the Prosecutor strongly challenges the assertions of the Accused, even if all were true and proved, stoppage of the proceedings is not a remedy available to him. That remedy is unavailable under the Statute or Rules. The Prosecutor further submits that the remedies sought have no foundation in law.

17. The Prosecutor submits that no rights of the Accused have been violated. In the alternative, The Prosecutor submits that if the rights of the Accused were violated from 1996, or even 1995, the Accused has acquiesced and waived his rights.

18. The Prosecutor submits that the Chamber should dismiss the Motion in its entirety.

DELIBERATION

Objection Based on Lack of Jurisdiction

19. The Chamber notes that the motion also is subtitled "objection based on lack of jurisdiction". Such a motion is a preliminary motion that an accused may bring under Rule 72(B). Rule 72(A) provides that preliminary motions "shall be brought within thirty days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(i), and in any case before the hearing on the merits". In the " " " " "Decision Rejecting Notice of Appeals" of 21 January 2000, the Appeals Chamber ruled that should the Accused wish to challenge jurisdiction under Rule 72(B)(i) in relation to the second amended indictment, he must do so within the period specified in Rule 72(A). See Kanyabashi v. Prosecutor, ICTR-96-15-I, at para. 28 (Decision Rejecting Notice of Appeal) (21 January 2000) (Appeals Chamber). In fact, the time limit has elapsed.

20. On 4 February 2000, the Defence filed a motion asserting that the Chamber lacked jurisdiction to conduct the proceeding based on the amended indictment. The Defence, pursuant to Rule 72(F), requested the Chamber to extend the time limit for filing such preliminary motion. In its oral decision of 29 February 2000, the Chamber rejected the request, holding:

[T]he Chamber is of the opinion that the reasons for the belated filing of the above-

mentioned preliminary motion are not considered good cause for a waiver of the time limit provided for under Rule 72(A), and consequently, the Trial Chamber decides not to allow the preliminary motion.

Transcript of 29 February 2000, at 104.

21. During the hearing of the Motion on 13 April 2000, the Chamber reminded the Defence that it had not granted Counsel an extension of time to file a preliminary motion objecting jurisdiction. The Defence agreed and explained that the Motion was not a preliminary motion brought under Rule 72. The Defence brought the Motion "on the basis of **habeas corpus**, which should lead the Tribunal to decide on the jurisdiction to detain [the Accused] on the basis of legality or illegality". Transcript of 13 April 2000, at 7. Consequently, the Chamber notes that the Defence files the Motion under Rule 73.

Habeas Corpus

22. The Chamber notes that the writ of **habeas corpus** is a common law legal procedure. Under English law, a writ of **habeas corpus** is directed to a person who detains another in custody and commands him to produce or have the body of that person before the court for a specified purpose. This writ was formerly much used for testing the legality of imprisonment for political reasons, especially during the reigns of the Stuarts. John Burke, Jowitts Dictionary of English Law, at 881 (2nd ed. 1977).

23. In Canada, the Canadian Bill of Rights provides, inter alia, that no law of Canada shall be construed or applied so as to deprive a person who has been arrested or detained of the remedy by way of **habeas corpus** for the determination of the validity of his detention and for his release if the detention is not lawful. Canadian Bill of Rights, Part I, 2(c)(iii).

24. In the United States, **habeas corpus**, in common usage, means the **habeas corpus** ad subjiciendum. It is "a writ directed to the person detaining another, and commanding him to produce the body of the prisoner, or person detained. This is the most common form of **habeas corpus** writ, the purpose of which is to test the legality of the detention or imprisonment; not whether he is guilty or innocent". The writ now extends to all constitutional challenges. Black's Law Dictionary, at 709 (6th ed. 1990). It is an instrument for safeguarding individual freedom against arbitrary and lawless state action. The case law indicates that the writ of **habeas corpus** can be used when a constitutional right of an accused is deprived during the course of proceedings.

It has been suggested that the [United States] Supreme Court in the Bowen case, and in other recent cases, intended to say that the writ of **habeas corpus** is available, not only when jurisdiction is lost during the course of the proceeding by deprivation of a constitutional right, but also whenever a petitioner is able to allege that he failed to enjoy a constitutional right.

Dorsey v. Gill, 148 F.2d 857, at 873, 80 U.S. App. D.C.9. at 24 (1945).

25. Because abuse of the writ may undermine the orderly administration of justice, a petitioner is entitled to **habeas** relief only if it can be established that the constitutional error had "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 & n.9 (1993).

26. The use of the writ of **habeas corpus** for seeking remedy for deprivation of constitutional rights must be limited to the exceptional circumstances where it is the only means of preserving such rights.

Bearing in mind that the use of the writ, in a case involving deprivation of constitutional rights, is limited to the exceptional situation in which it is the only means of preserving such rights, it is obvious that no useful or necessary purpose would be served by trying--over and over again--in **habeas corpus** proceedings, the same questions which were fully considered and fairly determined in the original proceeding.

Dorsey v. Gill, 148 F.2d 857, at 874, 80 U.S. App. D.C.9. at 26 (1945).

27. The Chamber notes that the Appeals Chamber held that the remedy of **habeas corpus** is a fundamental right and enshrined in international human rights norms. See Barayagwiza v. Prosecutor, ICTR-97-19-AR72, at para. 88, (Decision) (3 November 1999) (Appeals Chamber). The notion at the international level, however, has not gone that far. The Inter- American Court of Human Rights has defined the writ of **habeas corpus** as " " " " "a judicial remedy designed to protect personal freedom or physical integrity against arbitrary decisions". The purpose is to determine the lawfulness of the detention, and, if appropriate, to order the release of the detainee. See Barayagwiza, supra at para. 88. Article 5(4) of the European Convention on Human Rights, which governs **habeas corpus**, provides that a detained person have access to a court and the right to be heard on the issue of the provisional detention. See Barayagwiza, supra, footnote 236.

28. The Chamber restates that the Tribunal is not bound by any national law. It finds the notion of **habeas corpus** at the international level is limited to a review of the legality of detention. The Accused's Motion, apart from the submission of violation of the right to protection from unlawful detention, is beyond that scope and, therefore, is not proper. Thus, the Trial Chamber concludes that a writ of **habeas corpus**, as such, does not apply in this case and in these circumstances, particularly where a valid indictment charges the Accused.
29. Furthermore, in the case of Prosecutor v. Brdanin, the ICTY opined that

[T]he Tribunal certainly does have both the power and the procedure to resolve a challenge to the lawfulness of a detainee's detention. With respect, it did not need the decision of the Appeals Chamber of the ICTR to establish the existence of such a power.

A detained person whose case has been assigned to a Trial Chamber has recourse to the Tribunal in order to challenge the lawfulness of his detention by way of motion-pursuant to Rule 72 of the Rules of Procedure and Evidence ("Rules") if the application amounts

to a challenge to jurisdiction, or pursuant to Rule 73 if it does not.

Prosecutor v. Brdanin, IT-99-36, at paras. 5-6. (Decision on Petition for A Writ of **Habeas Corpus** on Behalf of Radoslav Brdanin) (8 December 1999).

30. The Chamber is of the opinion that the Motion could be admissible under Rule 72 if it includes an objection based on lack of jurisdiction of the Tribunal, or under Rule 73. A motion on the legality of detention, regardless of the title, is not a special motion which falls out of the scope of the Rules. The Chamber could wholly reject the Motion for the reason that a Rule 72 motion is out of time. Nevertheless, the Chamber considers those submissions within the scope of whether and to what extent, if any, the fundamental rights of the Accused have been violated, and what proper remedy exists under the Statute, the Rules, and international human rights law, if the Chamber finds any such violation.

Alleged Violation of the Accused's Rights

a. Violation of Right to Protection from Unlawful Detention

31. The Chamber notes that the Accused was arrested on 28 June 1995 in the territory of the Kingdom of Belgium based on an indictment charging him with international crimes and under a warrant of arrest issued by a Belgian judge on the same day. The Accused never challenged the lawfulness of his arrest and detention before the Tribunal.

32. On 11 January 1996, the former Trial Chamber II, upon the Prosecutor's motion, requested the Kingdom of Belgium to defer the criminal proceedings against the Accused instituted by its national jurisdictions. On 24 January 1996, the Prosecutor wrote to the Kingdom of Belgium to request for provisional arrest of the Accused, then a suspect, and to take all necessary steps to prevent his escape. The Defence argues that it was a "warrant of arrest" issued under Rule 40, which was valid only twenty days, and was never renewed.

33. The Chamber has examined the relevant Rules and has determined whether such a request amounts to a warrant of arrest and whether it is valid for only twenty days.

34. Rule 54 provides that "[a]t the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial." It indicates that only a Judge or a Trial Chamber has the authority to issue a warrant. Consequently other persons or organs have no such a power to issue warrant.

35. Rule 55 provides that "a warrant of arrest shall be signed by a Judge and shall bear the seal of the Tribunal. It shall be accompanied by a copy of the indictment, and a statement of the rights of the Accused", and shall be transmitted to the national authorities of the State by the Registrar. In this case, the Prosecutor's request for arrest of the Accused was neither signed by a Judge, nor accompanied by an indictment, nor

transmitted by the Registrar. It was not a warrant of arrest under Rule 55.

36. Rule 40 on provisional measures provides:

(A) In case of urgency, the Prosecutor may request any State:

(i) To arrest a suspect and place him in custody;

(ii) ....

(iii) To take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

....

(B) Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country of the Tribunal and the Registrar.

(C) ....

(D) The suspect shall be released if (i) the Chamber so rules; or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer.

Here, the Prosecutor's request was made under Rule 40, as the Defence submitted, or more specifically under Rule 40(A)(i) and (iii). The request did not constitute a warrant of arrest, but one of the provisional measures. In fact, "[t]he Statute and Rules, unlike many national jurisdictions, do not require a warrant to arrest a suspect". See Prosecutor v. Ngirumpatse, ICTR- 97-44-I, at para. 63 (Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items) (10 December 1999).

37. Rule 40 does not stipulate the length of time such a request remains valid. Rule 40(D) indicates the suspect shall be released if the Chamber so rules. However, thus far the Chamber has not so ruled. The twenty days validity, according to Rule 40 (B) and (D), applies only to the situation when, after a suspect is transferred to the seat of the Tribunal, or to such other place as the Bureau may decide, he or she may be detained provisionally by a designated Judge's order. In this case, the twenty day time limit does not start to run from the date on which the order is issued but from the date on which the suspect is transferred.

38. For these reasons, the Chamber concludes that the Defence's allegation of unlawful

detention of the Accused from 13 January 1996 to 15 July 1996 has no legal basis. The Accused's right to protection from unlawful detention has not been violated.

b. Violation of the Right to Be Promptly Informed

39. The Defence submits that the Prosecutor's "warrant of arrest", dated 24 January 1996, became ineffective on 13 February 1996. Thus, from 24 January 1996 to 12 August 1996, the Accused was not informed of the reasons for his detention at the request of the International Criminal Tribunal for Rwanda. See Motion, at paras. 130-31.

40. The Chamber notes that this allegation is based on the ineffectiveness of the Prosecutor's request for the arrest of the Accused as a provisional measure. Because the Chamber already has determined above that the latter has no legal basis, it, therefore, need not consider this allegation.

41. The Defence also submits that the warrant of arrest issued on 15 July 1996 was served on the Accused on 12 August 1996. After confirmation of the indictment against the Accused, he was questioned by investigators of the Office of the Prosecutor without being informed that he was an accused. Instead, he was informed of the rights of a suspect. See Motion, at paras. 133-35.

42. Concerning information of the charges, the Chamber bears in mind the right of the Accused to be informed promptly of the nature and cause of the charges against him, pursuant to Article 20 of the Statute, which is partially reflected in Rule 40 bis (E). This right corresponds literally to Article 14(3) of the International Covenant on Civil and Political Rights ("ICCPR"), which requires that information must be provided with the lodging of charges or directly thereafter.

43. Rule 55 provides that the Registrar take responsibility to transmit the warrant of arrest and the annexed documents to the national authorities of the State concerned and to instruct the said authorities to cause the arrest of the accused and serve the documents upon the accused. It is the responsibility of the national authorities to execute and serve the warrant of arrest, and consequently to inform the accused of charges against him.

44. The Trial Chamber notes that the following facts are not in dispute:

(a) On 15 July 1996, the date on which the indictment against the Accused was confirmed, Mr. Hugues Verita, the then Deputy Registrar, sent a letter to the Minister of Justice of the Kingdom of Belgium informing him of the warrant of arrest and the order to surrender, along with a copy of the indictment, the confirmation of the indictment and a document recalling the rights of the accused.

(b) On 22 July 1996, Mr. Visart de Bocarme, the Deputy Private Secretary of the Minister of Justice, received the said warrant of arrest on behalf of the Government of the Kingdom of Belgium.

(c) On 12 August 1996, the Forest Prison in Brussels was notified of the warrant of arrest,

the indictment, and the annexed confirmation thereof. On the same day the said warrant of arrest was served on the Accused.

45. The above undisputed facts show that the Deputy Registrar acted fully in accordance with Rule 55. If there was any delay for the Accused to be informed of charges against him, the delay can not be attributed to the Tribunal.

46. With regard to the allegation that the Accused was informed of the rights of a suspect after the indictment against him was confirmed, the relevant Rules are 42, 43 and 63.

Rule 42: Rights of Suspects during Investigation

(A)A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:

(i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it;

(ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and

(iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Rule 63: Questioning of the Accused

(A) After the initial appearance of the accused, the Prosecutor shall not question him unless his counsel is present and the questioning is audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. Furthermore, the Prosecutor shall, prior to the questioning caution the accused that he is not obliged to say anything unless he wishes to do so, but that whatever he says may be tendered as evidence.

(B) The questioning, as well as any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42(A)(iii).

47. The Chamber notes that Rule 63, which governs the questioning of an accused, applies Rules 42(A)(iii) and Rule 43, which govern the investigation of suspects. A suspect's rights to be assisted by counsel and to have the free assistance of an interpreter are the same as the rights of an accused person under Article 20 of the Statute. Thus, the

rights of an accused during questioning are the same as those of a suspect during investigation. The only difference between rights of a suspect during investigation and the rights of an accused when being questioned is that the accused shall be cautioned before the questioning that whatever he or she says may be tendered as evidence. The Chamber is of the view that the fact that the Accused, as an accused, was informed of the same rights as those of a suspect when being questioned can not prove that he was wrongly informed of his status. Thus, there was no violation of the Accused's right to being informed promptly of the charges against him. With regard to not being cautioned before the questioning, the Chamber shall take this allegation into consideration at the time when it may deal with this possible evidence at trial.

c. Violation of the Right to Have Legal Assistance of His Own Choosing

48. The Defence submits that the Registrar assigned counsel to the Accused, who did not share common language, on the eve of his initial appearance. The Accused was not assigned a French-speaking counsel until 16 April 1997. The Accused alleges that this constitutes a violation of his fundamental rights.

49. The Chamber notes that the Tribunal in 1996 addressed this issue regarding assignment of counsel to the Accused. See Prosecutor v. Kayanbashi, ICTR-96-15-I, (Decision Following the Initial Appearance) (29 November 1996)

Giving serious consideration to the concerns expressed by the accused concerning the difficulties in communicating with his assigned defence counsel through an interpreter;

Being of the opinion, however, that the Registrar, in assigning Mr. Evans Monari as defence counsel for the accused, has complied properly with the provisions in Article 20 of the Statute of the Tribunal. Rule 45 (C) of the Rules of Procedure and Evidence ("the Rules") and Article 10 of the Directive on Assignment of Defence Counsel ("the Directive");

Being convinced, therefore, that at this stage of the proceedings, the rights of the accused to counsel have been respected;

....

Reminding the accused of the provision in Article 19(D) of the Directive, which entitles him to request assignment of another counsel for his defence, should the difficulties in communicating with his assigned counsel amount to an exceptional circumstance at any later stage of the proceedings.

50. Following the above instruction of the former Trial Chamber II, the request for assignment of another counsel to the Accused was accepted and a French-speaking co-counsel was assigned.

51. On 29 October 1997, the Trial Chamber II granted the oral request of the lead counsel of the Accused to withdraw from the case during the hearing of the Accused's motion for

withdrawal of his lead counsel. On 5 December 1997, Mr. Michel Marchand, then the co-counsel, was assigned lead counsel for the Accused.

52. The Chamber notes that neither Rule 45 nor Article 10 of the Directive on the Assignment of Defence Counsel provides that the Registrar shall consult with an accused before he assigns counsel from the list. The Chamber also notes that Article 20(4)(d) of the Statute stipulates that an accused shall be entitled to be tried through legal assistance of his own choosing. The Accused has been represented by counsel throughout the proceedings. The Accused has had the free assistance of an interpreter for his communication with his first assigned lead counsel. He was assigned a French-speaking co-counsel on 16 April 1997. He has been assigned a lead counsel of his own choosing since 5 December 1997.

53. Moreover, the Chamber finds that the right to counsel does not mean that an indigent accused has a unfettered right to choose appointed defence counsel provided to him at Tribunal expense. The appointment of counsel may depend on the availability of counsel at the time when a decision on the assignment is made. Thus, the Chamber finds there is no violation of his right to counsel.

Alleged Violation of the Right to Trial without Undue Delay

a. Transfer to the Headquarters of the Tribunal

54. The Chamber recalls that a formal request for deferral was made to the Kingdom of Belgium on 11 January 1996. The Government of the Kingdom of Belgium did not adopt the law relating to the recognition of the Tribunal and cooperation with the Tribunal until 22 March 1996. The said law entered into force as from 27 April 1996. On 15 May 1996, the Appeals Chamber of Belgium pronounced the relinquishment of Belgian authorities of the case files of Joseph Kanyabashi and the others. In the Chamber's view, it is only on 15 May 1996 that the transfer of the Accused from Belgium to the Tribunal became practicable. Therefore, the Chamber will not consider the period before that date on the issue of prompt transfer of the Accused to the seat of the Tribunal.

55. The Chamber notes that the issue concerning the transfer of the Accused covers two periods. The first period is from 15 May 1996 to 15 July 1996, the date on which the indictment against the Accused and the warrant of arrest were issued. The second period is from 15 July 1996 to 8 November 1996, the date of issuance of the warrant of arrest to the date of the transfer of the Accused.

56. Concerning the first period, the Chamber observes that the Belgian authorities informed the Registrar that by virtue of Article 12 of the said law, the Accused would be released on 12 August 1996 if a final warrant of arrest from the Tribunal was not served upon them before that date. The indictment against Kanyabashi was confirmed on 15 July 1996 and the warrant of arrest was issued on the same day, i.e. approximately one month earlier than the time limit. There is no reason to find that the issuance of the indictment and the warrant of arrest constitutes a delay.

57. With regard to the second period, the Chamber notes that Rule 57 of the Rules provides that, "... The transfer of the accused to the seat of the Tribunal ... shall be arranged by the State authorities concerned, in liaison with the authorities of the host country and the Registrar" (emphasis added). The transfer of the Accused was clearly not fully under the control of the Tribunal. Considering that the transfer of the Accused depends on the cooperation between the Belgian Government and the Tribunal, the Chamber does not find merit in the allegation that the period of less than four months constitutes an undue delay.

58. Concerning the initial appearance, Rule 62 provides as follows, " " " " "[u]pon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber without delay, and shall be formally charged...." Article 9(3) of the International Covenant on Civil and Political Rights also provides that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." Article 7(5) of the American Convention on Human Rights and Article 5(3) of the European Convention on Human Rights contain the same provisions. The international instruments have not established specific time limits for the initial appearance of detainees, though the UN Human Rights Committee and the European Court of Human Rights opined that such delays must not exceed a few days. See Barayagwiza, supra, at para. 70. In the instance case, the period between the transfer of the Accused to the seat of the Tribunal and his initial appearance is twenty-one days.

59. The Chamber notes, however, firstly, the issue of promptness must be assessed in each case according to its special features. See De Jong Baijet and van den Brink, 22 May 1984, Series A, no.77 at para. 52, European Court of Human Rights; Van der Sluijs, Zuiderveld and Klappe, 22 May 1984, Series A, no. 78, at para. 49; Brogan and Others, 29 November 1988, Series A, no. 145-B, at para. 58.

60. Secondly, the above-mentioned provisions of various international instruments address a different situation from that envisaged by the Tribunal and serve a different purpose than does Rule 62. The European Court of Human Rights expressed that "it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his (the arrested or detained) right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness." Brogan and Others, supra. The Court further identified that the officer authorised by law should be independent of the executive and of the parties. "In addition, under Article 5(3), there is both a procedural and substantive requirement. The procedural requirement places the 'officer' under the obligation of hearing himself the individual brought before him; the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and ordering release if there are no such reasons." Schiesser, 4 December 1979, Series A, no. 34, at para.31.

61. In the case of Kelly v. Jamaica, Mr. Bertil Wennergren, who concurred with the opinion of the UN Human Rights Committee, said in his individual opinion that "[i]t should be noted that the words 'shall be brought promptly' reflect the original form of **habeas corpus ("habeas corpus** NN ad sub-judiciendum") and order the authorities to bring a detainee before a judge or judicial officer as soon as possible, independently of the latter's express wishes in this respect." Communication No. 253/1987, Report of the Human Rights Committee, General Assembly Official Records: Forty-Sixth Session, Supplement No. 40 (A/46/40).

62. Clearly, such provisions are based on national systems in which judicial organs are not involved in the arrest of individuals. Domestic law needs those provisions to place the executive action under judicial control after arrest and detention of individuals and to minimise the unlawful deprivation of the individuals' right to liberty. It is for this reason that international human rights law requires that a detainee shall be promptly brought before a Judge or officer who is "empowered to direct pre-trial detention or to release the person arrested. Thus custody must end within a few days with either release or remittal by a judge to pre-trial detention". Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, at 177, 1993.

63. The setting of the Tribunal defers from that of a national society. Judges are involved in the arrest and detention of an accused by confirming indictments and issuing warrants of arrest and orders of transfer. The function of an initial appearance before a Trial Chamber is not to ensure the lawfulness of the continuous detention of an accused, but to charge him or her formally, to ensure that his or her right to counsel is respected and to call upon the accused to enter a plea. Therefore, those provisions in international instruments, though with the wording similar to that in Rule 62, do not apply to the setting of the Tribunal. Consequently, the interpretation of the word "without delay" in Rule 62 is not necessarily the same as the interpretation of the word "promptly" in those international instruments.

64. The Chamber finds in the instant case, the period of twenty-one days between transfer of the Accused to the seat of the Tribunal and his initial appearance caused no material prejudice to the Accused. Consequently, the Accused's right to be tried without undue delay has not been violated. In the Chamber's view, even if there is a delay and if the delay is not so extensive, it will not necessitate a remedy of a stay of the proceedings.

b. Disclosure of Evidence

65. The Chamber notes that disclosure of materials by the Prosecutor is closely linked to the date of the initial appearance of the Accused and the date set for trial. Therefore, the Chamber finds without merit the Defence's allegation on the issue of untimely disclosure of materials by the Prosecutor before the further appearance of the Accused on the amended indictment, which took place on 12 August 1999. Because there is no date set for trial, the allegation that "the Prosecutor did not act with due diligence regarding her obligation to disclose evidence" lacks basis. However, bearing in mind that the materials subject to disclosure to the Defence are important for the preparation of the defence, the

Chamber reminds the Prosecutor to disclose in a timely manner the materials, information, and evidence, pursuant to Rules 66 and 68.

c. Joinder of Trials

66. The Defence submits that the Prosecutor had an inappropriate strategy, which resulted in the delay of the proceedings. The Chamber recalls that an indictment that jointly charged 29 accused persons, including the Accused, was submitted by the Prosecutor on 6 March 1998. The indictment was not confirmed by Judge Khan, and the Prosecutor's notice of appeal from the said decision was rejected by the Appeals Chamber on 6 June 1998. In the view of the Chamber, this did not cause any material prejudice to the Accused.

67. The Chamber also recalls its Decision on the Prosecutor's Motion for Joinder of Trials of 5 October 1999, in which it granted the joint trial of the Accused with other five accused persons based on, inter alia, the interest of justice. See Prosecutor v. Kanyabashi, ICTR-96-15-T, (Decision on the Prosecutor's Motion for Joinder of Trials) (5 October 1999). The Defence's appeal from the decision lodged on 2 November 1999 was rejected by the Appeals Chamber on the basis that the appeal was filed out of time. See Kanyabashi v. Prosecutor, ICTR-97-21-A, (Decision, Appeal Against Trial Chamber II's Decision of 5 October 1999) (13 April 2000) (Appeals Chamber). The Chamber, therefore, deems it unnecessary to consider this allegation.

68. The Chamber examines the Defence allegation regarding the Prosecutor's conduct and concludes that there is no violation of the Accused's right to be tried without undue delay. The Chamber notes that the issue of reasonable length of proceeding has been addressed by the U.N. Human Rights Committee, the European Court of Human Rights and the Inter-American Commission on Human Rights. "The reasonableness of the period cannot be translated into a fixed number of days, months or years, since it is dependent on other elements which the judge must consider." Firmenich v. Argentina, the Inter-American Commission on Human Rights Resolution No.17/89, (13 April 1989). In the opinion of the European Court of Human Rights, "the reasonableness of the length of the proceedings coming within the scope of Article 6(1) must be assessed in each case according to the particular circumstances. The Court has to have regard, inter alia, to the complexity of the factual or legal issues raised by the case, to the conduct of the applicants and the competent authorities and to what was at stake for the former, in addition to complying with the 'reasonable time' requirement.[four factors]" Zimmermann and Steiner, 13 July 1983, Series A, No. 66, at para. 24. Consequently, "the Strasbourg organs have deemed trials that even lasted longer than 10 years to be compatible with Article 6(1) of the ECHR, holding, on the other hand, others lasting less than one year to be in violation of the provision." Nowak, supra. at 257.

69. In the instant case, the Chamber finds that there is no need for discussion of all the above four factors. However, the Chamber emphasises that the conduct of both parties can cause the trial of an Accused to be unduly delayed and reminds both parties to perform their duties in a manner to expedite the proceedings so as to ensure respect of the Accused's fundamental human right to trial without undue delay.

Prejudice to the Fair Nature of the Proceedings

a. Deferral

70. The Defence submits that on 8 January 1996, the Prosecutor filed a motion to obtain a formal request for deferral addressed to the Kingdom of Belgium concerning the Accused and other accused persons in Belgium. On 11 January 1996, the former Trial Chamber II granted the Prosecutor's motion and officially asked the Kingdom of Belgium to transfer the criminal proceedings instituted by its national jurisdiction against the Accused and other accused persons. The Defence asserts that the Prosecutor ought not to have requested the deferral, because the Prosecutor was not ready to prosecute in this case.

71. The Chamber recalls that Article 8(2) of the Statute grants the Tribunal primacy over the national courts of all States. At any stage of the procedure, the Tribunal may formally request national courts to defer to its competence in accordance with the Statute and the Rules.

72. Under Rule 9, which provides for a Prosecutor's application for deferral, where, inter alia, the crimes which are the subject of investigations or criminal proceedings instituted in the courts of any State are the subject of an investigation by the Prosecutor, the Prosecutor may apply to the Chamber designated by the President to issue a formal request that such court defer to the competence of the Tribunal. The Accused acknowledged that the Prosecutor had already conducted investigations relating to the Accused. He only challenged that the Prosecutor's investigation was not very advanced. However, readiness for prosecution of a case is not a requirement for the Prosecutor's request for deferral under Rule 9.

73. Further, Rule 10(A) provides that "[i]f it appears to the Trial Chamber seized of a request by the Prosecutor under Rule 9 that paragraphs (i), (ii) or (iii) of Rule 9 are satisfied, the Trial Chamber shall issue a formal request to the State concerned that the Court defer to the competence of the Tribunal." Thus, a Trial Chamber shall determine the matter whether the Prosecutor ought to make a request for deferral. It appeared that the requirements for the Prosecutor's request for deferral of this case satisfied the Trial Chamber seized of the request so that the Trial Chamber granted a formal request for deferral. No Rules provide that the decision is subject to any review or appeal. The Chamber, therefore, dismisses this allegation.

b. Affidavits

74. The Defence submits that two affidavits filed in two separate cases by the Prosecutor deliberately concealed, from the Accused and his counsel, information that the Defence alleges is false. The Accused believes that it is likely to adversely influence the judges against him. The Accused, therefore, asks for, inter alia, a stay of proceedings.

75. The Chamber notes that the Defence raised the objection two months earlier in seeking to disqualify Judge Sekule as a member of Trial Chamber II, which is seized with the case of the Accused. The Bureau held in its decision on this matter:

7. [A]lthough Trial Chamber II received the affidavit in question, it does not follow ... that that Chamber relied on this document in order to reach its conclusion. ... The fact that the Accused and his Counsel were not invited to participate in those proceedings, is not relevant. The Chamber's task was simply to decide on witness protection in the cases against Mr Nsabimana and Mr Nteziryayo, not to make a finding concerning all allegations against the Accused.

8. Even if the affidavit contained some references to the Accused, this does not in the view of the Bureau give any legitimate reason to fear that a Judge that participated in the witness protection decision will not be impartial in the case against the Accused. The case-law referred to by Defence Counsel gives no support for impartiality in the present case.

Prosecutor v. Kanyabashi, ICTR-96-15-T, (Determination of the Bureau in terms of Rule 15(B)) (25 February 2000) (Bureau).

The Bureau, therefore, denied the Accused's application for the disqualification of Judge Sekule.

76. The Chamber opines that the Defence's request for a stay of proceeding based on the affidavit in question amounts to disqualification of the whole Tribunal to try the Accused. The Chamber, for the same reason described by the Bureau, considers there are no grounds to grant it.

c. Protection of Defence Witnesses

77. The Defence alleges that the Witness and Victim Support Section did not act with due diligence in protecting witnesses for the Defence on the basis of the fact that the Trial Chamber granted the Defence motion relating to the protection of Defence witnesses on 25 November 1997. The relevant information was sent to the Witness and Victim Support Section on 2 September and 14 October 1998, respectively. It was only in November 1999 that three Defence witnesses were met by representatives of the Section.

78. The Chamber finds that the ten protective measures granted for the Defence witnesses by the Trial Chamber can be accomplished without meeting with them. For example, the names, addresses, whereabouts of the Defence witnesses and other identifying information about them shall not be disclosed to the Prosecutor, public and media etc. (protective measures (iii), (iv), (v), (vi)). Some of the protective measures shall be taken by the Defence Counsel (protective measures (i), (viii), (ix), (x)). Protective measure (ii) authorises the Registrar to solicit for the assistance of the Republic of Kenya and the UNHCR. Protective measure (vii) concerns the protection of the Defence witnesses when they are within the premises of the Tribunal. See Prosecutor v. Kanyabashi, ICTR-96-15-T (Decision on the Protective Measures for Defence Witnesses and Their Families) (25 November 1997).

79. The Chamber finds that this allegation is without merit.

Remedy

80. The Defence cites the decision of 3 November 1999 of the Appeals Chamber in the case of Barayagwiza v. Prosecutor, and requests a stay of the proceedings. The Chamber notes that the remedy ordered by the Appeals Chamber for the violations to Barayagwiza in that decision was based on the totality of the violations of his fundamental rights that were repeatedly violated and due to the Prosecutor's negligence. In its subsequent decision of 31 March 2000, the Appeals Chamber found:

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

....

Accordingly, the remedy ordered by the Chamber in the Decision which consisted in the dismissal of the indictment and the release of the Appellant must be altered.

Barayagwiza v. Prosecutor, ICTR-97-19-AR72, at paras. 71, 74 (Decision, Prosecutor's Request for Review or Reconsideration) (31 March 2000) (Appeals Chamber).

81. In the Chamber's view, even if there is a violation and if the violation is not so extensive, it will not necessitate a remedy of a stay of the proceedings.
82. The Chamber recalls that Rule 5 on "Non-compliance with Rules" provides the remedy when the Rules or Regulations are violated by a party. It sets forth three principles. First, the party must raise an objection on the ground of non-compliance with the Rule or Regulations at the earliest opportunity. Second, the alleged non-compliance must be proved and it must cause material prejudice to that party. Third, the relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness.

83. In the case at bench, the Chamber finds there are no violations of the Accused's fundamental rights. Therefore no remedy is warranted.

84. FOR THESE REASONS, THE CHAMBER

DISMISSES the Motion.

Arusha, 23 May 2000.

Laïty Kama, Judge, Presiding

William H. Sekule, Judge

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IN THE APPEALS CHAMBER

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

Registrar: Mr. Agwu U. Okali

Decision of: 3 November 1999

JEAN-BOSCO BARAYAGWIZA
v.
THE PROSECUTOR

DECISION

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

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

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

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1. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seized of an appeal lodged by Jean-Bosco Barayagwiza ("the Appellant") against the "Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect" of Trial Chamber II of 17 November 1998 ("the Decision"). By Order dated 5 February 1999, the appeal was held admissible. On 19 October 1999, the Appellant filed a Notice of Appeal seeking to disqualify certain Judges of the Trial Chamber from sitting on his case ("19 October 1999 Notice of Appeal"). On 26 October 1999, the Appellant filed an additional Notice of Appeal concerning a request of the Prosecutor to amend the indictment against the Appellant ("26 October 1999 Notice of Appeal").

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

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

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

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

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

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

7. On 15 October 1996, responding to a letter from the Appellant complaining about his detention in Cameroon, the Prosecutor informed the Appellant that Cameroon was not holding him at her behest. Shortly thereafter, the Court of Appeal of Cameroon re-commenced the hearing on Rwanda's extradition request for the remaining suspects, including the Appellant. On 21 February 1997, the Court of Appeal of Cameroon rejected the Rwandan extradition request and ordered the release of the suspects, including the Appellant. The same day, the Prosecutor made a request pursuant to Rule 40 for the provisional detention of the Appellant and the Appellant was immediately re-arrested pursuant to this Order. The Prosecutor then requested an Order for arrest and transfer pursuant to Rule 40*bis* on 24 February 1997 and on 3 March 1997, Judge Aspegren signed an Order to that effect. The Appellant was not transferred pursuant to this Order, however, until 19 November 1997.

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

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

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

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

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

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

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

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

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

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

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

II. THE APPEAL

A. The Appellant

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

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

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

Cameroon authorities from 15 April 1996 until 21 February 1997.

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

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

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

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

B. The Prosecutor

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. APPLICABLE AND AUTHORITATIVE PROVISIONS

40. The relevant parts of the applicable Articles of the Statute, Rules of the Tribunal and international human rights treaties are set forth below for ease of reference. The Report of the U.N. Secretary-General

establishes the sources of law for the Tribunal. The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.

A. The Statute

Article 8

Concurrent Jurisdiction

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

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

Article 17

Investigation and Preparation of Indictment

1. [...]

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. [...]

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an Indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the present Statute. The Indictment shall be transmitted to a Judge of the Trial Chamber.

Article 20

Rights of the accused

1. [...]
2. [...]
3. [...]
4. In the determination of any charge against the accused pursuant to the present statute, the accused shall be entitled to the following minimum guarantees, in full equality:
   a. To be informed promptly and in detail in a language in which he or she understands of the

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nature and cause of the charge against him or her;
b. [...]
c. To be tried without undue delay;
d. [...]
e. [...]
f. [...]
g. [...]

Article 24

Appellate Proceedings

1. [...]

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

Article 28

Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

   a. The identification and location of persons;
   b. [...]
   c. [...]
   d. The arrest or detention of persons;
   e. The surrender or transfer of the accused to the International Tribunal for Rwanda.

B. The Rules

Rule 2
Definitions

[...]

Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47.

[...]

Suspect: A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction.

[...]

Rule 40

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Provisional Measures

(A) In case of urgency, the Prosecutor may request any State:

i. to arrest a suspect and place him in custody;
ii. to seize all physical evidence;
iii. to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The state concerned shall comply forthwith, in accordance with Article 28 of the Statute.

(B) Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country of the Tribunal and the Registrar.

(C) In the cases referred to in paragraph B, the suspect shall, from the moment of his transfer, enjoy all the rights provided for in Rule 42, and may apply for review to a Trial Chamber of the Tribunal. The Chamber, after hearing the Prosecutor, shall rule upon the application.

(D) The suspect shall be released if (i) the Chamber so rules, or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer.

Rule 40*bis*

Transfer and Provisional Detention of Suspects

(A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a summary of the material upon which the Prosecutor relies.

(B) The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met:

(i) the Prosecutor has requested a State to arrest the suspect and to place him in custody, in accordance with Rule 40, or the suspect is otherwise detained by a State;

(ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and

(iii) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.

(C) The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal.

(D) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the request made by the Prosecutor under Sub-Rule (A), including the provisional charge, and shall state the Judge's grounds for making the order, having regard to Sub-Rule (B). The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43.

(E) As soon as possible, copies of the order and of the request by the Prosecutor are served upon the suspect and his counsel by the Registrar.

(F) At the end of the period of detention, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the provisional detention for a period not exceeding 30 days.

(G) At the end of that extension, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the detention for a further period not exceeding 30 days.

(H) The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made.

(I) The provisions in Rules 55(B) to 59 shall apply *mutatis mutandis* to the execution of the order for the transfer and provisional detention of the suspect.

(J) After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the initial order, or another Judge of the same Trial Chamber, who shall ensure that his rights are respected.

(K) During detention, the Prosecutor, the suspect or his counsel may submit to the Trial Chamber of which the Judge who made the initial order is a member, all applications relative to the propriety of provisional detention or to the suspect's release.

(L) Without prejudice to Sub-Rules (C) to (H), the Rules relating to the detention on remand of accused persons shall apply *mutatis mutandis* to the provisional detention of persons under this Rule.

Rule 58

National Extradition Provisions

The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

Rule 62

Initial Appearance of Accused

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

(i) satisfy itself that the right of the accused to counsel is respected

(ii) read or have the indictment read to the accused in a language he speaks and understands, and satisfy itself that the accused understands the indictment;

(iii) call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;

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

Rule 72

Preliminary Motions

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

B. Preliminary motions by the accused are:

i. objections based on lack of jurisdiction;
ii. [...]
iii. [...]
iv. [...]

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

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

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

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

C. International Covenant on Civil and Political Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and

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shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

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

Article 14

1. [...]

2. [...]
3. In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   b. [...]
   c. [...]
   d. [...]
   e. [...]
   f. [...]
   g. [...]
4. [...]
5. [...]
6. [...]
7. [...]

D. European Convention on Human Rights

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

   a. [...]

   b. [...]

   c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

   d. [...]

e. [...]

f. the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 6

1. [...]

2. [...]

3. Everyone charged with a criminal offence has the following minimum rights:

   a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b. [...]
   c. [...]
   d. [...]
   e. [...]

E. American Convention on Human Rights

Article 7

1. [...]
2. [...]
3. No one shall be subject to arbitrary arrest or detention.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before judge or other law officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his

release if the arrest or detention is unlawful. In states Parties whose law provides that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. [...]

Article 8

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

   a. [...]
   b. prior notification in detail to the accused of the charges against him;
   c. [...]
   d. [...]
   e. [...]
   f. [...]
   g. [...]
   h. [...]

3. [...]

4. [...]

5. [...]

IV. DISCUSSION

A. Were the rights of the Appellant violated?

1. Status of the Appellant

41. Before discussing the alleged violations of the Appellant's rights, it is important to establish his status following his arrest and during his provisional detention. Rule 2 sets forth definitions of certain terms used in the Rules. The indictment against the Appellant was not confirmed until 23 October 1997. Pursuant to the definitions of 'accused' and 'suspect' set forth in Rule 2, the Appeals Chamber finds that the Appellant was a 'suspect' from his arrest on 15 April 1996 until the indictment was confirmed on 23 October 1997. After 23 October 1997, the Appellant's status changed and he became an 'accused'.

2. The right to be promptly charged under Rule 40*bis*

42. Unlike national systems, which have police forces to effectuate the arrest of suspects, the Tribunal

lacks any such enforcement agency. Consequently, in the absence of the suspect's voluntary surrender, the Tribunal must rely on the international community for the arrest and provisional detention of suspects. The Statute and Rules of the Tribunal establish a system whereby States may provisionally detain suspects at the behest of the Tribunal pending transfer to the Tribunal's detention unit.

43. In the present case, there are two relevant periods of time under which Cameroon was clearly holding the Appellant at the behest of the Tribunal. Cameroon arrested the Appellant pursuant to the Rwandan and Belgian extradition requests on 15 April 1996. Two days later, the Prosecutor made her first Rule 40 request for provisional detention of the Appellant. On 6 May 1996, the nineteenth day of the Appellant's provisional detention pursuant to Rule 40, the Prosecutor requested the Cameroon authorities to extend the Appellant's detention for an additional three weeks. On 16 May 1996, however, the Prosecutor informed Cameroon that she was no longer interested in pursuing a case against the Appellant at 'that stage'. Thus, the first period runs from 17 April 1996 until 16 May 1996—a period of 29 days, or nine days longer than allowed under Rule 40. This first period will be discussed, *infra*, at sub-section IV.B.2.

44. The second period during which Cameroon detained the Appellant for the Tribunal commenced on 4 March 1997 and continued until the Appellant's transfer to the Tribunal's detention unit on 19 November 1997. On 21 February 1997, the Cameroon Court rejected Rwanda's extradition request and ordered the release of the Appellant. However, on the same day, while the Appellant was still in custody, the Prosecutor again made a request pursuant to Rule 40 for the provisional detention of the Appellant. This request was followed by the Rule 40*bis* request, which resulted in the Rule 40*bis* Order of Judge Aspegren dated 3 March 1997, and filed on 4 March 1997. This Order comprised, *inter alia*, four components. First, it ordered the transfer of the Appellant to the Tribunal's detention unit. Second, it ordered the provisional detention in the Tribunal's detention unit of the Appellant for a maximum period of thirty days. Third, it requested the Cameroon authorities to comply with the transfer order and to maintain the Appellant in custody until the actual transfer. Fourth, it requested the Prosecutor to submit the indictment against the Appellant prior to the expiration of the 30-day provisional detention.

45. However, notwithstanding the 4 March 1997 Rule 40*bis* Order, the record reflects that the Tribunal took no further action until 22 October 1997. On that day, the Deputy Prosecutor, Mr. Bernard Muna (who had spent much of his professional career working in the Cameroon legal community prior to joining the Office of the Prosecutor) submitted the indictment against the Appellant for confirmation. Judge Aspegren confirmed the indictment against the Appellant the next day and simultaneously issued a Warrant of Arrest and Order for Surrender addressed to the Government of Cameroon on 23 October 1997. However, the Appellant was not transferred to the Tribunal's detention unit until 19 November 1997. Thus, Cameroon held the Appellant at the behest of the Tribunal from 4 March 1997 until his transfer on 19 November 1997. At the time the indictment was confirmed, the Appellant had been in custody for 233 days, more than 7 months, from the date the Rule 40*bis* Order was filed.

46. It is important that Rule 40 and Rule 40*bis* be read together. It is equally important in interpreting these provisions that the Appeals Chamber follow the principle of 'effective interpretation', a well-established principle under international law. Interpreting Rule 40 and Rule 40*bis* together, we conclude that both Rules must be read restrictively. Rule 40 permits the Prosecutor to request any State, in the event of urgency, to arrest a suspect and place him in custody. The purpose of Rule 40*bis* is to restrict the length of time a suspect may be detained without being indicted. We cannot accept that the Prosecutor, acting alone under Rule 40, has an unlimited power to keep a suspect under provisional detention in a State, when Rule 40*bis* places time limits on such detention if the suspect is detained at the Tribunal's detention unit. Rather, the principle of effective interpretation mandates that these Rules be read together and that they be restrictively interpreted.

47. Although both Rule 40 and Rule 40*bis* apply to the provisional detention of suspects, there are important differences between the two Rules. For example, the time limits under which the Prosecutor must issue an indictment vary depending upon which Rule forms the basis of the provisional detention. Pursuant to Rule 40(D)(ii), the suspect must be released if the Prosecutor fails to issue an indictment within 20 days of the transfer of the suspect to the Tribunal's detention unit, while Rule 40*bis*(H) allows the Prosecutor 90 days to issue an indictment. However, the remedy for failure to issue the indictment in the proscribed period of time is the same under both Rules: *release of the suspect.*

48. The Prosecutor may apply for Rule 40*bis* measures 'in the conduct of an investigation'. Rule 40*bis* applies only if the Prosecutor has previously requested provisional measures pursuant to Rule 40 or if the suspect is otherwise already being detained by the State to whom the Rule 40*bis* request is made. The Rule 40*bis* request, which is made to a Judge assigned pursuant to Rule 28, must include a provisional charge and a summary of the material upon which the Prosecutor relies.

49. The Judge must make two findings before a Rule 40*bis* order is issued. First, there must be a reliable and consistent body of material that tends to show that the suspect may have committed an offence within the Tribunal's jurisdiction. Second, the Judge must find that provisional detention is a necessary measure to 'prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation'.

50. Pursuant to Rule 40*bis*(C), the provisional detention of the suspect may be ordered for an initial period of thirty days. This initial thirty-day period begins to run from the 'day after the transfer of the suspect to the detention unit of the Tribunal'. Two additional thirty-day period extensions are permissible. At the end of the first thirty-day period, the Prosecutor must show that an extension is warranted by the needs of the investigation in order to have the provisional detention extended. At the end of the second thirty-day period, the Prosecutor must demonstrate that special circumstances warrant the continued provisional detention of the suspect for the final thirty-day period to be granted. In no event shall the total period of provisional detention of a suspect exceed ninety days. At the end of this cumulative ninety-day period, the suspect must be released if the indictment has not been confirmed and an arrest warrant signed.

51. The Statute and Rules of the Tribunal envision a system whereby the suspect is provided a copy of the Prosecutor's request, including provisional charges, in conjunction with the Rule 40*bis* Order. He is also served a copy of the confirmed indictment with the Warrant of Arrest, and pursuant to Rule 62(ii) he is to be orally informed of the charges against him at the initial appearance. In the present case, 6 days elapsed between the filing of the Rule *40bis* Order on 4 March 1997 and the date on which the Appellant apparently was shown a copy of the Rule 40*bis* Order. Additionally, 27 days elapsed between the confirmation of the indictment against the Appellant on 23 October 1998 and the service of a copy of the indictment upon the Appellant on 19 November 1998.

52. The Trial Chamber found that the Appellant was initially arrested at the behest of Rwanda and Belgium, a point the Prosecutor reiterates in this appeal, contending that the Prosecutor's request was merely 'superimposed' on the existing requests of those States. However, the Prosecutor fails to acknowledge that on 16 May 1996, she requested a three-week extension of the provisional detention of the Appellant. The Appeals Chamber finds the Appellant was detained at the request of the Prosecutor from 17 April 1996 through 16 May 1996. This detention—for 29 days—violated the 20-day limitation in Rule 40.

53. The Prosecutor also successfully argued before the Trial Chamber that Rule 40*bis* is inapplicable, since its operative provisions do not apply until after the transfer of the suspect to the Tribunal's detention unit. It is clear, however, that the purpose of Rule 40 and Rule 40*bis* is to limit the time that a

suspect may be provisionally detained without the issuance of an indictment. This comports with international human rights standards. Moreover, if the time limits set forth in Rule 40(D) and Rule 40*bis* (H) are not complied with, those rules mandate that the suspect must be released.

54. Although the Appellant was not physically transferred to the Tribunal's detention unit until 19 November 1997, he had been detained since 21 February 1997 solely at the behest of the Prosecutor. The Appeals Chamber considers that if the Appellant were in the constructive custody of the Tribunal after the Rule *40bis* Order was filed on 4 March 1997, the provisions of that Rule would apply. In order to determine if the period of time that the Appellant spent in Cameroon at the behest of the Tribunal is attributable to the Tribunal for purposes of Rule 40*bis*, it is necessary to analyse the relationship between Cameroon and the Tribunal with respect to the detention of the Appellant. In fact, the Prosecutor has acknowledged that between 21 February 1997 and 19 November 1997, 'there existed what could be described as joined or concurrent personal jurisdiction over the Appellant, the personal jurisdiction being shared between the Tribunal and Cameroon'.

55. The Tribunal issued a valid request pursuant to Rule 40 for provisional detention, and shortly thereafter, pursuant to Rule 40*bis*, for the transfer of the Appellant. These requests were honoured by Cameroon, and *but for* those requests, the Appellant would have been released on 21 February 1997, when the Cameroon Court of Appeal denied the Rwandan extradition request and ordered the immediate release of the Appellant.

56. Thus, the Appellant's situation is analogous to the 'detainer' process, whereby a special type of warrant (known as a 'detainer' or 'hold order') is filed against a person *already in custody* to ensure that he will be available to the demanding authority upon completion of the present term of confinement. A 'detainer' is a device whereby the requesting State can obtain the custody of the detainee upon his release from the detaining State. The U.S. Supreme Court has stated that, '[I]n such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State...'. Moreover, that court has held that since the detaining state acts as an agent for the demanding state pursuant to the detainer, the petitioner is in custody for purposes of filing a *writ of habeas corpus* pursuant to U.S. law. Thus, the court reached the conclusion that the accused is in the constructive custody of the requesting State and that the detaining State acts as agent for the requesting state for purposes of *habeas corpus* challenges. In the present case, the relationship between the Tribunal and Cameroon is even stronger, on the basis of the international obligations imposed on States by the Security Council under Article 28 of the Statute.

57. Other cases have held that a defendant sentenced to concurrent terms in separate jurisdictions is in the constructive custody of the second jurisdiction after the first jurisdiction has imposed sentence on him. For example, In the Matter of Eric Grier, Peritioner v. Walter J. Flood, as Warden of the Nassau County Jail, Respondent, the court concluded that '*constructive custody attached before any sentence was imposed.* In Ex p. Hampton M. Newell, the court ruled that although the petitioner was in the physical custody of the federal authorities, he was in the constructive custody of the State of Texas on the basis of a detainer that Texas had filed against him.

58. The Prosecutor relies, in part, on a definition of custody ('care and control') from an oft-cited law dictionary. However, this same law dictionary also defines custody as 'the detainer of a man's person by virtue of lawful process or authority'. Thus, even using the Prosecutor's authority, custody can be taken to mean the detention of an individual pursuant to lawful authority even in the absence of physical control. It would follow, therefore, that notwithstanding a lack of physical control, the Appellant *was* in the Tribunal's custody *if* he were being detained pursuant to 'lawful process or authority' of the Tribunal. Or, as a Singapore court noted in Re Onkar Shrian, '[T]hat the person bailed is in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if

he were in the actual custody of the proper gaoler'.

59. The Prosecutor has also relied on In the Matter of Surrender of Elizaphan Ntakirutimana in support of the proposition that under international law, an order by the Tribunal for the transfer of an individual does not give the Tribunal custody over such a person until the physical transfer has taken place. Reliance on this case is misguided in two respects. First, the U.S. Fifth Circuit Court of Appeals recently upheld a District Court ruling that reversed the Decision of the Magistrate that Ntakirutimana could not be extradited. Second, notwithstanding the reversal, Ntakirutimana had challenged the transfer process and is thus clearly distinguishable from the facts in the present case. There is no evidence here that either the Appellant sought to challenge his transfer to the Tribunal, or that Cameroon was unwilling to transfer him. On the contrary, the Deputy Prosecutor of the Cameroon Centre Province Court of Appeal, appearing at the Rwandan extradition hearing on 31 May 1996, argued that the Tribunal had primacy and, thus, convinced that Court to defer to the Tribunal. Moreover, as noted above, the President of Cameroon signed a decree order to transfer the Appellant prior to the signing of the Warrant of Arrest and Order for Surrender by Judge Aspegren on 23 October 1997. These facts indicate that Cameroon was willing to transfer the Appellant.

60. The co-operation of Cameroon is consistent with its obligation to the Tribunal. The Statute and Rules mandate that States must comply with a request of the Tribunal for the surrender or transfer of the accused to the Tribunal. This obligation on Member States of the United Nations is mandatory, since the Tribunal was established pursuant to Chapter VII of the Charter of the United Nations.

61. Thus, the Appeals Chamber finds that, under the facts of this case, Cameroon was holding the Appellant in constructive custody for the Tribunal by virtue of the Tribunal's lawful process or authority. In the present case, the Prosecutor specifically requested Cameroon to detain and transfer the Appellant. The Statute of the Tribunal obligated Cameroon to detain the Appellant for the benefit of the Prosecutor. The Prosecutor has admitted that it had personal jurisdiction over the Appellant after the Rule 40*bis* Order was issued. That Order also asserts personal and subject matter jurisdiction. This finding does not mean, however, that the Tribunal was responsible for each and every aspect of the Appellant's detention, but only for the decision to place and maintain the Appellant in custody. However, as will be discussed below, this limitation imposed on the Tribunal is consistent with international law. Even if the appellant was not in the constructive custody of the Tribunal, the principles governing the provisional detention of suspects should apply.

62. The Appeals Chamber recognises that international standards view provisional (or pre-trial) detention as an exception, rather than the rule. However, in light of the gravity of the charges faced by accused persons before the Tribunal, provisional detention is often warranted, so long as the provisions of Rule 40 and Rule 40*bis* are adhered to. The issue, therefore, is whether the length of time the Appellant spent in provisional detention, prior to the confirmation of his indictment, violates established international legal norms for provisional detention of suspects.

63. It is well-established under international human rights law that pre-trial detention of suspects is lawful, as long as such pre-trial detention does not extend beyond a reasonable period of time. The U.N. Human Rights Committee, in interpreting Article 9(2) of the ICCPR, has developed considerable jurisprudence with respect to the permissible length of time that a suspect may be detained without being charged. For example, in Glenford Campbell v. Jamaica, the suspect was detained for 45 days without being formally charged. In holding this delay to be a violation of ICCPR Article 9(2), the Committee stated the following:

> [T]he Committee finds that the author was not "promptly" informed of the charges against him:

> one of the most important reasons for the requirement of "prompt" information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority. A delay from 12 December 1984 to 26 January 1985 does not meet the requirement of article 9, paragraph 2.

64. Similar findings have been made in other cases involving alleged violations of ICCPR Article 9(2). For example, in Moriana Hernández Valentini de Bazzano, a period of eight months between the commencement of detention and filing of formal charges was held to violate ICCPR Article 9(2). In Monja Jaona, a period of eight months under which the suspect was placed under house arrest without being formally charged was found to be a violation of ICCPR Article 9(2). In Alba Pietraroia, the petitioner was detained for seven months without being formally charged and the Committee held that this detention violated ICCPR Article 9(2). Finally, in Leopoldo Buffo Carballal, a delay of one year between arrest and formal filing of charges was held to be a violation of ICCPR Article 9(2).

65. The Appeals Chamber also notes that the delay in indicting the Appellant apparently caused concern for President Kama. In a letter sent to the Appellant's Counsel on 8 September 1997, President Kama:

> I have already reminded the Prosecutor of the need to establish as soon as possible an indictment against Mr. Jean Bosco Barayagwiza, if she still intends to prosecute him. Only recently, Mr. Bernard Muna, the Deputy Prosecutor, reassured me that an indictment against Mr. Jean Bosco Barayagwiza should soon be submitted to a Judge for review.

However, even at that point the 90-day period had expired.

66. Additionally, the Trial Chamber, in its Decision dismissing the Extremely Urgent Motion, stated, 'It is regrettable that the Prosecution did not submit an indictment until 22 October 1997'. Moreover, even the Prosecutor acknowledged that the delay in indicting the Appellant was not justified. During the oral argument on the Appellant's Extremely Urgent Motion on 11 September 1998, Mr. James Stewart, appearing for the Prosecutor, acknowledged that the Appellant could or should have been indicted earlier:

> Now, I will say this, and I have to be frank with you, the president of this tribunal – and this is reflected in one of the letters that was sent to the accused –was anxious for the prosecutor to produce an indictment, if we were going to indict this man, and it may have been that *the indictment was, was not produced as early as it could have been or should have been*...

67. In conclusion, we hold that the length of time that the Appellant was detained in Cameroon at the behest of the Tribunal without being indicted violates Rule 40*bis* and established human rights jurisprudence governing detention of suspects. The delay in indicting the Appellant violated the 90-day rule as set forth in Rule 40*bis*. In the present appeal, Judge Aspregren issued the Rule 40*bis* Order with the proviso that the indictment be presented for confirmation within 30 days (the Rule permits for two 30-day extensions). In doing so, he invoked Sub-rule 40*bis*, thereby making an assertion of jurisdiction over the Appellant. The Prosecutor agrees that there was 'joined or concurrent jurisdiction' over the Appellant. Sub-rule 40*bis*(H) provides explicitly that the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made if the indictment is not issued within 90 days. This limitation on the detention of suspects is consistent with established human rights jurisprudence.

3. The delay between the transfer of the Appellant and his initial appearance

68. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer. At the outset of this analysis the Appeals Chamber rejects the Prosecutor's contention that a 31-day holiday recess, between 15 December 1997 and 15 January 1998, could somehow justify this delay. The Appellant should have had his initial appearance well before the holiday recess even commenced and did not have it until over one month after the end of the recess.

69. The issue, therefore, is whether the 96-day period between the Appellant's transfer and initial appearance violates the statutory requirement that the initial appearance is held without delay. There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge during the period of the provisional detention and the Appellant contends that he was denied this opportunity. Consequently, it is even more important for the protection of his rights that his initial appearance was held without delay.

70. Rule 62, which is predicated on Articles 19 and 20 of the statute, provides that an accused shall be brought before the assigned Trial Chamber and formally charged *without delay* upon his transfer to the seat of the Tribunal. In determining if the length of time between the Appellant's transfer and his initial appearance was unduly lengthy, we note that the right of the accused to be promptly brought before a judicial authority and formally charged ensures that the accused will have the opportunity to mount an effective defence. The international instruments have not established specific time limits for the initial appearance of detainees, relying rather on a requirement that a person should 'be brought promptly before a Judge' following arrest. The U.N. Human Rights Committee has interpreted 'promptly' within the context of 'more precise' standards found in the criminal procedure codes of most States. Such delays must not, however, exceed a few days. Thus, in Kelly v. Jamaica, the U.N. Human Rights Committee held that a detention of five weeks before being brought before a Judge violated Article 9(3).

71. Based on the plain meaning of the phrase, 'without delay', the Appeals Chamber finds that a 96-day delay between the transfer of the Appellant to the Tribunal's detention unit and his initial appearance to be a violation of his fundamental rights as expressed by Articles 19 and 20, internationally-recognised human rights standards and Rule 62. Moreover, we find that the Appellant's right to be promptly indicted under Rule 40*bis* to have been violated. Although we find that these violations do not result in the Tribunal losing jurisdiction over the Appellant, we nevertheless reaffirm that the issues raised by the Appellant certainly fall within the ambit of Rule 72.

72. In the Tadić Interlocutory Appeal Decision, the Appeals Chamber set forth several policy arguments for why a liberal approach to admitting interlocutory appeals is warranted. The Appeals Chamber there stated:

> Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed—this is by no means conclusive, but interesting nevertheless: *were not those questions to be dealt with in limine litis, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial.* After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of the Appellant's interlocutory appeal is indisputable.

We find that the challenge to jurisdiction raised by the Appellant is consistent with the logic underlying the decision reached in the Tadić case. Given that the Appeals Chamber is of the opinion that to proceed with the trial of the Appellant would amount to an act of injustice, we see no purpose in denying the Appellant's appeal, forcing him to undergo a lengthy and costly trial, only to have him raise, once again the very issues currently pending before this Chamber. Moreover, in the event the Appellant was to be acquitted after trial we can foresee no effective remedy for the violation of his rights. Therefore, on the basis of these findings, the Appeals Chamber will decline to exercise jurisdiction over the Appellant, on the basis of the abuse of process doctrine, as discussed in the following Sub-section.

B. The Abuse of Process Doctrine

1. In general

73. The Appeals Chamber now considers, in light of the abuse of process doctrine, the Appellant's allegations concerning three additional issues: 1) the right to be promptly informed of the charges during the first period of detention; 2) the alleged failure of the Trial Chamber to resolve the *writ of habeas corpus* filed by the Appellant; and 3) the Appellant's assertions that the Prosecutor did not diligently prosecute her case against him. These assertions will be considered. Before addressing these issues, however, several points need to be emphasised in the context of the following analysis. First and foremost, this analysis focuses on the alleged violations of the Appellant's rights and is not primarily concerned with the entity responsible for the alleged violation(s). As will be discussed, it is clear that there are overlapping areas of responsibility between the three organs of the Tribunal and as a result, it is conceivable that more than one organ could be responsible for the violations of the Appellant's rights. However, even if fault is shared between the three organs of the Tribunal—or is the result of the actions of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights. Second, we stress that the circumstances set forth in this analysis must be read as a whole. Third, none of the findings made in this sub-section of the Decision, in isolation, are necessarily dispositive of this issue. That is, it is the combination of these factors—and not any single finding herein—that lead us to the conclusion we reach in this sub-section. In other words, the application of the abuse of process doctrine is case-specific and limited to the egregious circumstances presented by this case. Fourth, because the Prosecutor initiates the proceedings of the Tribunal, her special responsibility in prosecuting cases will be examined in sub-section 4, *infra*.

74. Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process. The House of Lords summarised the abuse of process doctrine as follows:

> [P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.

It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.

75. The application of this doctrine has resulted in dismissal of charges with prejudice in a number of cases, particularly where the court finds that to proceed on the charges in light of egregious violations of the accused's rights would cause serious harm to the integrity of the judicial process. One of the leading cases in which the doctrine of abuse of process was applied is R. v. Horseferry Road Magistrates' Court *ex parte* Bennett. In that case, the House of Lords stayed the prosecution and ordered the release of the accused, stating that:

> [A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) *because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.*

The abuse of doctrine has been applied in several cases. For example, in Bell v. DPP of Jamaica, the Privy Council held that under the abuse of process doctrine courts have an inherent power to decline to adjudicate a case which would be oppressive as the result of unreasonable delay. In making this determination, the court set forth four guidelines for determining whether a delay would deprive the accused of a fair trial:

1. the length of the delay;
2. the prosecution's reasons to justify the delay;
3. the accused's efforts to assert his rights; and
4. the prejudice caused to the accused.

Regarding the issue of prejudice, in R. v. Oxford City Justices, *ex parte* Smith (D.K.B.), the court applied the abuse of process doctrine in dismissing a case on the grounds that a two-year delay between the commission of the offence and the issuing of a summons was unconscionable, stating:

> In the present case it seems to me that the delay which I have described was not only quite unjustified and quite unnecessary due to inefficiency, but it was a delay of such length that it could rightly be said to be unconscionable. That is by no means the end of the matter. It seems to me also that the delay here was of such a length that it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case.

In R. v. Hartley, the Wellington Court of Appeal relied on the abuse of process doctrine in quashing a conviction that rested on an unlawful arrest and the illegally obtained confession that followed.

76. Closely related to the abuse of process doctrine is the notion of supervisory powers. It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice, regardless of a specific violation. The U.S. Supreme Court has stated that courts have a 'duty of establishing and maintaining civilized standards of procedure and evidence' as an inherent function of the court's role in supervising the judicial system and process. As Judge Noonan of the U.S. Ninth Circuit Court of Appeals has stated:

> This court has inherent supervisory powers to dismiss prosecutions in order to deter illegal conduct. The "illegality" deterred by exercise of our supervisory power need not be related to a constitutional or statutory violation.

The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process.

77. As noted above, the abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct. Considering the lengthy delay in the Appellant's case, 'it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case'. The following discussion, therefore, focuses on whether it would offend the Tribunal's sense of justice to proceed to the trial of the accused.

2. The right to be promptly informed of the charges during the first period of detention

78. In the present case, the Appellant makes several assertions regarding the precise date he was informed of the charges. However, using the earliest date, we conclude that the Appellant was informed of the charges on 10 March 1997 when the Cameroon Deputy Prosecutor showed him a copy of the Rule 40*bis* Order. This was approximately 11 months after he was initially detained pursuant to the *first* Rule 40 request.

79. Rule 40*bis* requires the detaining State to promptly inform the *suspect* of the charges under which he is arrested and detained. Thus, the issue is when does the right to be promptly informed of the charges attach to suspects before the Tribunal. Existing international norms guarantee such a right, and suspects held at the behest of the Tribunal pursuant to Rule 40*bis* are entitled, at a bare minimum, to the protections afforded under these international instruments, as well as under the rule itself. Consequently, we turn our analysis to these international standards.

80. International standards require that a suspect who is arrested be informed promptly of the reasons for his arrest and the charges against him. The right to be promptly informed of the charges serves two functions. First, it counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect. In this respect, the suspect needs to be promptly informed of the charges against him in order to challenge his detention, particularly in situations where the prosecuting authority is relying on the serious nature of the charges in arguing for the continued detention of the suspect. Second, the right to be promptly informed gives the suspect the information he requires in order to prepare his defence. The focus of the analysis in this Sub-section is on the first of these two functions. At the outset of this analysis, it is important to stress that there are two distinct periods when the right to be informed of the charges are applicable. The first period is when the suspect is initially arrested and detained. The second period is at the initial appearance of the accused after the indictment has been confirmed and the accused is in the Tribunal's custody. For purposes of the discussion in this Sub-section, only the first period is relevant.

81. The requirement that a suspect be promptly informed of the charges against him following arrest provides the 'elementary safeguard that any person arrested should know why he is deprived of his liberty'. The right to be promptly informed at this preliminary stage is also important because it affords the arrested suspect the opportunity to deny the offence and obtain his release prior to the initiation of trial proceedings.

82. International human rights jurisprudence has developed norms to ensure that this right is respected. For example, the suspect must be notified 'in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, as he sees fit, to apply to a court to

challenge its lawfulness…'. However, there is no requirement that the suspect be informed in any particular way. Thus, at this initial stage, there is no requirement that the suspect be given a copy of the arrest warrant or any other document setting forth the charges against him; in fact, there is no requirement at this stage that the suspect be notified in writing at all, so long as the suspect is informed promptly.

83. The European Court of Human Rights has held that the required information need not be given in its entirety by the arresting officer at the 'moment of the arrest', provided that the suspect is informed of the legal grounds of his arrest within a sufficient time after the arrest. Moreover, the information may be divulged to the suspect in stages, as long as the required information is provided promptly. Whether this requirement is complied with requires a factual determination and is, therefore, case-specific. Consequently, we will briefly survey the jurisprudence of the Human Rights Committee and the European Court of Human Rights in interpreting the promptness requirement of Article 9(2) of the ICCPR, Article 5(2) of the ECHR and Article 7 of the ACHR.

84. As pointed out above, the Human Rights Committee held in Glenford Campbell v. Jamaica, that detention without the benefit of being informed of the charges for 45 days constituted a violation of Article 9(2) of the ICCPR. Under the jurisprudence of the European Court of Human Rights, intervals of up to 24 hours between the arrest and providing the information as required pursuant to ECHR Article 5 (2) have been held to be lawful. However, a delay of ten days between the arrest and informing the suspect of the charges has been held to run afoul of Article 5(2).

85. In the present case, the Appellant was detained for a total period of 11 months before he was informed of the general nature of the charges that the Prosecutor was pursuing against him. While we acknowledge that only 35 days out of the 11-month total are clearly attributable to the Tribunal (the periods from 17 April—16 May 1996 and 4—10 March 1997), the fact remains that the Appellant spent an inordinate amount of time in provisional detention without knowledge of the general nature of the charges against him. At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal—and not any other entity—that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated.

86. As noted above, in Bell v. DPP of Jamaica, the abuse of process doctrine was applied where unreasonable delay would have resulted in an oppressive result had the case gone to trial. Applying the guidelines set forth in that case convinces us that the abuse of process doctrine is applicable under the facts of this case. The Appellant was detained for 11 months without being notified of the charges against him. The Prosecutor has offered no satisfactory justifications for this delay. The numerous letters attached to one of the Appellant's submissions point to the fact that the Appellant was in continuous communication with all three organs of the Tribunal in an attempt to assert his rights. Moreover, we find that the effect of the Appellant's pre-trial detention was prejudicial.

3. The failure to resolve the *writ of habeas corpus* in a timely manner

87. The next issue concerns the failure of the Trial Chamber to resolve the Appellant's *writ of habeas corpus* filed on 29 September 1997. The Prosecutor asserts that *after* the Appellant filed the *writ of habeas corpus*, the President of the Tribunal wrote a letter to the Appellant informing the Appellant that the Prosecutor would be submitting an indictment shortly. In fact, the President's letter is dated *8 September 1997*, and the Appellant claims that the *writ* was filed on the basis of this letter from the President. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997. The Appellant asserts that 'the Registry without the consent

of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'. The Appellant also claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*. These assertions by the Appellant are, of course, impossible for him to prove, absent an admission by the Prosecutor. We note, however, that the Prosecutor has not directed the Appeals Chamber to any evidence to the contrary, and that the Appellant was never afforded an opportunity to be heard on the *writ of habeas corpus*.

88. Although neither the Statute nor the Rules specifically address *writs of habeas corpus* as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules. Moreover, this is a fundamental right and is enshrined in international human rights norms, including Article 8 of the Universal Declaration of Human Rights, Article 9(4) of the ICCPR, Article 5(4) of the ECHR and Article 7(6) of the ACHR. The Inter-American Court of Human Rights has defined the *writ of habeas corpus* as:

> [A] judicial remedy designed to protect personal freedom or physical integrity against arbitrary decisions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered.

Thus, this right allows the detainee to have the legality of the detention reviewed by the judiciary.

89. The European Court of Human Rights has held that the detaining State must provide recourse to an independent judiciary in all cases, whether the detention was justified or not. Under the jurisprudence of that Court, therefore, a *writ of habeas corpus* must be heard, even though the detention is eventually found to be lawful under the ECHR. Thus, the right to be heard on the *writ* is an entirely separate issue from the underlying legality of the initial detention. In the present case, the Appellant's right was violated by the Trial Chamber because the *writ* was filed but was not heard.

90. The Appeals Chamber is troubled that the Appellant has not been given a hearing on his *writ of habeas corpus*. The fact that the indictment of the Appellant has been confirmed and that he has had his initial appearance does not excuse the failure to resolve the *writ*. The Appellant submits that as far as he is concerned the *writ of habeas corpus* is still pending. The Appeals Chamber finds that the *writ of habeas corpus* is rendered moot by this Decision. Nevertheless, the failure to provide the Appellant a hearing on this *writ* violated his right to challenge the legality of his continued detention in Cameroon during the two periods when he was held at the behest of the Tribunal and the belated issuance of the indictment did not nullify that violation.

4. The duty of prosecutorial due diligence

91. Article 19(1) of the Statute of the Tribunal provides that the Trial Chambers shall ensure that accused persons appearing before the Tribunal are guaranteed a fair and expeditious trial. However, the Prosecutor, has certain responsibilities in this regard as well. For example, the Prosecutor is responsible for, *inter alia*: conducting investigations, including questioning suspects; seeking provisional measures and the arrest and transfer of suspects; protecting the rights of suspect, by ensuring that the suspect understands those rights; submitting indictments for confirmation; amending indictments prior to confirmation; withdrawing indictments prior to confirmation; and, of course, for actually prosecuting the case against the accused.

92. Because the Prosecutor has the authority to commence the entire legal process, through investigation

and submission of an indictment for confirmation, the Prosecutor has been likened to the 'engine' driving the work of the Tribunal. Or, as one court has stated, '[T]he ultimate responsibility for bringing a defendant to trial rests on the Government and not on the defendant'. Consequently, once the Prosecutor has set this process in motion, she is under a duty to ensure that, within the scope of her authority, the case proceeds to trial in a way that respects the rights of the accused. In this regard, we note that some courts have stated that 'mere delay' which gives rise to prejudice and unfairness might by itself amount to an abuse of process. For example, in R. Grays Justices ex p. Graham, the Queen's Bench stated in *obiter dicta* that:

> [P]rolonged delay in starting or conducting criminal proceedings may be an abuse of process when the substantial delay was caused by the improper use of procedure or inefficiency on the part of the prosecution and the accused has neither caused nor contributed to the delay.

93. The Prosecutor has asserted that her 'abstention from proceeding against the Appellant-Defendant before 3 March 1997 was due to on-going investigation,. The Prosecutor further argues that she should not be barred from proceeding against the Appellant simply because she did not proceed against the Appellant at the first available opportunity. In putting forth this argument, the Prosecutor relies on Judge Shahabuddeen's Separate Opinion from the Kovačević Decision. In that Separate Opinion, Judge Shahabuddeen referred to United States v. Lovasco, a leading United States case on pre-indictment delay, wherein the Court stated:

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgement as to when to seek an indictment. Judges are not free, in defining 'due process', to impose on law enforcement officers our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function'. ... Our task is more circumscribed. We are to determine only whether the action complained of—here, compelling respondent to stand trial after the Government delayed indictment to investigate further—violates ... "fundamental conceptions of justice..." which "define the community's sense of fair play and decency"...

The Court continued:

> It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.

94. The facts in Lovasco are clearly distinguishable from those of the Appellant's case, and, therefore, we do not find the Supreme Court's reasoning persuasive. In Lovasco, the respondent was subjected to an 18-month delay between the alleged commission of the offences and the filing of the indictment. However, Mr. Lovasco had not been arrested during the 18-month delay and was not in custody during that period when the police were conducting their investigation. We also note that in United States v. Scott, in a dissent filed by four of the Court's nine Justices, (including Justice Marshall, the author of the Lovasco decision), the Lovasco holding regarding pre-indictment delay was characterised as a 'disfavored doctrine'.

95. Moreover, in the Kovačević Decision relied upon by the Prosecutor, the Appeals Chamber held that that the Rules provide a mechanism whereby the Prosecutor may seek to amend the indictment. Pursuant to Rule 50(A), the following scheme for amending indictments is available to the Prosecutor. The Prosecutor may amend an indictment, without prior leave, at any time before the indictment is confirmed. After the indictment is confirmed, but prior to the initial appearance of the accused, the

indictment may be amended only with the leave of the Judge who confirmed it. At or after the initial appearance of the accused, the indictment may be amended only with leave of the Trial Chamber seized of the case. The Prosecutor thus has the ability to amend indictments based on the results of her investigations. Therefore, the Prosecutor's argument that investigatory delay at the pre-indictment stage does not violate the rights of a suspect who is in provisional detention is without merit. Rule 40*bis* clearly requires issuance of the indictment within 90 days and the amendment process is available in situations where additional information becomes available to the Prosecutor.

96. Although a suspect or accused before the Tribunal is transferred, and not extradited, extradition procedures offer analogies that are useful to this analysis. In the context of extradition, several cases from the United States confirm that the prosecuting authority has a due diligence obligation with respect to accused awaiting extradition. For example, in Smith v. Hooey, the Supreme Court found that the Government had a 'constitutional duty to make a diligent, good-faith effort to bring [the defendant] before the court for trial'. In United States v. McConahy, the court held that the Government's obligation to provide a speedy resolution of pending charges is not relieved unless the accused fails to demand that an effort be made to return him and the prosecuting authorities have made a diligent, good faith effort to have him returned and are unsuccessful, or can show that such an effort would prove futile. We note that the Appellant made several inquiries of Tribunal officials regarding his status. It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the *writ of habeas corpus*. Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant. Rather, it appears that the Appellant was simply forgotten about.

97. Moreover, conventional law and the legislation of many national systems incorporate provisions for the protection of individuals detained pending transfer to the requesting State. We also note in this regard that the European Convention on Extradition provides that provisional detention may be terminated after as few as 18 days if the requesting State has not provided the proper documents to the requested State. In no case may the provisional detention extend beyond 40 days from the date of arrest.

98. Setting aside for the moment the Prosecutor's contention that Cameroon was solely responsible for the delay in transferring the Appellant, the only plausible conclusion is that the Prosecutor failed in her duty to take the steps necessary to have the Appellant transferred in a timely fashion. The Appellant has claimed that the Prosecutor simply forgot about his case, a claim that is, of course, impossible for the Appellant to prove. However, we note that after the Appellant raised this claim, the Prosecutor failed to rebut it in any form, relying solely on the argument that it was Cameroon's failure to transfer the Appellant that resulted in this delay. The Prosecutor provided no evidence that she contacted the authorities in Cameroon in an attempt to get them to comply with the Rule 40*bis* Order. Further, in the 3 June 1999 Scheduling Order, the Appeals Chamber directed the Prosecutor to answer certain questions and provide supporting documentation, including an explanation for the delay between the request for transfer and the actual transfer. Notwithstanding this Order, the Prosecutor provided no evidence that she contacted the Registry or Chambers in an effort to determine what was causing the delay.

99. While it is undoubtedly true, as the Prosecutor submits, that the Registry and Chambers have the primary responsibility for scheduling the initial appearance of the accused, this does not relieve the Prosecutor of some responsibility for ensuring that the accused is brought before a Trial Chamber 'without delay' upon his transfer to the Tribunal. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer, in violation of his right to an initial appearance 'without delay'. There is no evidence that the Prosecutor took any steps to encourage the Registry or Chambers to place the Appellant's initial appearance on the docket. Prudent steps in this regard can be demonstrated

through written requests to the Registry and Chambers to docket the initial appearance. The Prosecutor has made no such showing and the only logical conclusion to be drawn from this failure to provide such evidence is that the Prosecutor failed in her duty to diligently prosecute this case.

C. Conclusions

100. Based on the foregoing analysis, we conclude that the Appellant was in the constructive custody of the Tribunal from 4 March 1997 until his transfer to the Tribunal's detention unit on 19 November 1997. However, international human rights standards comport with the requirements of Rule 40*bis*. Thus, even if he was not in the constructive custody of the Tribunal, the period of provisional detention was impermissibly lengthy. Pursuant to that Rule, the indictment against the Appellant had to be confirmed within 90 days from 4 March 1997. However, the indictment was not confirmed in this case until 23 October 1997. We find, therefore, that the Appellant's right to be promptly charged pursuant to international standards as reflected in Rule 40*bis* was violated. Moreover, we find that the Appellant's right to an initial appearance, without delay upon his transfer to the Tribunal's detention unit under Rule 62, was violated.

101. Moreover, we find that the facts of this case justify the invocation of the abuse of process doctrine. Thus, we find that the violations referred to in paragraph 101 above, the delay in informing the Appellant of the general nature of the charges between the initial Rule 40 request on 17 April 1996 and when he was actually shown a copy of the Rule 40*bis* Order on 10 March 1997 violated his right to be promptly informed. Also, we find that the failure to resolve the Appellant's *writ of habeas corpus* in a timely manner violated his right to challenge the legality of his continued detention. Finally, we find that the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence.

D. The Remedy

102. In light of the above findings, the only remaining issue is to determine the appropriate remedy for the violation of the rights of the Appellant. The Prosecutor has argued that the Appellant is entitled to either an order requiring an expeditious trial or credit for any time provisionally served pursuant to Rule 101(D). The Appellant seeks unconditional immediate release.

103. With respect to the first of the Prosecutor's suggestions, the Appeals Chamber notes that an order for the Appellant to be expeditiously tried would be superfluous as a remedy. The Appellant is already entitled to an expedited trial pursuant to Article 19(1) of the Statute. With respect to the second suggestion, the Appeals Chamber is unconvinced that Rule 101(D) can adequately protect the Appellant and provide an adequate remedy for the violations of his rights. How does Rule 101(D) offer any remedy to the Appellant in the event he is acquitted?

104. We turn, therefore, to the remedy proposed by the Appellant. Article 20(3) states one of the most basic rights of all individuals: the right to be presumed innocent until proven guilty. In the present case, the Appellant has been in provisional detention since 15 April 1996—more than three years. During that time, he spent 11 months in illegal provisional detention at the behest of the Tribunal without the benefits, rights and protections afforded by being formally charged. He submitted a *writ of habeas corpus* seeking to be released from this confinement—and was never afforded an opportunity to be heard on this *writ*. Even after he was formally charged, he spent an additional 3 months awaiting his initial appearance, and several more months before he could be heard on his motion to have his arrest and detention nullified.

105. The Statute of the Tribunal does not include specific provisions akin to speedy trial statutes existing

in some national jurisdictions. However, the underlying premise of the Statute and Rules are that the accused is entitled to a fair and expeditious trial. The importance of a speedy disposition of the case benefits both the accused and society, as has been recognised by national courts:

> The criminal defendant's interest in prompt disposition of his case is apparent and requires little comment. Unnecessary delay may make a fair trial impossible. If the accused is imprisoned awaiting trial, lengthy detention eats at the heart of a system founded on the presumption of innocence. ... Moreover, we cannot emphasize sufficiently that the public has a strong interest in prompt trials. As the vivid experience of a witness fades into the shadow of a distant memory, the reliability of a criminal proceeding may become seriously impaired. This is a substantial price to pay for a society that prides itself on fair trials.

106. The crimes for which the Appellant is charged are very serious. However, in this case the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him. This finding is consistent with Rule 40*bis*(H), which requires release if the suspect is not charged within 90 days of the commencement of the provisional detention and Rule 40(D) which requires release if the Prosecutor fails to issue an indictment within 20 days after the transfer of the suspect. Furthermore, this limitation on the period of provisional detention is consistent with international human rights jurisprudence. Finally, this decision is also consistent with national legislation dealing with due process violations that violate the right of the accused to a prompt resolution of his case.

107. Considering the express provisions of Rule 40*bis*(H), and in light of the Rwandan extradition request for the Appellant and the denial of that request by the court in Cameroon, the Appeals Chamber concludes that it is appropriate for the Appellant to be delivered to the authorities of Cameroon, the State to which the Rule 40*bis* request was initially made.

108. The Appeals Chamber further finds that this dismissal and release must be with prejudice to the Prosecutor. Such a finding is consistent with the jurisprudence of many national systems. Furthermore, violations of the right to a speedy disposition of criminal charges have resulted in dismissals with prejudice in Canada, the Philippines, the United States and Zimbabwe. As troubling as this disposition may be to some, the Appeals Chamber believes that to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process. Moreover, we find that it is the only effective remedy for the cumulative breaches of the accused's rights. Finally, this disposition may very well deter the commission of such serious violations in the future.

109. We reiterate that what makes this case so egregious is the combination of delays that seemed to occur at virtually every stage of the Appellant's case. The failure to hear the *writ of habeas corpus*, the delay in hearing the Extremely Urgent Motion, the prolonged detention of the Appellant without an indictment and the cumulative effect of these violations leave us with no acceptable option but to order the dismissal of the charges with prejudice and the Appellant's immediate release from custody. We fear that if we were to dismiss the charges without prejudice, the Appellant would be subject to immediate re-arrest and his ordeal would begin anew. Were we to dismiss the indictment without prejudice, the strict 90-day limit set forth in Rule 90*bis*(H) could be thwarted by repeated release and re-arrest, thereby giving the Prosecutor a potentially unlimited period of time to prepare and submit an indictment for confirmation. Surely, such a 'revolving door' policy cannot be what was envisioned by Rule 40*bis*. Rather, as pointed out above, the Rules and jurisprudence of the Tribunal permit the Prosecutor to seek

to amend the indictment if additional information becomes available. In light of this possibility, the 90-day rule set forth in Rule 40*bis* must be complied with.

110. Rule 40*bis*(H) states that in the event that the indictment has not been confirmed and an arrest warrant signed within 90 of the provisional detention of the suspect, the 'suspect shall be released'. The word used in this Sub-rule, 'shall', is imperative and it is certainly not intended to permit the Prosecutor to file a new indictment and re-arrest the suspect. Applying the principle of effective interpretation, we conclude that the charges against the Appellant must be dismissed with prejudice to the Prosecutor. Moreover, to order the release of the Appellant without prejudice—particularly in light of what we are certain would be his immediate re-arrest—could be seen as having cured the prior illegal detention. That would open the door for the Prosecutor to argue (assuming *arguendo* the eventual conviction of the Appellant) that the Appellant would not then be entitled to credit for that period of detention pursuant to Rule 101(D), on the grounds that the release was the remedy for the violation of his rights. The net result of this could be to place the Appellant in a worse position than he would have been in had he not raised this appeal. This would effectively result in the Appellant being punished for exercising his right to bring this appeal.

111. The words of the Zimbabwean Court in the Mlambo case are illustrative. In ordering the dismissal of the charges and release of the accused, the Zimbabwean Court held:

> The charges against the applicant are far from trivial and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are charged with the commission of serious crimes. Yet, that trial can only be undertaken if the guarantee under...the Constitution has not been infringed. In this case it has been grievously infringed and the unfortunate result is that a hearing cannot be allowed to take place. To find otherwise would render meaningless a right enshrined in the Constitution as the supreme law of the land'.

We find the forceful words of U.S. Supreme Court Justice Brandeis compelling in this case:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself: it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

112. The Tribunal—an institution whose primary purpose is to ensure that justice is done—must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals—including those charged with unthinkable crimes—would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.

V. DISPOSITION

113. For the foregoing reasons, THE APPEALS CHAMBER hereby:

Unanimously,

1. ALLOWS the Appeal, and in light of this disposition considers it unnecessary to decide the 19 October 1999 Notice of Appeal or the 26 October 1999 Notice of Appeal;

Unanimously,

2. DISMISSES THE INDICTMENT with prejudice to the Prosecutor;

Unanimously,

3. DIRECTS THE IMMEDIATE RELEASE of the Appellant; and

By a vote of four to one, with Judge Shahabuddeen dissenting,

4. DIRECTS the Registrar to make the necessary arrangements for the delivery of the Appellant to the Authorities of Cameroon.

Judge Shahabuddeen appends a Separate Opinion to this Decision.

Judge Nieto-Navia appends a Declaration to this Decision.

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

Gabrielle Kirk McDonald Mohamed Shahabuddeen Lal Chand Vohrah

Presiding

Wang Tieya Rafael Nieto-Navia

Dated this third day of November 1999
At The Hague,
The Netherlands.

[Seal of the Tribunal]

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Appendix A

Chronology of Events

15 April 1996:	Cameroon arrests twelve to fourteen Rwandans on the basis of international arrest warrants. The accused was among those arrested. The parties disagree with respect to the question of under whose authority the accused was detained. The Appellant asserts he was arrested by Cameroon on the basis of a request from the Prosecutor, while the Prosecutor contends that the Appellant was arrested on the basis of international arrest warrants emanating from the Rwandan and Belgian authorities.
17 April 1996:	The Prosecutor requests that provisional measures under Rule 40 be taken in relation to the Appellant.
6 May 1996:	The Prosecutor seeks a three-week extension for the detention of the Appellant in Cameroon.
16 May 1996:	The Prosecutor informs Cameroon that she seeks to transfer and hold in provisional detention under Rule 40*bis* four of the individuals detained by Cameroon, *excluding* the Appellant.
31 May 1996:	The Court of Appeal in Cameroon issues a Decision to adjourn *sine die* consideration of the Rwandan extradition proceedings concerning the Appellant as the result of a request by the Cameroonian Deputy Director of Public Prosecution. In support of his request, the Deputy Director cites Article 8(2) of the ICTR Statute.
15 October 1996:	The Prosecutor sends the Appellant a letter indicating that Cameroon is not holding the Appellant at her behest.
21 February 1997:	The Cameroon court rejects Rwanda's extradition request for the Appellant. The court orders the Appellant's release, but he is immediately re-arrested at the behest of the Prosecutor pursuant to Rule 40. This is the second request under Rule 40 for the provisional detention of the Appellant.
24 February 1997:	Pursuant to Rule 40*bis*, the Prosecutor requests the transfer of the accused to Arusha.
4 March 1997:	An Order pursuant to Rule 40*bis* (signed by Judge Aspegren on 3 March 1997), is filed. This Order requires Cameroon to arrest and transfer the Appellant to the Tribunal's detention unit.
10 March 1997:	The Appellant is shown a copy of the Rule 40*bis* Order, including the general nature of the charges against him.
29 September 1997:	The Appellant files a *writ of habeas corpus*.
21 October 1997:	The President of Cameroon signs a decree ordering the Appellant's transfer to the Tribunal's detention unit.
22 October 1997:	The Prosecutor submits the indictment for confirmation.

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23 October 1997:	Judge Aspegren confirms the indictment against the Appellant and issues a Warrant of Arrest and Order for Surrender to Cameroon.
19 November 1997:	The Appellant is transferred to Arusha.
23 February 1998:	The Appellant makes his initial appearance.
24 February 1998:	The Appellant files the Extremely Urgent Motion seeking to nullify the arrest.
11 September 1998:	The Trial Chamber hears the arguments of the parties on the Motion.
17 November 1998:	The Trial Chamber dismisses the Extremely Urgent Motion *in toto*.
27 November 1998:	The Appellant notified the Appeals Chamber of his intention to appeal, claiming that he did not receive the Decision until 27 November 1998. On that same day, he signs his Notice of Appeal.

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IN TRIAL CHAMBER II

Before:
Judge Antonio Cassese, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge David Hunt

Registrar:
Dorothee de Sampayo Garrido-Nijgh

Decision of:
8 December 1999

PROSECUTOR

v

Radoslav BRDANIN

DECISION ON PETITION FOR A WRIT OF HABEAS CORPUS ON BEHALF OF RADOSLAV BRDANIN

The Office of the Prosecutor:

Ms Joanna Korner
Mr Michael Keegan
Ms Ann Sutherland

Counsel for the Accused:

Mr John Ackerman

1 The form and nature of the application

1. The accused Radoslav Brdanin ("Accused") has filed a document entitled "Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brdanin" ("Petition"), requesting that –

> [...] a Writ of Habeas Corpus issue without delay ordering the following:
>
> a. That the Petitioner be brought speedily before the Trial Chamber for a hearing on the Writ of Habeas Corpus.
>
> b. That the Prosecutor be ordered to present to the Trial Chamber, in such hearing, the evidence in its possession, if any, which supports a *prima facie* case against the Petitioner.

2. It is submitted by the Accused that the Appeals Chamber of the International Criminal Tribunal for

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Rwanda ("ICTR") has held that *habeas corpus* is a proper remedy by which a person may challenge the lawfulness of his detention[1]. The Accused asserts that this was held by that Appeals Chambers in the recent decision of *Jean-Bosco Barayagwiza v The Prosecutor.*[2] What the Appeals Chamber said, however, was this:

> 88. Although neither the Statute nor the Rules specifically address *writs of habeas corpus* as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules. (Footnote: See, for example, Articles 19 and 20 of the Statute and Rule 40*bis*(J).)[3]

The reference there is to the recognition by the Statute and Rules of the notion that a detainee must have recourse to a court to challenge the lawfulness of his detention. That is the fundamental issue raised by a *writ of habeas corpus*, as that passage makes clear.[4] But the Rwanda Decision gives no support to such a challenge being made in either that or this Tribunal by way of a *writ of habeas corpus*.

3. The Appeals Chamber went on to show that such recourse was a fundamental right enshrined in international human rights norms[5]. Such provisions also make it clear, as the Appeals Chamber says, that a detainee has the right to have the lawfulness of his detention reviewed by the judiciary.[6]

4. Those statements are fully accepted. They do not, however, establish that such recourse may be by way of an application for a *writ of habeas corpus*. A *writ of habeas corpus* is one of the old forms of prerogative writ available in certain common law countries – documents issued in the name of the Sovereign by which the named defendant was ordered to carry out a particular action and which, if the action was not carried out, led to proceedings in a court of generally civil (not criminal) jurisdiction, unless otherwise provided by statute. Prerogative writs no longer exist, as such, in most of those countries, having been replaced by orders "in the nature of" *mandamus*, prohibition, *habeas corpus*, *certiorari* and others. In the United States, however, the continued existence of the *writ of habeas corpus* is enshrined in the Constitution (Article 1, Section 9).

5. This Tribunal has no power to issue writs in the name of any Sovereign or other head of state, and it is not a court of civil jurisdiction which can hear the proceedings commenced by such a writ. But the Tribunal certainly does have both the power and the procedure to resolve a challenge to the lawfulness of a detainee's detention. With respect, it did not need the decision of the Appeals Chamber of the ICTR to establish the existence of such a power.

6. A detained person whose case has been assigned to a Trial Chamber has recourse to the Tribunal in order to challenge the lawfulness of his detention by way of motion – pursuant to Rule 72 of the Rules of Procedure and Evidence ("Rules") if the application amounts to a challenge to jurisdiction, or pursuant to Rule 73 if it does not.[7] Once such a motion has been filed before a Trial Chamber, the prosecution has a right to file a response, and the Trial Chamber then gives its decision. Such a procedure fully complies with the international human rights norms referred to earlier.

7. Rather than merely refuse the present request by the Accused for the issue of a *writ of habeas corpus* upon the basis that no such procedure is available within the Tribunal, the more appropriate course, in the circumstances, would be to treat the Petition as a wrongly entitled motion by the Accused seeking to challenge the lawfulness of his detention.[8] The prosecution has, wisely, assumed that the Accused would wish to have his Petition treated as a motion pursuant to Rule 73.[9] The Petition has been so treated.

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2 The history of the proceedings

8. On 14 March 1999, Judge Rodrigues –

(a) pursuant to Article 19 of the Tribunal's Statute and Rule 47 of the Rules, confirmed an indictment against the Accused and others, charging them (apparently jointly) with a crime against humanity, based upon persecutions on political, racial or religious grounds;[10]

(b) pursuant to Rules 47 and 55, signed –

(i) warrants directed to the national authorities of Bosnia and Herzegovina and to the entity known as "Republika Srpska", directing them to search for and arrest the Accused and to surrender him to the Tribunal, and

(ii) a warrant to the Prosecutor, authorising her to do the same; and

(c) pursuant to Rule 53, made orders –

(i) that the arrest warrants directed to the national authorities of Bosnia and Herzegovina and to the entity known as "Republika Srpska" were not to be transmitted to them until the Accused himself had been served with an arrest warrant,

(ii) authorising copies of the arrest warrant to be transmitted to the Prosecutor and to the International Stabilisation Force ("SFOR"), and

(iii) prohibiting the public disclosure (except to SFOR) of the indictment, supporting material and arrest warrant until the Accused had been served with an arrest warrant.

9. The arrest warrant was executed on 6 July, and the Accused was transferred to the seat of the Tribunal in accordance with Rule 57 on the same day. His initial appearance took place on 12 July. On the same day, an order was made pursuant to Rule 64 that the Accused be detained in the United Nations Detention Unit in The Hague.

10. On 31 August, the Accused moved for the dismissal of the indictment, challenging the jurisdiction of the Tribunal pursuant to Rule 72 and arguing that:

(1) the confirmation procedure is jurisdictional, and there can be no jurisdiction if that procedure is not properly followed, and

(2) the Tribunal has jurisdiction to try him upon any one count in an indictment only when the supporting material supports the existence of that count.[11]

This motion was dismissed on 5 October. The Trial Chamber held that the jurisdiction of the Tribunal did not depend upon whether the supporting material provided by the Prosecutor to the confirming judge supported the charge,[12] and that there was no provision in the Rules which permitted a Trial Chamber to

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review the actual decision made by the confirming judge by way of appeal or in any other way.[13] An interlocutory appeal against that decision was rejected on 16 November. The Appeals Chamber considered that any substantive error by the confirming judge in the assessment of the supporting material did not go to the jurisdiction of the Tribunal within the ambit of Rule 72(B)(i), and that the Interlocutory Appeal did not involve any of the categories contemplated by Rule 72 as giving an appeal as of right.[14]

11. The present application was filed on 30 November. In the meantime, on 2 September, the prosecution filed a joint indictment against this Accused and Momir Talic, charging them jointly with the crime against humanity already referred to. An amended indictment was lodged with the confirming judge on 19 November, and the prosecution awaits his decision as to whether the leave required should be granted.

3 The basis of the application

12. The Petition asserts that the Accused has been "illegally restrained" since, variously, 6 July[15] and "at least since 21 October 1999" [...] and [...] presumably prior to 21 October 1999".[16] The first date is the date upon which the Accused was arrested, and the second is the date when the prosecution stated that it intended to apply to the confirming judge for leave to amend the indictment.[17]

13. The Accused alleges that the stated intention of the prosecution to apply for leave to amend the indictment was both "an attempt to render Petitioner's Motion to Dismiss the Indictment moot",[18] and "in effect" a concession by the prosecution that it was "responsible for the illegal detention of the Petitioner since 21 October 1999".[19] There is absolutely no foundation for either allegation.

14. The Accused goes on to allege that, on 21 October, he was "informed by the Prosecution that the charges contained in the current pending Indictment are not the charges against him and that he has not been informed since that date that there are any additional charges against him".[20] This allegation is then used as the basis for the assertion that he has been denied his right to be informed promptly of the charge against him.[21] The Accused is undoubtedly entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.[22] The failure to comply with that right might in some circumstances lead to the dismissal of an indictment.[23]

15. However, the assertion that the Accused has been denied such a right in the present case is wholly fanciful. There is absolutely no basis for his assertion that he was informed that the charges in the current indictment against him "are not the charges against him". The document by which the Accused was informed that the prosecution intended to apply to the confirming judge for leave to amend the indictment was in the following terms:

> The Prosecution gives notice that it is the present intention to apply to the confirming Judge (within 28 days) under Rule 50(A)(ii) for leave to amend the Indictment.

In a document filed on 29 October, the Senior Trial Attorney for the prosecution confirmed the intention of the prosecution to seek an amendment to the original indictment against this Accused and Momir Talic, and said:

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> The amendment will add a number of new charges to the original indictment.
>
> The reasons for the proposed amended indictment are:
>
> 1. The nature of the evidence has changed and developed since the original indictment was confirmed by his Honour Judge Almiro Simões Rodrigues on 14 March 1999; and
>
> 2. The indictment needs to be brought into accord with the current jurisprudence of the Tribunal.

In those circumstances, until there is any amendment to it by leave, the charge in the indictment against the Accused remains the same as that to which he pleaded at his initial appearance on 12 July, six days after his arrest. There could be no basis for any allegation that the Accused has been denied his right to be informed promptly of the charge against him.[24]

16. The Accused is presently being held in custody pursuant to the order of this Trial Chamber, made pursuant to Rule 64 on 12 July, that he be detained in the United Nations Detention Unit in The Hague. That order was lawfully based upon the arrest of the Accused pursuant to the arrest warrant issued by Judge Rodrigues, which in turn was lawfully based upon the confirmation by that judge of the indictment against the Accused.[25] There has been no suggestion that the circumstances in which the Accused was arrested are relevant to the lawfulness of his detention. The true purpose of the Petition appears to be, as the prosecution asserts, "yet another attempt to force the Trial Chamber to reconsider the evidence which was placed before the confirming judge".[26] That this is so is demonstrated by the second order sought in the Petition:

> That the Prosecutor be ordered to present to the Trial Chamber, in such hearing, the evidence in its possession, if any, which supports a *prima facie* case against the Petitioner.

Such material is manifestly irrelevant to any issue shown to have arisen in the present case concerning the lawfulness of the Accused's detention.

4 Disposition

17. For the reasons given, the Petition is dismissed.

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

Dated this 8th day of December 1999,
At The Hague,
The Netherlands.

_____

Judge David Hunt
Pre-Trial Judge
(on behalf of the Trial Chamber, at the request of the Presiding Judge)

[Seal of the Tribunal]

1. Petition, 30 Nov 1999, par 8.
2. ICTR-97-19-AR72, 3 Nov 1999, p 50 ("Rwanda Decision").
3. Rwanda Decision, par 88. These references are to the ICTR Statute and Rules of Procedure and Evidence.
4. See also *Zabrovsky v General Officer Commanding Palestine* S1947C AC 246; Halsbury's Laws of England (4th Edn, 1982), Volume 37 (Practice and Procedure), par 584; Black's Law Dictionary (7th Edn, 1999) "*habeas corpus ad subjiciendum*".
5. Article 8 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". Article 9 provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile."

Article 9(4) of the International Covenant on Civil and Political Rights 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."

Article 5(4) the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Article 7(6) of the American Convention on Human Rights provides, *inter alia*:

> "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful."

See also Article 7(1)(a) of the African Charter on Human and Peoples' Rights:

> "Every individual shall have the right to have his cause heard. This comprises:
>
> (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;[...]."

6. Rwanda Decision, par 88.
7. Prior to the assignment of the case to a Trial Chamber, the application would be made to a Duty Judge, in accordance with Rule 28(C).
8. Such a course was followed by Trial Chamber III in *Prosecutor v Simic*, Case IT-95-9-PT, 23-24 Nov 1999 (Transcript, pp 487-488, 535-536).
9. Prosecution's Response to "Petition for a Writ of Habeas Corpus on Behalf of Radislav Brdanin", 2 Dec 1999 ("Prosecution Response"), par 5. The time for filing a preliminary motion pursuant to Rule 72 has long expired.
10. The original indictment remains sealed. The various indictments which have been filed are discussed in more detail in *Prosecutor v Talic*, a decision given in the present proceedings against a co-accused of this Accused, on 4 November 1999, at pars 4-6.
11. An order had been made granting an extension of time for filing this motion: Order Granting Extension of Time under Rule 72, 4 Aug 1999.
12. Decision on Motion to Dismiss Indictment, 5 Oct 1999 ("Dismissal Decision"), par 20.
13. *Ibid*, par 23.
14. Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed under Rule 72, 16 Nov 1999, p 3.
15. Petition, p 2.
16. *Ibid*, par 10.
17. Prosecution's Response to Interlocutory Appeal, 21 Oct 1999, p 2.
18. Petition, par 5.
19. *Ibid*, par 10.
20. *Ibid*, par 10.
21. *Ibid*, par 10.
22. Statute, Article 21.4(a).

23. It did so in the Rwanda Decision, although it is unnecessary for the Trial Chamber in this case to express any view as to whether that decision, by which it is not bound, was correct in the circumstances of that case.
24. The usual course is for a copy of the indictment as confirmed to be handed to an accused when he is served with the arrest warrant, but there is no evidence before the Trial Chamber as to whether this was done in the present case.
25. Statute, Article 19.2. This is discussed in the Dismissal Decision, at par 14.
26. Prosecution Response, par 7.

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IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding

Judge Antonio Cassese

Judge Wang Tieya

Judge Rafael Nieto-Navia

Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 15 October 1998

PROSECUTOR

v.

DUSKO TADIC

DECISION ON APPELLANT'S MOTION FOR THE EXTENSION OF THE TIME-LIMIT AND ADMISSION OF ADDITIONAL EVIDENCE

The Office of the Prosecutor:

Ms. Brenda Hollis
Mr. Michael Keegan

Counsel for the Appellant:

Mr. Milan Vujin
Mr. John Livingston

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("the International Tribunal") is seised of an appeal against conviction and sentence by Dusko Tadic ("Appellant") and a cross-appeal by the Prosecutor. Currently pending before it is a motion entitled "Motion for The Extension Of The Time Limit" ("the Motion"), filed by the Appellant on 6 October 1997 in which the Appellant seeks to admit additional evidence pursuant to Rule 115 of the

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Rules of Procedure and Evidence of the International Tribunal ("the Rules"). This is a decision on the Motion.

II. PROCEDURAL BACKGROUND

2. On 7 May 1997 the Appellant was convicted by Trial Chamber II of the International Tribunal of certain offences under the Statute of the International Tribunal ("the Statute"), as set out in its Opinion and Judgment[1]. The Appellant filed Notice of Appeal against the Judgement on 3 June 1997. On 8 September 1997, the Appellant requested an extension of the time-limit for the filing of its appeal brief in order to collect and present additional evidence pursuant to Rule 115. On 19 September 1997, at the Appellant's request, the Presiding Judge of the Appeals Chamber convened an *in camera* hearing, at which both the Appellant and the Office of the Prosecutor ("the Prosecution") presented oral arguments.

3. On 6 October 1997, the Appellant filed the Motion, seeking to present additional evidence under Rule 115. After receiving the response of the Prosecution on 20 October 1997, a hearing on the Motion was held on 22 January 1998. At this time the Appeals Chamber ordered, *inter alia*, that the normal appeal proceedings were to be suspended until the determination of the Motion, and set out a ten-point timetable for receiving the further submissions of the parties[2].

4. On 2 February 1998, pursuant to a request filed by the Appellant, the Appeals Chamber issued an *ex parte* order addressed to Republika Srpska and granted the Appellant until 2 May 1998 to file any material obtained pursuant to that and other orders.

5. The Appellant filed his "Appellant's Brief In Relation To Admission Of Additional Evidence On Appeal Under Rule 115" ("Appellant's Rule 115 Brief") and supporting material on 5 February 1998, to which the Prosecution responded on 9 March 1998.

6. On 23 March and 1 May 1998, the Appellant filed the remainder of his submissions in support of the Motion. The Appellant also sought an extension of time of 28 days in which to file one additional witness statement. On 7 May 1998 the Prosecution also sought an extension of time to file its Response to the Appellant's Rule 115 Brief. Both requests were granted: the Prosecution filed its Response to the Appellant's Rule 115 Brief on 8 June 1998 and the Appellant filed his reply on 25 June 1998, a "Substituted Copy" of this document being later filed 15 July 1998[3]. This completed the filings and submissions in this matter.

III. ARGUMENTS OF THE PARTIES

7. The Appeals Chamber will now summarise the arguments of the parties in relation to the principal issues.

A. Unavailability under Rule 115

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1. Appellant's arguments

8. The Appellant argues that there is a substantial amount of evidence which was "unavailable" at trial within the meaning of Rule 115 of the Rules which it presents as referring to evidence

a. which was not before the Trial Chamber for its consideration;
b. which was "unavailable" to Appellant for any one or more of five reasons:
   i. it was not in existence at the time of the trial;
   ii. the Appellant was unaware of its existence;
   iii. the Appellant's lawyers at trial were unable to adduce the evidence, e.g., because the witnesses felt intimidated and refused to give evidence;
   iv. the Appellant's lawyers failed to seek out and/or otherwise obtain the evidence in question, whether negligently or not;
   v. the Appellant's lawyers failed to call the evidence other than with the agreement of Appellant; and
c. which, if omitted, might create a doubt as to whether a miscarriage of justice had occurred[4].

9. The Appellant submits that witness and documentary evidence was not available at trial for a number of reasons, including:

a. difficulty faced by Appellant in obtaining and collecting evidence in Republika Srpska at the time of the trial, as well as other investigatory difficulties, which meant that
   i. some witnesses were unwilling to come forward;
   ii. some witnesses could not be contacted at the time of the trial;
   iii. some witnesses would not come forward due to threats or intimidation, in particular by Simo Drljaca (now deceased) and/or Miso Danicic;
b. the circumstances that the trial defence team

   i. chose not to call witnesses available to it (sometimes despite the request of the Appellant to do so);
   ii. did not have access to the evidence now sought to be adduced;
   iii. were ultimately responsible for the failure to present "credible and potentially decisive evidence" on behalf of the Appellant at trial.

10. The Appellant submits that the Appeals Chamber "should adopt a liberal rather than restricted interpretation of Rule 115 and should be [slow] to rule out any additional evidence which, if not admitted might create doubts as to whether a miscarriage of justice has occurred"[5]. He contends that, to satisfy the requirement of "unavailability" pursuant to Rule 115, "it is sufficient to present new evidence which was not known to the Trial Chamber"[6]. He submits that the Appeals Chamber is empowered to admit any additional evidence without restriction under and in accordance with Article 25 of the Statute and Rule 115 of the Rules[7], and that an appeal under those provisions is not restricted to issues of law or procedural error[8].

2. Prosecution arguments

11. The Prosecution argues that the criteria under Rule 115 of the Rules relating to the question whether the additional evidence "was not available ... at the trial" should be construed narrowly. Article 25 of the Statute defines the criteria of Rule 115, and limits the scope of that Rule. The right of appeal, within the purview of Article 25, does not allow for trials *de novo*[9]. The Prosecution cites the Appeals

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Chamber's Judgement in *Prosecutor v. Erdemovic*[10] that the "appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing"[11].

12. The Prosecution submits that the evidence sought to be admitted must satisfy one of the criteria under Article 25 of the Statute, namely:

a. an error on a question of law invalidating the decision; or
b. an error of fact which has occasioned a miscarriage of justice;

and that the Appellant must show that the evidence was unavailable at the time of trial and that it is in the interest of justice to admit it.

13. The Prosecution argues that the Appellant's Motion should not be granted unless

a. the evidence could not have been produced at trial through the exercise of due diligence;
b. the additional evidence, if proved, could have been a decisive factor in reaching a decision; and
c. the new evidence is credible (in the sense that there is a likelihood it can be proved)[12].

14. The Prosecution submits that

> [g]enerally, appeals courts will not consider additional evidence . . . unless they determine that the evidence was unavailable at trial, that it is reliable and would be admissible evidence in the trial, and that there is a high probability the evidence would disprove or cast doubt on the findings of the court below.[13]

B. Due Diligence and Error of Counsel

15. In the most recent submissions in these proceedings, it is clear that, as it was put by the Appellant, the parties are not in substantial disagreement that the Defence "must, in practice, use all due diligence in gathering evidence on behalf of their client"[14]. However, there is disagreement between the parties about when the due diligence requirement applies and about whether alleged failure on the part of the Appellant's counsel to act with due diligence at trial can be relied upon by the Appellant in seeking leave to admit additional evidence.

1. Appellant's arguments

16. In support of the submission that evidence "not available to it at trial" includes evidence "not adduced because of negligence" of the Appellant's lawyers at trial, the Appellant refers to Rule 119 of the Rules, which requires that, for a judgement to be reviewed on the basis of a new fact, that fact must not have been discoverable through the exercise of "due diligence". The Appellant contends that the omission of this term in Rule 115 shows that the requirement of due diligence does not apply under that Rule.

17. The Appellant presents written statements of potential witnesses and documents which it alleges "were not accessible to the previous defense counsel of the accused" or "which the previous defense

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counsel was erroneously of the view that it [would] not help determine the truth, in spite of the request by the accused for this evidence to be presented"[15]. The Appellant, who has changed his counsel, states that this was the reason for the change[16].

18. The Appellant submits that there is "no justification, in the interests of justice for not allowing the Accused to re-open proceedings when the reason why relevant, credible and potentially decisive evidence was not obtained was because of negligence by lawyers"[17]. The Appellant should not, it is argued, be made to suffer for this. A similar argument is also raised in respect of evidence not presented as a consequence of a defence strategy by the Appellant's counsel at the time of trial.

2. Prosecution arguments

19. The Prosecution argues that one of the tests for admission of additional evidence under Rule 115 of the Rules is that "the evidence could not have been discovered before the trial by the exercise of due diligence"[18]. The Prosecution submits that all jurisdictions which permit the admission of additional evidence require due diligence on behalf of the moving party[19].

20. Furthermore, the Prosecution contends that

[a]lmost all of the proposed witnesses and evidence was available at trial or could have been discovered by the exercise of due diligence by the Trial Defence Counsel, and, therefore, fails the requirement of unavailability.[20]

The Prosecution also argues:

While no burden of proof is placed on the defence, the defence must be under a corresponding obligation to exercise due diligence in ensuring that all evidence on which the defence seeks to rely is placed before the Trial Chamber at the time of the trial. A party cannot, by failing to discharge its own obligation of due diligence, provide itself with a grounds of appeal in the event of an adverse judgment.[21]

The Prosecution also states:

In determining whether the Appellant diligently sought to make the new testimony available at trial, the court should examine whether the Appellant took certain steps such as subpoenaing the witness or moving for a continuance or an adjournment in order to obtain the testimony.[22]

C. The Interests of Justice

1. Appellant's arguments

21. The Appellant submits that the "interests of justice" require that additional evidence be such that it would probably change the result of the trial proceedings conducted before the Trial Chamber[23]. In his view, that phrase represents a broad concept which includes any consideration necessary to ensure a fair

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trial, such as the need for the accused to feel that justice has been done through the presentation of evidence which bears upon his guilt or innocence[24].

2. Prosecution arguments

22. The Prosecution submits that the condition relating to interests of justice is to be construed narrowly as follows:

a. the evidence must be relevant to a material issue;
b. the evidence must be credible;
c. the evidence, if proven to be true and credible, must be such that it would probably change the result if a new trial or appeal were granted[25].

In the view of the Prosecution, the principle of finality must be considered as being in the "interests of justice"; this principle would be undermined if either party could have proceedings reopened to hear the testimony of additional witnesses[26].

D. Rule 115 or Rule 119

1. Appellant's arguments

23. The Appellant submits that if the correct interpretation of Articles 25 and 26 of the Statute and Rules 115 and 119 to 122 of the Rules is that the presentation of the additional evidence which he proposes to introduce is properly a matter for review rather than appellate proceedings, this motion should be remitted to the Trial Chamber under Rule 122 as an application for review[27]. It is, however, the Appellant's primary submission that the evidence he seeks to adduce is admissible under Rule 115.

2. Prosecution arguments

24. The Prosecution submits that the standards for admission are the same, but that the discovery of a new fact after judgement is a matter for review under Article 26 of the Statute and Part Eight of the Rules, rather than appeal under Article 25 of the Statute and admission as additional evidence under Rule 115 of the Rules[28]. If the discovery of new evidence after trial were grounds both of appeal and review, there would be potential duplication of proceedings[29].

25. The Prosecution also argues that the Appellant cannot file notice of appeal and, at the same time, seek extension of time to search for additional evidence to support the appeal. The Prosecution asserts that, even if recourse to the review procedure is permissible, that provision allows a party to seek review on the basis of a new fact once it has been discovered, not to permit the party to preserve its right to appeal while still searching for the evidence to support the appeal[30].

IV. APPLICABLE LAW

26. The relevant provisions of the Statute and the Rules are as follow:

Article 25

Appellate proceedings

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1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
   a. an error on a question of law invalidating the decision; or
   b. an error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26

Review proceedings

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

Rule 115

Additional Evidence

A. A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of the hearing.
B. The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.

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 122

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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.

V. DISCUSSION

27. The Appeals Chamber will now consider the issues it regards as pertinent.

A. Distinction between Rule 115 and Rule 119

28. The parties are agreed that the Motion is to be treated as a motion for leave to admit additional evidence under Rule 115 of the Rules. However, in addition, or in the alternative, the Appellant asks that the Motion be treated as a motion for review of the Judgement on the basis of a "new fact" within the meaning of Rule 119 of the Rules, as read with the review provisions of Article 26 of the Statute. The Prosecution does not consider the Rule 119 procedure to be applicable.

29. The Appeals Chamber considers that there is a distinction between two provisions of the Statute and their related Rules, namely Article 25 of the Statute and Rule 115, and Article 26 of the Statute and Rule 119. The Chamber will address this issue first.

30. Review proceedings under Article 26 of the Statute and Rule 119 are different from appellate proceedings under Article 25 and Rule 115. Where an applicant seeks to present a new fact which becomes known only after trial, despite the exercise of due diligence during the trial in discovering it, Rule 119 is the governing provision. In such a case, the Appellant is not seeking to admit additional evidence of a fact that was considered at trial, but rather a new fact. The proper venue for a review application is the Chamber that rendered the final judgement; it is to that Chamber that the motion for review should be made. In this case, it is for the Trial Chamber to review the Judgement and determine whether the new fact, if proved, could have been a decisive factor in reaching a decision.

31. Rule 122 of the Rules, set out above, empowers the Appeals Chamber to "return the case to the Trial Chamber for disposition of the motion". The Appellant has brought his motion under Rule 115 for the reason that he considers that the matters presented can be treated as additional evidence under that Rule. In the course of the written arguments, he leaves it to the Appeals Chamber to deal with the matter as one raising new facts if the Chamber considers that new facts are raised. The Appellant has not, however, presented any convincing arguments of his own to support the view that new facts are raised. The Appeals Chamber, for its part, considers it sufficient to say that it is not satisfied that new facts are raised.

32. The Appeals Chamber will, however, observe that a distinction exists between a fact and evidence of that fact. The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules. In the view of the Appeals Chamber, the alleged

new fact evidence submitted by the Appellant is not evidence of a new fact; it is additional evidence of facts put in issue at the trial. Some of that additional evidence was not available at the trial. That being so, it is necessary to consider whether so much of that evidence as was not available at the trial is required by the interests of justice to be presented at the appeal. This is considered below.

B. The Requirements of Rule 115

33. The Appeals Chamber will now consider the basic tests of admissibility under Rule 115 of the Rules.

34. To be admissible under Rule 115 the material must meet two requirements: first, it must be shown that the material was not available at the trial and, second, if it was not available at trial, it must be shown that its admission is required by the interests of justice.

35. The first issue, the "availability" of the material, turns on the question whether due diligence is required. This is addressed in the following section of this Decision. As to the second requirement, it is clear from the structure of Rule 115 that "the interests of justice" do not empower the Appeals Chamber to authorise the presentation of additional evidence if it was available to the moving party at the trial. Such an interpretation is supported by the principle of finality. Naturally, the principle of finality must be balanced against the need to avoid a miscarriage of justice; when there could be a miscarriage, the principle of finality will not operate to prevent the admission of additional evidence that was not available at trial, if that evidence would assist in the determination of guilt or innocence. It is obvious, however, that, if evidence is admitted on appeal even though it was available at trial, the principle of finality would lose much of the value which it has in any sensible system of administering justice. It is only to the extent that the Appeals Chamber is satisfied that the additional evidence in question was not available at trial that it will be necessary to consider whether the admission of the evidence is required by the interests of justice.

C. The Requirement for Due Diligence

36. Rule 115 (A) provides that a "party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial". That relates to appeals. Rule 119 enables a party to seek a review "[w]here 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 Appellant submits that the reference to "diligence" in the latter but not in the former means that diligence is not required under Rule 115. However, whilst the Rules can illustrate the meaning of the Statute under which they are made, they cannot vary the Statute. If there is a variance, it is the Statute which prevails. But, for the reasons explained below, there is no variance in this case. In the view of the Appeals Chamber, there is a requirement for the exercise of due diligence by a party moving under Rule 115.

37. Article 25, paragraph 1, of the Statute provides for appeals on two grounds, namely, "an error on a question of law invalidating the decision" and "an error of fact which has occasioned a miscarriage of

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justice". The first error is clearly an error committed by the Trial Chamber. That, in principle, would seem to be also the case with the second error. But it is difficult to see how the Trial Chamber may be said to have committed an error of fact where the basis of the error lies in additional evidence which, through no fault of the Trial Chamber, was not presented to it. Where evidence was sought to be presented to the Trial Chamber but was wrongly excluded by it, there is no need for recourse to the provisions relating to the production of additional evidence to the Appeals Chamber; there the Trial Chamber would have committed an error appealable in the ordinary way.

38. It is only by construing the reference to "an error of fact" as meaning objectively an incorrectness of fact disclosed by relevant material, whether or not erroneously excluded by the Trial Chamber, that additional material may be admitted. Such an extension of the concept of an "error of fact" as being not restricted to an error committed by the Trial Chamber may be required by justice; but justice would also require the accused to show why the additional evidence could not be presented to the Trial Chamber in exercise of the rights expressly given to him by the Statute. It would be right to hold that the purpose of the Statute in giving those rights was that the accused should exercise due diligence in utilising them. This would exclude cases in which the failure to exercise those rights was due to lack of diligence.

39. Under Article 21, paragraph 4, of the Statute, an accused person is entitled at his trial "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing". He is also entitled "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Article 22 of the Statute provides for protection of victims and witnesses while Article 29 requires States, as a matter of law, to cooperate with the International Tribunal in the investigation and prosecution of accused persons. That applies in relation to material sought by either party.

40. The compulsory and protective machinery of the International Tribunal may not always be able to give total assurance that witnesses will be both available and protected if necessary. That is all the more reason why the machinery at the disposal of the International Tribunal should be used. A party seeking leave to present additional evidence should show that it has sought protection for witnesses from the Trial Chamber where appropriate, and that it has requested the Trial Chamber to utilise its powers to compel witnesses to testify if appropriate. Any difficulties, including those arising from intimidation or inability to locate witnesses, should be brought to the attention of the Trial Chamber.

41. An application pursuant to Rule 115 is part of the appellate proceedings before the Appeals Chamber. Arguments as to whether, in some countries, an appeal is by way of rehearing and, if so, to what extent, do not affect the fact that, so far as the Statute is concerned, an appeal does not involve a trial *de novo*[31].

42. By the time proceedings have reached the Appeals Chamber, evidence relevant to the culpability of the accused has already been submitted to a Trial Chamber to enable it to reach a verdict and a sentence, if he is found guilty. From the judgement of the Trial Chamber there lies an appeal to the Appeals Chamber. The corrective nature of that procedure alone suggests that there is some limitation to any additional evidentiary material sought to be presented to the Appeals Chamber; otherwise, the unrestricted admission of such material would amount to a fresh trial. Further, additional evidence should not be admitted lightly at the appellate stage, considering that Rule 119 provides a remedy in circumstances in which new facts are discovered after the trial.

43. Consideration may be given to the consequences of the opposite holding that additional evidence may be presented to the Appeals Chamber even where, through lack of diligence, it was not presented to the Trial Chamber though available. The Prosecutor can appeal from an acquittal. She may seek to

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reverse the acquittal on the basis of an error of fact disclosed by additional evidence. If the additional evidence was available to her but not presented to the Trial Chamber through lack of diligence, the accused is in effect being tried a second time. In substance, the *non bis in idem* prohibition is breached.

44. The Appeals Chamber therefore finds that the position under the Statute is as indicated above and cannot be cut down by reference to any apparent discrepancy in the wording of Rules 115 and 119 of the Rules. The word "apparent" is used because, on a proper construction, Rule 115 is to be read in the light of the Statute; it is therefore subject to requirements of the Statute which have the effect of imposing a duty to be reasonably diligent. Where evidence is known to an accused person, but he fails through lack of diligence to secure it for the Trial Chamber to consider, he is of his own volition declining to make use of his entitlements under the Statute and of the machinery placed thereunder at his disposal; he certainly cannot complain of unfairness.

45. In summary, additional evidence is not admissible under Rule 115 in the absence of a reasonable explanation as to why it was not available at trial. Such an explanation must include compliance with the requirement that the moving party exercised due diligence. This conclusion is consistent with the Statute and with the jurisprudence of many countries; it is not, however, dependent on that jurisprudence.

D. Diligence in Relation to the Responsibilities of Counsel

46. The concept of due diligence must now be considered in relation to the responsibilities of counsel.

47. Due diligence is a necessary quality of counsel who defend accused persons before the International Tribunal. The unavailability of additional evidence must not result from the lack of due diligence on the part of the counsel who undertook the defence of the accused. As stated above, the requirement of due diligence includes the appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber.

48. Thus, due diligence is both a matter of criminal procedure regarding admissibility of evidence, and a matter of professional conduct of lawyers. In the context of the Statute and the Rules, unless gross negligence is shown to exist in the conduct of either Prosecution or Defence counsel, due diligence will be presumed.

49. In this case, the parties agree that due diligence might have been lacking in respect of certain evidence which was not presented at trial because of the decision of the Defence team to withhold it[32]. The Appeals Chamber is not, however, satisfied that there was gross professional negligence leading to a reasonable doubt as to whether a miscarriage of justice resulted. Accordingly, evidence so withheld is not admissible under Rule 115 of the Rules.

50. The Appeals Chamber considers it right to add that no counsel can be criticised for lack of due diligence in exhausting all available courses of action, if that counsel makes a reasoned determination that the material in question is irrelevant to the matter in hand, even if that determination turns out to be incorrect. Counsel may have chosen not to present the evidence at trial because of his litigation strategy or because of the view taken by him of the probative value of the evidence. The determination which the Chamber has to make, except in cases where there is evidence of gross negligence, is whether the

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evidence was available at the time of trial. Subject to that exception, counsel's decision not to call evidence at trial does not serve to make it unavailable.

F. Availability of Specific Categories of the Proposed Additional Evidence

51. The Defence called 40 witnesses at the trial, including the Appellant. It now seeks to call more than 80 witnesses and to present documentary material. It is entitled to do so if it satisfies the applicable requirements. Accordingly, the Appeals Chamber will now consider whether the requirements of Rule 115 have been satisfied in relation to the various categories of evidence put forward by the Appellant.

1. Burden of proof

52. A preliminary matter of a general nature concerns the burden of proof. The question at issue in this Motion is whether the Appellant is entitled to a right given to him by the appeal process which he has invoked. It is for him to establish his entitlement to the right which he claims. Accordingly, it is for the Appellant to prove the elements of the entitlement.

53. In the absence of any explanation as to why certain items now sought to be admitted were not available at trial, the Appeals Chamber finds that the Appellant has failed to discharge his burden of proof in respect of these items to its satisfaction. Specific issues will be considered later in relation to particular legal criteria which are applicable. At this stage, the Appeals Chamber determines that the burden of proof has not been discharged in relation to the following potential witnesses: Vinka Andic, Zeljko Meakic (or Mejakic), Nada Balaban, Gradan (or Drgan) Kontic, Mirko Groarac, Dragan Lukic, Murudif (or Muradin) Mrkalj, Goran Jankovic, Njegoslav (or Negoslav) Tadic, Milovan Tadic, Dr. Kotromanovic, Muradif Aleksic, Branko Drazic, Jadranka Gavranic, Mijodrag Kostic, Milan Kovacevic (now deceased), Slobodan Kuruzovic, Dragan Lukic, Muradin Mrkalj, Pero Mrkalj, Mevlud Semenovic, Mijatovic Vaso (or Mijativic Vasa) and Drago Prcac. The testimony of these potential witnesses will therefore not be admitted. For the same reasons, the documentary evidence listed in Annexes 1, 2, 5, 6, 7, 8, 9, 10, 11, 14, 17, 20, 21, 22, 23, 24, 25, 26, 27, 30 and 31, I, II/4, II/5 and II/6 and the video-tapes numbered AB 1-16 and AB 18 and 19, will not be considered further. The Appeals Chamber has made considerable efforts to try to identify from the lengthy filings of the parties those witnesses in respect of whom specific arguments have been raised. Any witnesses or material not specifically referred to in this Decision are also rejected for failure to meet the burden of proof.

2. Material not in existence at the time of the trial

54. This category includes the testimony of potential witness Ljubica Sajcic, and the documents contained in Annexes 3, 4, 19, 28, 32 and 34, none of which was in existence at the time of the trial. However, on closer examination, the Appeals Chamber is satisfied that, with one exception, all of the information referred to in this material was available to the Defence at the time of trial and therefore cannot now be admitted.

55. Take, for example, the statement of Ljubica Sajcic. Ljubica Sajcic is an interpreter who would testify as to the content of an interview with one Milorad Tadic for which Ljubica Sajcic acted as interpreter. The interview covered events in Kozarac in May 1992 and at Omarska from June to August 1992. What is being sought in substance is "authorisation" to present, through her, the evidence of Milorad Tadic. But his evidence was in existence at the time of trial. The Appeals Chamber is not satisfied that the Appellant has discharged the burden of proving that he exercised due diligence in seeking out and

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compelling the attendance of this person as a witness at the trial.

56. The exception referred to above relates to Annex 34. This contains various details of voter registration figures, including a document giving OSCE voter registration details for the 1997 Municipality Elections, which is said to show that there was no reduction in the number of eligible voters in the municipality of Prijedor[33]. Clearly, this document was not available at the time of the trial. It appears that the Appellant is seeking to rely on this document to establish that the ethnic composition of the region did not change in the way that it appeared at trial[34]. It follows that the OSCE records of 1997 constitute additional evidence not available at the time of trial. It thus passes the first limb of Rule 115. Its admission before the Appeals Chamber then falls to be determined under Rule 115 (B) and will be discussed with other material in this category later in this Decision.

3. Material which existed at trial but of which the Defence was unaware

57. This category includes the testimony of potential witnesses Ernad Besirevic, Sasa Maric, Vlado Krckovski, Vinka Gajic, Slobodan Zrnic, Drago Pesevic, Slobodan Malbasic, Zivko Pusac, Vladimir Maric, Mile Ratkovic, Mladen Zgonjanin and Dragoje Cavic, together with witness XX and his medical records. Certain of these individuals are said to have been at the battlefront at the time of the trial or to have been actively avoiding contact with the authorities. Others were simply unknown to the Defence and did not come forward at the time, while some have come forward as a result of information obtained under a Binding Order of the Appeals Chamber issued to the Republika Srpska on 2 February 1998. One item, a confidential document from the United States Department of State, was only disclosed by the Prosecution to the Appellant on 21 April 1998.

58. The Appeals Chamber is mindful of the difficulties of conducting investigations in the conditions relevant to this case. It appreciates that some witnesses, who were unknown to the Defence, would not volunteer themselves and indeed might not have been aware of the trial. While the Defence is required to use due diligence to identify and seek out witnesses, there are limits to this obligation. The Appeals Chamber finds that the Appellant has provided sufficient indication that these witnesses and materials were unknown to the Defence, despite the exercise of due diligence, and thus not available at the time of trial and will examine in a later part of this Decision whether it would be in the interests of justice to admit this evidence.

4. Material which the Appellant was unable to adduce at trial

59. This category relates to witnesses of whom the Defence was aware at the time of trial but whose evidence they were unable to produce. The material under this heading may be divided into three sub-categories: witnesses who were unwilling or unable to come forward at the trial stage, for example, witnesses who were imprisoned at the time; witnesses alleged to have been intimidated; and potential witnesses who could not be located at the time of trial.

60. First, then, there is the category of potential witnesses who were simply unwilling to come forward at the trial stage but are now willing to do so at the appeal stage. There are four witnesses in this category, namely, D.D., Miroslav Kvocka, Mladen Radic and one other witness, whose name the Appellant has asked to be kept confidential. The Appellant claims that this witness was unavailable at the time of trial due to imprisonment. All four had been indicted at the time of trial, the last three in connection with events at the Omarska camp; the first, namely D.D., whose identity is unknown to the Chamber, is acknowledged to have been employed at Omarska[35]. The three named witnesses could have been discovered at the time of trial from the public indictment concerning events at the Omarska camp, events that were clearly relevant to the charges against the Appellant. No evidence has been submitted to

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the Appeals Chamber to indicate that any request was made to the Trial Chamber for the issue of subpoenas to compel the attendance of these witnesses. Despite the obvious practical difficulties in obtaining the evidence of such witnesses, a party cannot later seek to have such material admitted as additional evidence unavailable at trial unless it has raised the issue with the Trial Chamber at the time. As discussed above, the requirement of due diligence is not satisfied where there is insufficient attempt to invoke such coercive measures as were at the disposal of the International Tribunal. Therefore, it cannot be said that the evidence of these three witnesses was not available at trial.

61. The Appeals Chamber is unable to determine whether the evidence of witness D.D. was available at trial or not, as it does not know his true identity. The Chamber will therefore assume that this evidence was not available and will consider in a later part of this Decision whether it would be in the interests of justice to admit such evidence.

62. The second category is a substantial one. It relates to potential witnesses who were known to the Defence at the time of trial but who are said to have been intimidated by persons in authority in the former Yugoslavia. These include witness D.J. (and the Annex of 15 photographs), D.S., D.B., Bosko Dragicevic, Dusan Babic, D.V., Vaso Mijatovic, P.Q., Bosana (or Bozana) Grahovac, Stoja Coprka, Milos Preradovic, Brane Bolta, Mile Cavic, Milan Vlacina, Milan Andjic, D.T.Z., D.R.M., Mladen Majkic, Dusan (or Dule) Jankovic, Milorad Tadic, Simo Kevic and D.S.D. Again, in the absence of any evidence to demonstrate that attempts were made to obtain such protection for these witnesses as the International Tribunal could offer, the Appeals Chamber finds that reasonable diligence was not exercised. Consequently, the testimony of these witnesses cannot be said to have been unavailable at trial.

63. The third category concerns potential witnesses who were known to the Defence but who could not be located at the time of trial. They include Milka Saric, D.O., and Milan Grgic. The Appellant claims that all three of these witnesses had fled abroad and could not be located. In view of the difficulties facing defence counsel in locating such witnesses, the Appeals Chamber finds that the Appellant has provided sufficient indication that these witnesses were not available at the time of trial. The Appeals Chamber will examine in a later part of this Decision whether it would be in the interests of justice to admit their evidence.

6. Material not called by Defence counsel

64. This large category of items includes the testimony of potential witnesses Miroslav Cvijic, Srdjan Staletovic, Dara Jankovic, Slavica Tadic, Pero Curguz, Radoslavka Vidovic, Risto Vokic, Mladen Tadic, Mira Tadic (on matters other than those on which she did testify), Ostoja Trebovac, Slavko Svraka and Dragan Radakovic. In addition, the Appellant seeks to admit the expert evidence of Dr. Dusan Dunjic, which was obtained prior to trial, plus substantial amounts of documentary evidence under this category, including Annexes 12, 13, 15, 16, 18, 29, 33, 35 and II/3, together with video-tape AB17.

65. As indicated above, when evidence was not called because of the advice of defence counsel in charge at the time, it cannot be right for the Appeals Chamber to admit additional evidence in such a case, even if it were to disagree with the advice given by counsel. The unity of identity between client and counsel is indispensable to the workings of the International Tribunal. If counsel acted despite the wishes of the Appellant, in the absence of protest at the time, and barring special circumstances which do not appear, the latter must be taken to have acquiesced, even if he did so reluctantly[36]. An exception applies where there is some lurking doubt that injustice may have been caused to the accused by gross professional incompetence. Such a case has not been made out by the Appellant. Consequently, it cannot

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be said that the witnesses and material were not available to the Appellant despite the exercise of due diligence.

66. Also in this category are the 11 expert witnesses whom the Appellant would now like to call. One, Thomas Deichmann, testified at trial. Barring exceptional circumstances, which are not made out in this case, it is difficult to think of circumstances which would show that expert witnesses were not available to be called at trial despite the exercise of reasonable diligence. The evidence of these experts, and the related documents in Annexes 36, 37, II/1a, II/1b and II/2, cannot be said to have been unavailable at trial for the purposes of Rule 115.

7. Testimony of Dragan Opacic

67. The Appellant also seeks to recall this witness, who originally testified as witness L for the Prosecution. The testimony of this witness was discredited, largely as a result of the efforts of the Defence counsel at the time, and the Prosecution asked the Trial Chamber to disregard the evidence in its entirety. The matter is also dealt with in the Judgement[37].

68. The evidence of this witness was available to the Appellant at trial and therefore it cannot be admitted as additional evidence under Rule 115.

G. Interests of Justice

69. As mentioned above, the Appeals Chamber finds that the following items were not available at trial within the meaning of Rule 115 (A):

- OSCE voting registration details for Municipality Elections in autumn 1997;

- witnesses Ernad Besirevic, Sasa Maric, Vlado Krckovski, Vinka Gajic, Slobidan Zrnic, Drago Pesevic, Slobodan Malbasic, Zivko Pusac, Vladimir Maric, Mile Ratkovic, Mladen Zgonjanin, Dragoje Cavic and witness XX, together with his medical records;

- the confidential document from the United States Department of State;

- witnesses Milka Saric, D.O., and Milan Grgic.

In relation to these items and, for the reasons given in paragraph 61 above, the evidence of witness D.D., it will accordingly be necessary to consider the operation of the criteria relating to the interests of justice.

70. If the Appeals Chamber at this stage authorises the presentation of additional evidence, it will be for the Chamber at a later stage to decide whether the evidence discloses an "error of fact which has occasioned a miscarriage of justice" within the meaning of Article 25, paragraph 1(b), of the Statute. At this stage, the Chamber cannot pre-empt this decision by definitively deciding that the proposed evidence does or does not disclose "an error of fact which has occasioned a miscarriage of justice".

71. The task of the Appeals Chamber at this stage is to apply the somewhat more flexible formula of Rule 115 of the Rules, which requires the Chamber to "authorise the presentation of such evidence if it considers that the interests of justice so require". For the purposes of this case, the Chamber considers

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that the interests of justice require admission only if:

(a) the evidence is relevant to a material issue;

(b) the evidence is credible; and

(c) the evidence is such that it would probably show that the conviction was unsafe.

72. The Appeals Chamber would only add that, in applying these criteria, account has to be taken of the principle of finality of decisions. As mentioned above, the principle would not operate to prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice. But clearly the principle does suggest a limit to the admissibility of additional evidence at the appellate stage.

73. The Appeals Chamber also considers that, in applying these criteria, any doubt should be resolved in favour of the Appellant in accordance with the principle *in dubio pro reo.*

74. However, even taking that principle into account, the Appeals Chamber is not satisfied that any material which was not available at trial is required by the interests of justice to be presented at the hearing of the appeal. The Chamber does not consider that it is necessary to give details of the application of the criteria in relation to each of the various pieces of evidence. The importance of avoiding the risk of prejudgement in relation to other aspects of the case is also evident.

VI. DISPOSITION

FOR THE FOREGOING REASONS, the Appeals Chamber unanimously dismisses the Motion.

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

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Mohamed Shahabuddeen

Presiding

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Antonio Cassese

Judge

_____

Wang Tieya

Judge

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Rafael Nieto-Navia

Judge

Florence Mdepele Mwchande Mumba

Judge

Dated this fifteenth day of October 1998

At The Hague

The Netherlands

[Seal of the Tribunal]

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1. Opinion and Judgment, *Prosecutor v. Tadic,* Case No. IT-94-1-T, 7 May 1997 ("*Judgement*").

2. Transcript, *Prosecutor v. Tadic,* Case No. IT-94-1-A, 22 Jan. 1998, pp. 104-111.

3. This is the version of this document referred to hereafter.

4. Motion for the extension of the time limit, *Prosecutor v. Tadic,* Case No. IT-94-1-A, 6 Oct. 1997, para. 2 ("*Motion*").

5. *Ibid.*, para. 4.

6. Appellant's Response to the Cross-Appellant's Brief in relation to admission of additional evidence on appeal under Rule 115, *Prosecutor v. Tadic,* Case No. IT-94-1-A, 23 Mar. 1998, p. 5 ("*Response*").

7. Reply to Cross-Appellant's Response to Appellant's submissions since March 9, 1998 on the Motion for the presentation of additional evidence on appeal under Rule 115, *Prosecutor v. Tadic,* Case No. IT-94-1-A, 15 Jul. 1998, para. 2 ("*Reply*").

8. *Ibid.*, para. 4.

9. Memorandum of Law on the admissibility of new evidence under Rule 115, *Prosecutor v. Tadic,* Case No. IT-94-1-A, 21 Jan. 1998, para. 2 ("*Memorandum of Law*").

10. Judgement, *Prosecutor v. Erdemovic,* Case No. IT-96-22-A, 7 Oct. 1997 ("*Erdemovic Judgement*").

11. *Ibid.*, para. 115.

12. Cross-Appellant's Response to Appellant's submissions since 9 March 1998 on the Motion for the presentation of additional evidence on appeal under Rule 115, *Prosecutor v. Tadic,* Case No. IT-94-1-A, 8 Jun. 1998, para. 3 ("*Cross-Appellant's Response*").

13. Response to the Appellant's Motion entitled "Motion for the extension of the time limit", *Prosecutor v. Tadic,* Case No. IT-94-1-A, 20 Oct. 1997, para. 4.

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14. Reply, *supra n. 7*, para. 33.

15. Appellant's Brief in relation to admission of additional evidence on appeal under Rule 115, *Prosecutor v. Tadic,* Case No. IT-94-1-A, 5 Feb. 1998, p. 2 (*"Rule 115 Brief"*).

16. *Ibid.*

17. Reply, *supra n. 7,* para. 33.

18. Cross-Appellant's Response to the Appellant's motion entitled "Brief in relation to admission of additional evidence on appeal under Rule 115, *Prosecutor v. Tadic,* Case No. IT-94-1-A, 9 Mar. 1998, para. 2.

19. *Ibid.*

20. *Ibid.*, para. 6.

21. Cross-Appellant's Response, *supra n. 12*, para. 49.

22. Memorandum of Law, *supra n. 9,* para. 10.

23. Response, *supra n. 6*, p. 6.

24. Reply, s*upra n. 7,* para. 24.

25. Memorandum of Law, *supra n. 9*, paras. 3-4.

26. Cross-Appellant's Response, *supra n. 12,* para. 45.

27. Reply, *supra n. 7*, para. 2.

28. Cross-Appellant's Response, s*upra n. 12*, para 3.

29. *Ibid.*, para. 16.

30. *Ibid.*

31. *See* Erdemovic Judgement, *supra n. 10,* para. 15.

32. *See also* Reply, *supra n. 7*, para. 33.

33. Rule 115 Brief, *supra n. 15.*

34. *See, e.g.*, Response, pp. 16 – 18.

35. Rule 115 Brief, s*upra n. 15,* p. 11.

36. The Directive on Assignment of Defence Counsel, IT/73/Rev. 5, provides for an accused person who is dissatisfied with his counsel to seek redress. Such redress includes requesting withdrawal of defence counsel and assignment of new counsel (*see* Article 20).

37. Judgement, *supra n. 1*, paras. 353-54.

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IN THE TRIAL CHAMBER

Before: Judge Florence Ndepele Mwachande Mumba, Presiding

Judge Antonio Cassese

Judge Richard May

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 21 October 1998

PROSECUTOR

v.

DRAGOLJUB KUNARAC

DECISION ON DEFENCE PRELIMINARY MOTION ON THE FORM OF THE AMENDED INDICTMENT

Office of the Prosecutor:

Mr. Franck Terrier
Ms. Peggy Kuo
Ms. Hildegard Uertz-Retzlaff

Counsel for the Accused:

Mr. Slavisa Prodanovic

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 ("the International Tribunal"),

BEING SEISED of the "Defence Preliminary Motion on the Form of the Amended Indictment", filed on 6 October 1998 ("the Preliminary Motion"), and the "Prosecutor's Response to Defence Preliminary Motion on the Form of the Amended Indictment" ("the Response"), filed on 13 October 1998,

CONSIDERING that, in general, indictments contain allegations that must be proved at trial,

CONSIDERING that the background information contained in paragraphs 1.1 to 1.10 of the Amended Indictment is relevant to place in context the alleged actions against the accused regarding the victims,

CONSIDERING that the request in the Preliminary Motion that the Prosecutor be instructed to "describe precisely the acts, the time and place of perpetration of the acts of the accused, and in accordance therewith to define the legal qualifications" is not in accordance with the standard set out in Rule 47(C) of the Rules of Procedure and Evidence ("the Rules"),

NOTING that the assertions in the Preliminary Motion relating to sexual assault are at variance with Rule 96 of the Rules,

NOTING FURTHER that criminal responsibility of a superior for rape is not excluded under Article 7(3) of the Statute of the International

Tribunal,

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CONSIDERING that the rest of the assertions in the Preliminary Motion are contentious issues requiring decisions on the merits of the evidence at trial,

PURSUANT to Rule 72 of the Rules,

HEREBY dismisses the Preliminary Motion.

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

Florence
Ndepele
Mwachande
Mumba

Presiding

Dated this twenty-first day of October 1998

At The Hague

The Netherlands

[Seal
of the
Tribunal]

International Criminal Tribunal for Rwanda
Trial Chamber II

THE PROSECUTOR
v.

EMANNUEL **BAGAMBIKI** SAMUEL IMANISHIMWE YUSSIF MUNYAKAZI

ICTR-97-36-(I)

Arusha, 24 September 1998

Original: English

DECISION ON THE DEFENCE MOTION ON DEFECTS IN THE FORM OF THE INDICTMENT

For the Prosecution: Mr. William Egbe

For the Defence: Ms. Marie Louise Mbida Kanse Tah, Mr. Georges So'O

Before: Presiding Judge William H. Sekule, Judge Yakov A. Ostrovsky, Judge Tafazzal Hossain Khan
Registry: Mr. John M. Kiyeyeu

The International Criminal Tribunal for Rwanda (the "Tribunal"),

SITTING AS Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Yakov A. Ostrovsky and Judge Tafazzal H. Khan, (the "Trial Chamber");

CONSIDERING the indictment filed on 9 October 1997 by the Prosecutor against Emmanuel **Bagambiki,** Samuel Imanishimwe and Yusuf Munyakazi pursuant to article 17 of the Statute of the Tribunal ("the Statute");

CONSIDERING FURTHER the indictment against Samuel Imanishimwe ("the accused") which was confirmed by Judge Lennart Aspegren on 10 October 1997;

TAKING NOTE of the initial appearance of the accused which took place on 27 November 1997;

HAVING BEEN SEIZED of a preliminary motion filed by the Defence on 24 March 1998, ("Defence Motion") contending that due to defects in the form of the indictment, against the accused, the Prosecutor should be ordered to "redefine the facts;"

HAVING RECEIVED the Prosecutor's written reply ("Prosecutor's Reply"), filed on 24 March 1998, in which she submitted that the Defence Motion should be dismissed as the

indictment complies with the Statute and the Rules of Evidence and Procedure ("the Rules");

HAVING HEARD the parties during an open session of 26 March 1998.

AFTER HAVING DELIBERATED:

1. In its written motion and at the hearing the Defence argued that the Prosecutor is obliged to state precise facts of the crime or crimes with which the accused is charged in the indictment. If this obligation is not met, the Defence contended, the accused's right to be "informed, in detail, of the nature and cause of the charge against him," as guaranteed under article 20(4)(a) of the Statute, would be violated. (Defence Motion, p. 3).

2. Additionally, the Defence averred that the indictment was drafted in a vague manner and supported by insufficient and questionable documentation. The Defence further argued that the accused and others were inappropriately charged with the same crimes. Therefore, the Defence claimed that the Prosecutor should be ordered to further clarify the facts, without which it could not prepare an adequate defence.

3. The Prosecutor's representative responded that first, the Defence Motion joined two issues, which could not be addressed by the Trial Chamber simultaneously. He stated that the claims in the instant motion, that the evidence against the accused is insufficient to support the charges and that there is a lack of a concise statement of facts, were essentially arguments that there were defects in the merits and defects in the form of the indictment, respectively, which constitute distinctly different issues. At this stage of the proceedings, the Prosecution claimed, the Trial "Chamber is bound to examine and dispose of issues relating to defects in [the] form" of the indictment only. (Prosecutor's Reply, para. 37.) Defects in the merits are questions that should be addressed, as evidentiary questions, once the trial begins.

4. Next, the Prosecution claimed that in the indictment a concise statement of facts was provided along with the crimes charged. The said indictment was then disclosed to the Defence on 8 October 1997, giving him sufficient notice to prepare for trial. Therefore, the Prosecution submitted that the only question remaining for the Trial Chamber to resolve is whether the time frame, within which the alleged crimes were committed, were sufficiently described.

On the Defects in the Form of the Indictment Due to an Insufficient Concise Statement of the Facts Against the Accused

5. As a preliminary matter, the Trial Chamber notes that at this stage of the proceedings, issues concerning the merits of the indictment are not yet ripe for consideration. Therefore, we will limit the scope of the analysis in this decision to the possible defects in the form of the indictment only. Rule 72(B) of the Rules contains a non-exhaustive list of pre-trial motions which the accused may bring forth prior to the commencement of the trial on the merits. Sub-section (ii) of this rule provides the accused with the right to object to the form of the indictment. Thus, the Trial Chamber recognizes the right of the

accused to bring forth such objections.

6. The Statute, through article 20(4)(a), guarantees the accused the right "To be informed promptly, and in detail, in a language he or she understands of the nature and cause of the charges against him." In addition, rule 47(B) of the Rules states "The indictment shall set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime with which the suspect is charged ...." (Emphasis added.) The Trial Chamber notes that neither the Statute nor the Rules define the phrase "concise statement of facts."

7. Although the Rules do not define the phrase "concise statement of the facts," as provided in rule 47, there is sufficient persuasive precedent, in the decisions of this Tribunal as well as the decisions of the International Criminal Tribunal for the Former Yugoslavia, to guide the Trial Chamber in reaching a decision with regard to this matter. The Trial Chamber recalls the decision of 24 November 1997, in the case of the Prosecutor v. Ferdinand Nahimana (ICTR-96-11-T), where the Tribunal interpreted the phrase in question to mean "a brief statement of facts but comprehensive in expression." (Para. 20.) With this interpretation as a foundation, the Trial Chamber will address the objections raised by the Defence in the instant motion.

8. The Defence claims that counts 7, 8, 9, 10 and 13 are drafted and presented in such a manner that "it [is] impossible for the Tribunal to know which facts correspond with which crimes" due to "the wide range of facts and the disorderly definition of the identical facts." (Defence Motion, Para. 7.) Although it is true that in all of the abovementioned counts the Prosecutor refers to paragraphs 3.17, 3.18, 3.20, 3.25 and 3.30, of the concise statement of facts, it is clear that more than one crime may arise out of the same act or set of acts. Therefore, the Trial Chamber observes that no difficulties arise from the use of overlapping facts.

If the intention of the Defence was to raise the principle of non-bis-in idem, that is, the inappropriate accumulation of charges, then the Trial Chamber again must refer to the Nahimana decision, supra, (paras. 35 - 37) in which the Tribunal held that this question also could not be addressed at this stage of the proceedings.

9. The Defence submitted that counts 11, 12 and 19 of the indictment were vaguely drafted, in terms of the facts and the law, but only provided the Trial Chamber with details of his objection to count 12 at the oral presentation of this motion. The Defence states that count 12 of the indictment charges the accused with crimes against humanity under article 3(f) of the Statute, (torture as a part of a widespread and systematic attack against any civilian population) and was based on paragraphs 3.24 and 3.25 of the concise statement of facts, of which the former did not appear to refer to any acts of torture. It would be reasonable to read paragraph 3.24 however, as a foundation for paragraph 3.25, which in fact does include allegations of torture at the Cyangugu Barracks. Thus, the Trial Chamber is of the opinion that there is no need for further clarification of that particular count.

10. The Trial Chamber has reviewed also counts 11 and 19 of the indictment. It appears that count 11 (crimes against humanity) provides the accused with information that would enable him to establish a link between his acts, that is allegedly imprisoning civilians, and the criminal charges brought against him by the Prosecutor. In particular paragraph 3.22 of the concise statement of facts states that "refugees [escorted there by the accused] could not leave the stadium which was guarded by gendarmes." The accused allegedly exercised de facto authority over the said gendarmes. Therefore, we find that the information provided in count 11 is sufficient to allow the accused to begin to prepare his defence.

11. Count 19 charges the accused persons and others with conspiracy to commit genocide. Paragraphs 3.12 through 3.30 of the statement of facts are articulated in such a way that the Prosecutor's intent to join the accused with Emmanuel **Bagambiki** and Yussuf Munyakazi, in their alleged criminal acts and omissions, is intelligible. However, the Trial Chamber notes that in paragraph 3.14 reference to the phrase "held a large number of meetings among themselves, or with others ...," without supplying further details, renders this paragraph vague and by extension count 19 inadequately supported. (Emphasis added.)

FOR ALL THE FORGOING REASONS THE TRIAL CHAMBER:

ORDERS the Prosecution to clarify paragraph 3.14 of the concise statement of facts by providing further information with regard to the alleged meetings referred to in that paragraph. Specifically, the Prosecution should present details, such as the approximate dates, locations and the purpose of these meetings, so far as possible, and also clarify whether the accused persons and others named in the indictment were the only persons present at these meetings or if others, not named in the indictment, were present also.

DISMISSES the Defence Motion on all other points.

Arusha, 24 September 1998.

Yakov A. Ostrovsky, Judge

Tafazzal Hossain Khan, Judge

Judge Sekule appends a separate opinion, on the issue of count 19, to this decision.

Seal of the Tribunal

END OF DOCUMENT

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IN THE TRIAL CHAMBER

Before:
Judge Almiro Rodrigues, Presiding
Judge Fouad Riad
Judge Patricia Wald

Registrar: Mr. Jean-Jacques Heintz, Deputy Registrar

Decision of: 28 January 2000

THE PROSECUTOR

v.

RADISLAV KRSTIC

DECISION ON DEFENCE PRELIMINARY MOTION ON THE FORM OF THE AMENDED INDICTMENT, COUNT 7-8

The Office of the Prosecutor:

Mr. Mark Harmon

Defence Counsel:

Mr. Nenad Petrusic

Trial Chamber I 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 is seised of the Defence "Preliminary Motion on the Form of the Amended Indictment, Counts 7-8."

General Radislav Krstic has been charged in an eight-count indictment with genocide, crimes against humanity, and violations of the laws or customs of war for his role in the events in and around the Bosnian Muslim enclave of Srebenica in 1995. Specifically, the amended indictment alleges that between 11 July 1995 and 18 July 1995, forces of the Army of the Republika Srpska (VRS) under the command and control of Ratko Mladic and Radislav Krstic either expelled or killed most of the members of the Bosnian Muslim population of the Srebenica enclave.[1] According to the amended indictment, General Krstic was the Chief of Staff/Deputy Commander of the Drina Corps of the VRS from October 1994 through 12 July 1995 and assumed command of the Drina Corps on 13 July 1995.

The instant motion concerns counts 7 and 8 of the amended indictment, which charge General Krstic with deportation, a crime against humanity, or in the alternative, inhumane acts (forcible transfer), a

crime against humanity. These counts were not in the original indictment, but were added in October 1999. The amended indictment was confirmed on 22 November 1999, and the Defendant entered a plea of not guilty to the new counts on 25 November 1999. This motion challenging the form of the amended indictment pursuant to Rule 72(A)(ii) was filed by the Defendant on 24 December 1999. The Prosecution filed its response on 18 January 2000.

I. FACTUAL ALLEGATIONS

General Krstic's first objection relates to the evidence supporting counts 7 and 8. He argues that Order No. 01/4 157-5, which was included in the supporting materials submitted by the Prosecution to the confirming judge but which has not yet been presented to the Trial Chamber, does not support the conclusion that General Krstic was responsible as a commander for the deportation or forced transfer of Bosnian Muslims from Srebenica between 11 July and 13 July 1995. Further, he contends, the Prosecution is obliged to submit evidence of the deportation and has failed to do so.

The Prosecution responds that General Krstic's objections are "nothing more than an attack upon the adequacy of evidence in support of a factual allegation" and that it is "well established in the jurisprudence of this Tribunal that disputes as to issues of fact are for determination at trial and thus should be dismissed, as a matter of law, in motions challenging the form of the indictment." In addition, the Prosecution notes that it intends to prove that General Krstic was in fact responsible as a commander for the actions of his subordinates pursuant to Article 7(3) and for his own individual actions pursuant to Article 7(1) regardless of whether he was formally designated as a "Commander" of the Drina Corps on 13 July or whether he still retained the rank of "Chief of Staff/Deputy Commander." Thus, the Prosecution argues, whether or not Order No. 01/4 157-5 ultimately establishes that General Krstic was the "Commander" of the Drina Corps on 13 July 1995 is not of critical importance to its case.

The Trial Chamber agrees with the Prosecution that General's Krstic's challenges based on the evidence are not valid objections to the "form of the indictment" cognisable under Rule 72(A)(ii). The Trial Chambers have consistently held that a "motion on the form of the indictment is not an appropriate way of challenging the evidence" and that proof of the facts alleged in the indictment is a matter for trial.[2] While the Prosecution must plead the material facts in sufficient detail to inform the defendant of the nature and causes of the charges against him, it need not include in the indictment all the evidence it intends to use to support those charges.[3] The judge who confirmed the indictment was satisfied that the indictment, together with the supporting materials submitted by the Prosecutor, established a *prima facie* case. Whether or not the evidence proves the crime is to be determined at trial, and not by way of a preliminary motion under Rule 72(a)(ii).

II. CUMULATIVE CHARGING

The Defendant's second objection is that the acts underlying counts 7-8 (deportation/forcible transfer) are identical with those underlying count 6 (persecution), and that he should have been charged with one or the other (persecution or deportation/forcible transfer) but not both.

The Tribunal's jurisprudence on cumulative charging is still in a state of development. Up until now, the trial chambers have generally held that any overlap in charges is a matter to be addressed not at the indictment stage but at the end of the trial. For example, in *Prosecutor v. Krnojelac*, the trial chamber

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stated

> This pleading issue has already been determined by the International Tribunal in favour of the prosecution: previous complaints that there has been an impermissible accumulation where the prosecution has charged such different offences based upon the same facts . . . have been consistently dismissed by the Trial Chambers, upon the basis that the significance of that fact is relevant only to the question of penalty.[4]

And in *Prosecutor v. Delalic*, the appeals chamber refused the defendant's request for interlocutory appeal on the form of the indictment, holding that the trial chamber did not commit error when it held that cumulative charging was better dealt with at the penalty stage.[5]

While it has been the practice of the trial chambers to leave the question of cumulativeness for the end of trial, there are good reasons for considering the matter of cumulative versus alternative charging at the beginning. If the issues are clarified and narrowed at the outset, it may help in making the proceedings, which have heretofore lasted months and even years, more focused and efficient. In addition, it may aid the defendant in the preparation of his case to know which charges will ultimately be considered to cover the same "offence" for purposes of conviction and sentencing. As the Trial Chamber in *Kupreskic* recently explained:

> The approach currently adopted by the Prosecution creates an onerous situation for the Defence, on the grounds that the same facts are often cumulatively classified under different headings . . . . In practice, however, the Prosecutor may legitimately fear that, if she fails to prove the required legal and factual elements necessary to substantiate a charge, the count may be dismissed even if in the course of the trial it has turned out that other elements were present supporting a different and perhaps even a lesser charge.[6]

To reconcile these somewhat conflicting concerns, the *Kupreskic* trial chamber opined that the prosecutor "should charge in the alternative rather than cumulatively whenever an offence appears to be in breach of more than one provision, depending on the elements of the crime the Prosecution is able to prove."[7] In many instances, it may be useful to consider before the trial begins which charges should be considered in the alternative rather than cumulatively because it is clear that one offence charged includes all the elements of another.

In the case before us, the Defendant objects to the overlap between count 6 (persecution) and counts 7 (deportation) and 8 (inhumane acts/forcible transfer). The scope of the overlap is not entirely clear at this stage. As the Prosecution points out, the act of deportation or forced transfer is but one of five types of actions alleged to constitute persecution under Count 6; other alleged persecutory acts include the murder of Bosnian Muslims, cruel treatment such as beatings, terrorising of civilians, and destruction of personal property. Additionally, the crime of persecution requires a discriminatory intent which the crime of deportation does not. Some national courts, faced with similar situations, have held that "whether an aggregate of acts constitute a single course of conduct and therefore a single offence, or more than one, may not be capable of ascertainment merely from the bare allegations of an information and may have to await the trial on the facts."[8] Indeed, one reason why so many of the Trial Chambers have frequently left decisions on cumulativeness until the end of trial may be that "[u]nlike provisions of national criminal codes . . . each Article of the [Tribunal's] Statute does not confine itself to indicating a single category of well-defined acts" but instead "embrace[s] broad clusters of offences sharing certain *general* legal ingredients."[9] This often makes it difficult to analyse the overlap in charges before the proof is in. As the Tribunal's case law develops and the elements of each offence become more well-

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defined, it may become easier to analyse the overlap in particular charges before trial. The charges to which General Krstic objects do not, however, present such a clear-cut example of unduly cumulative charging as would require that they be pleaded alternatively at this time.

Accordingly, the Trial Chamber rejects the Defendant's objection to the indictment on these grounds. The Trial Chamber does note, however, that it may be useful, in terms of conducting an efficient trial, for the parties to address the issue of cumulativeness on all relevant charges in their pre-trial briefs. That possibility will be discussed at upcoming status conferences.

III. DISPOSITION

For the foregoing reasons,

TRIAL CHAMBER I,

PURSUANT to Rule 72,

HEREBY DENIES the Defendant's Preliminary Motion on the Form of the Amended Indictment, Counts 7-8.

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

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Almiro Rodrigues
Presiding Judge

Dated this twenty-eighth day of January 2000
At the Hague,
The Netherlands

(SEAL OF THE TRIBUNAL)

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1. *See* Amended Indictment, para. 11.
2. *Prosecutor v. Delalic, et al.*, Case No. IT-96-21-T, Decision on Motion by the Accused Esad Landzo Based on Defects in the Form of the Indictment, 15 November 1996, para. 9; *see also, e.g.*, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 20; *Prosecutor v. Blaskic*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 April 1997, para. 20; *Prosecutor v. Delalic, et al.*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalic Based on defects in the Form of the Indictment, 2 October 1996, paras. 7, 11.
3. *See, e.g.*, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 20.
4. *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, at para. 5. As examples of this practice, the *Krnojelac* trial chamber cited *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995, paras. 15-18; *Prosecutor v. Delalic*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalic Based on Defects in the Form of the Indictment, 2 October 1996, para. 24; *Prosecutor v. Blaskic*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 April 1997, para. 32; *Prosecutor v. Kupreskic*, Case No. IT-95-16-PT, Decision on Defence Challenges to the Form of the Indictment, 15 May 1998, p.3.
5. *See Prosecutor v. Delalic, et al.*, Case No. IT-96-21-AR72.5, Decision Application for Leave to Appeal by Hazim Delic

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(Defects in the Form of the Indictment), 6 December 1996, para. 36.
6. *Prosecutor v. Kupreskic*, Case No. IT-95-16-PT, Judgement, 14 January 2000, paras. 721-723.
7. *Id.*, para. 727.
8. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225 (1952).
9. *Kupreskic*, para. 697.

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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-98-34-PT

Date 15 February 2000

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

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

Decision of: **15 February 2000**

THE PROSECUTOR

v.

MLADEN NALETILIĆ
VINKO MARTINOVIĆ

DECISION ON DEFENDANT VINKO MARTINOVIĆ'S OBJECTION TO THE INDICTMENT

The Office of the Prosecutor:

Mr. Franck Terrier

Defence Counsel:

Mr. Branko Šerić

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1. **TRIAL CHAMBER I** 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 is seised of "Defendant Vinko Martinović's Objection to the Indictment."

2. Vinko Martinović and Mladen Naletilić were charged in a twenty-two-count indictment with crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws or customs of war.[1] The charges were based on their alleged command of military units in and around the city of Mostar in Bosnia-Herzegovina in 1993 and 1994. The indictment was confirmed on 21 December 1998.[2] Mr. Martinović was transferred into the custody of the Tribunal on 9 August 1999 and entered a plea of not guilty in his initial appearance before the Trial Chamber three days later. The co-accused, Mr. Naletilić, remains in detention in Croatia.

3. Rule 72(A)(ii) allows for preliminary motions alleging "defects in the form of the indictment," and Mr. Martinović filed such a motion on 4 October 1999. Mr. Martinović's challenges to the indictment fall within four general categories. First, he objects that certain factual allegations in the indictment are "incorrect" or that no evidence has been offered to support them.[3] Second, he contends that he should not have been charged with more than one offence based on the same underlying facts.[4] Third, he argues that those portions of the indictment charging him with responsibility under both Article 7(1) and 7(3) of the Statute are defective because, in his view, Article 7(3) does not provide a separate ground for command responsibility and liability can be based only on Article 7(1).[5] Fourth, he claims that portions of the indictment are unclear and asks for more specific details to enable him to prepare his defence.[6]

4. The Trial Chamber rejects these objections as a basis for dismissing or amending the indictment, and notes that the Defence now has extensive witness statements as well as supporting materials in its possession. We also note that the Defendant, in the unlikely event that he still does not feel he may adequately prepare for trial even after reviewing

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[1] *Prosecutor v. Naletilić and Martinović*, Case IT 98-34-I, Indictment, 18 December 1998.
[2] *Prosecutor v. Naletilić and Martinović*, Case IT 98-34-I, Order Confirming Indictment, 21 December 1998.
[3] Defendant Vinko Martinović's Objection to the Indictment ("Objection to the Indictment"), 4 October 1999, (a), (b), AD-I to AD-VII, AD-XIII, AD-XV to XVII, AD-XXI and AD-XXII.
[4] Objection to the Indictment, AD-X, AD-XI, AD-XII, AD-XIV, AD-XIX, and AD-XX.
[5] Objection to the Indictment, AD-XIX and AD-XX.
[6] Objection to the Indictment, AD-IV to AD-IX, AD-XV, AD-XIX to AD-XXI and XXII.

these materials, may seek further particulars from the Prosecution. In addition, the Trial Chamber notes that the parties will be asked to address the issue of cumulative charging in their final pre-trial briefs.

I. Proof of the Facts Alleged in the Indictment

5. Mr. Martinović objects that certain factual allegations in the indictment are "incorrect" or that no evidence has been offered to support them.[7] Two sections of the Tribunal's Statute provide the starting point for our analysis of this claim. Article 18 states that "the Prosecutor shall prepare an indictment containing a *concise statement* of the facts and the crime or crimes with which the accused is charged"[8] (emphasis added). Article 21 guarantees the accused the right "to be informed *promptly and in detail* in a language which he understands of the nature and cause of the charge against him" as well as the right "to have adequate time and facilities for the preparation of his defence" (emphasis added).

6. Previous Tribunal decisions have interpreted these provisions to mean that "there is a minimum level of information that must be provided by the indictment; there is a floor below which the level of information must not fall if the indictment is to be valid as to form."[9] But these decisions have also stressed that a "motion on the form of the indictment is not an appropriate way of challenging the evidence" and that proof of the facts alleged in the indictment is a matter for trial.[10] Many of Mr. Martinović's objections are exactly the sort of challenges to the evidence that can only be decided at trial. For example, he contends that "it is incorrect that a state of international armed conflict existed on the territory of the Republic of Bosnia and Herzegovina."[11] The Trial Chamber in *Blaškić* rejected a similar objection, stating that "the international

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[7] Objection to the Indictment (a), (b), AD-I to AD-VII, AD-XIII, AD-XV to XVII, AD-XXI and AD-XXII.

[8] Rule 47(C) essentially tracks Article 18, stating that "[t]he indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged."

[9] *Prosecutor v. Kvočka*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 14.

[10] *Prosecutor v. Delalić, et al.*, Decision on Motion by the Accused Esad Landžo Based on Defects in the Form of the Indictment ("*Landžo*"), 15 November 1996, para. 9; *see also, e.g.*, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 20; *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 April 1997, para. 20; *Prosecutor v. Delalić, et al.*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment ("*Delalić*"), 2 October 1996, paras. 7, 11.

characterisation of an armed conflict is an issue intimately involving questions of both law and fact" that must be "discussed at trial."[12] The *Blaškić* decision concluded that the "mere mention of an international character of the conflict, at the stage concerning us here, already allows the accused to comprehend the situation and prepare his defence as soon as the accusation is made."[13]

7. To take another example, Martinović's motion claims that there is "no evidence that members of Vinko Martinović's sub-unit mistreated and tortured imprisoned Bosnian Muslims in [the Heliodrom], nor that they took them to the front-lines, forcing them to labour, and using them as human shields."[14] Again, whether or not the evidence ultimately supports these allegations is a matter for trial.[15]

8. Accordingly, the Trial Chamber rejects those objections of Mr. Martinović that are based on his contention that allegations in the indictment are untrue or that the Prosecution is obliged to offer evidence of their truth at this stage in the proceedings.[16]

II. Cumulative Charges

9. Mr. Martinović also claims that the indictment is defective because it charges him with more than one crime based on the same facts.[17] The Prosecutor points out that the Appeals Chamber and several Trial Chambers have held that any overlap in charges is a matter that may be addressed at the time of conviction and sentencing, and urges this Chamber to leave the issue for the end of trial.[18] The Tribunal's jurisprudence on cumulative charging is still evolving. Previous Tribunal decisions have mentioned several factors that may be relevant to the analysis of cumulative charging, but have not voiced a clear view on how these factors relate to one another: (1) whether each charge requires proof of a legal element not required by the others; (2) whether the offences are

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[11] Objection to the Indictment, AD-II.
[12] *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof, 4 April 1997, para. 27.
[13] *Id.*
[14] Objection to the Indictment, AD-III.
[15] *See, e.g., Delalić*, para. 11.
[16] Objection to the Indictment (a), (b), AD-I to AD-VII, AD-XIII, AD-XV to XVII, AD-XXI and AD-XXII.
[17] Objection to the Indictment AD-X to AD-XII, AD-XIV, AD-XIX, and AD-XX.
[18] *See, e.g., Prosecutor v. Delić*, Case No. IT-96-21-AR72.5, Appeal Decision, 6 December 1996, paras. 35-36; *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, paras. 5-10; *Landžo*, para. 11.

designed to protect different values; (3) whether it is necessary to record a conviction for both offences in order fully to describe what the accused did.[19]

10. The recent *Kupreškić* judgement provides the most in-depth analysis of the issue to date.[20] After an extensive analysis of the practice in both civil and common law countries, the *Kupreškić* judgement concluded that an accused may be found guilty of two offences for a single act if each offence contains an element not required by the other.[21] The Trial Chamber also recognised that cumulative charges may be justified when the provisions at stake protect different values, but found that this test was seldom used as an independent ground for upholding more than one charge based on the same facts if the elements test was not satisfied as well.

11. Were this analysis to be applied to Martinović's objections, some of the cumulative charging, particularly in counts 2-8 and in counts 13-17, might appear problematic. The Prosecution commendably conceded at argument that in the ordinary meaning of the term as used in the *Kupreškić* decision, many of the Article 3 counts appear to be cumulative with the Article 2 and Article 5 counts, but offered that they might still be justified as advancing different interests.[22] The Prosecution also indicated that its position on the *Kupreškić* decision was not yet final.

12. Since the Tribunal's jurisprudence on cumulative charging is still evolving, this Trial Chamber does not see a reason at this juncture for departing from the Trial Chambers' past practice of declining to decide the issue at the indictment stage, since the defendant will not be prejudiced if cumulativeness is decided after the evidence has been presented.[23] As the Trial Chamber indicated at oral argument, however, it may be helpful if the parties organise their trial presentation in terms of the offences which have the greatest requirements, such as persecution and the Article 2 offences requiring proof of international armed conflict, especially when other offences may be seen as lesser

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[19] *See, e.g., Prosecutor v. Kvočka*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 47 (mentioning factors (1) and (2) with conjunctive phrasing); *Prosecutor v. Kupreškić*, Case No. IT-95-16-PT, Decision on Defence Challenges to Form of the Indictment, 15 May 1998, p. 3 (same); *see also* the decision of the ICTR in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 2 September 1998, para. 468 (mentioning factors (1), (2) and (3) with disjunctive phrasing).
[20] *See Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgement, 14 January 2000.
[21] *Id.*, para. 718; *see also id.*, paras. 680-688 (comparing the separate-elements test followed in many common law jurisdictions and set out in *Blockburger v. United States*, 284 U.S. 299 (1932) and the common law doctrine of "lesser included offences", with the civil law concepts of reciprocal speciality and consumption).
[22] *See* Transcript of Status Conference, 3 February 2000, pp. 130-131.
[23] *See, e.g., Prosecutor v. Krstić*, Case No. It-98-33-PT, Decision on the Form of the Indictment, 28 January 2000, pp. 5-7.

included offences which require some but not all of the elements of the greater offence. To that end, the parties will be asked to address the issue of cumulativeness in greater depth in their final pre-trial briefs.

III. Individual Criminal Responsibility

13. Each count of the indictment charges Mr. Martinović with liability under both Article 7(1) and 7(3). Mr. Martinović contends that "the only foundation for someone to be held responsible for a criminal act is Article 7(1), since Article 7(3) simply says that a person is not exempt from a responsibility if such an act was committed by his subordinate."[24] The Trial Chamber does not think this is a correct statement of the law. The Trial Chamber agrees with those decisions of the Tribunal interpreting the Statute to allow a commanding officer to be held liable either on the basis of his own acts pursuant to Article 7(1), or on the basis of his failure to prevent or punish the illegal actions of his subordinates pursuant to Article 7(3), or, where appropriate, both.[25] Mr. Martinović's objection is, therefore, rejected.

IV. Vagueness

14. Mr. Martinović objects that several portions of the indictment are not specific enough. The touchstones for the analysis are once again Articles 18 and 21 of the Statute.[26] The Trial Chambers have expressed a range of views on how specific an indictment must be to satisfy these provisions. A number of decisions have suggested that "[a]n indictment

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[24] Objection to the Indictment, AD-XIX and XX.

[25] *See Prosecutor v. Kvočka, et al.*, Case No. IT-98-30-PT, Decision on the Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 50 ("an accused may be charged either alternatively or cumulatively under Article 7, paragraph 1, and paragraph 3"); *Prosecutor v. Delalić, et al.*, Case No. IT-96-21-T, Judgement, para. 333 (holding that it is a "well-established norm of customary and conventional international law" that "a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates"); see also *id.*, para. 1222 ("in practice there are factual situations rendering the charging and convicting of the same person under both Articles 7(1) and 7(3) perfectly appropriate").

[26] As noted earlier, Article 18 requires the indictment to contain a "concise statement of the facts." *See also* Rule 47(C) ("The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime."). Article 21 says the accused must be "informed promptly and in detail . . . of the nature and cause of the charge against him" and must "have adequate time and facilities for the preparation of his defence."

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must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed."[27] Other Trial Chambers, however, have taken the view that the "massive scale of the crimes with which the International Tribunal has to deal makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes."[28]

15. The Trial Chambers have also expressed a variety of views on the significance of the materials disclosed in discovery in deciding if an indictment is specific enough. Some chambers have stated that "neither the supporting material nor the witness statements made available to an accused under Rule 66 of the Rules of Procedure and Evidence . . . can be used to fill in any gaps in the indictment."[29] Other chambers have intimated a slightly broader view of the role of discovery materials, stating that the guarantees of Article 21 (to be informed of the charges and to put be in a position to prepare a defence) have different meanings at different stages in the proceedings since "the preparation of

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[27] *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 12; *see also, e.g., Prosecutor v. Kunarac,* Case No. IT-96-23-PT, Decision on the Form of the Indictment, 4 November 1999, para. 6 ("[T]he capacity in which the accused allegedly committed the charged offence must be clearly defined. The indictment must also leave no doubt as to what the accused is alleged to have done at a particular venue on a particular date during a particular time period, with whom, to whom, or to what purpose. It must describe the full conduct complained of which amounts to the crime(s) charged. It must identify with reasonable clarity other persons involved, or affected, where necessary."); *Prosecutor v. Blaškić*, Case No. IT- 95-14-PT, Decision on Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof, 4 April 1997, para. 20 ("[T]he indictment must contain certain information which permits the accused to prepare his defence (namely, the identity of the victim, the place and approximate date of the alleged crime and the means used to perpetrate it) in order to avoid prejudicial surprise."); *Prosecutor v. Landžo*, Case No. IT-96-21-T, Decision on Motion By the Accused Based on Defects in the Form of the Indictment, 15 November 1996, para. 5 ("The Indictment before the Trial Chamber contains all the necessary information for the Defence to prepare its defence: the identity of the victim, the place and approximate time of the alleged crime and the means by which it was committed.").

[28] *Prosecutor v. Kvočka*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para.1; *see also, e.g., Prosecutor v. Aleksovski*, Case No. IT-95-14/1-PT, Decision on the Defence Motion in Respect of Defects in the Form of the Indictment, 25 September 1997, para.16 ("in a case of this sort, the specific identification of each victim and perpetrator is neither possible nor necessary"); *Prosecutor v. Krstić*, Case No. IT-98-33-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 6 May 1999, p. 3 ("the nature and very scope of the crimes being prosecuted as well as the type of responsibility charged are sufficient to justify the fact that when they began and when they ended cannot be precisely identified"); *Prosecutor v. Blaškić*, para. 37 ("at the indictment stage an exhaustive list of plundered public or private property cannot be demanded because wars characteristically bring in their wake massive and large scale destruction"); *Prosecutor v. Kvočka*, para. 23 ("the massive scale of the crimes alleged before this International Tribunal does not allow for specific naming of victims").

[29] *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23-PT, Decision on the Form of the Indictment, 4 November 1999, para. 7; *see also, e.g., Prosecutor v. Brđanin*, Case No. IT-99-36-PT, Decision on Motion to Dismiss Indictment, 5 October 1999, para.13 ("the supporting material may not be used to fill in any gaps which may exist in the material facts so pleaded when determining whether a *prima facie* case exists in accordance with Article 19.1 of the Statute"); *Krnojelac*, para.15 ("this Trial Chamber does not accept any interpretation . . . which suggests that the supporting material given during the discovery process can be used by the prosecution to fill any gaps in the material facts pleaded in the indictment").

his defence by the accused assumes a more detailed level of information which may not be available at the time the indictment is framed."[30] However, even those Chambers adhering to the view that the supporting materials provided by the Prosecutor in discovery cannot be used to fill in gaps in the indictment have nevertheless concluded that

> in a limited class of case, less emphasis may be placed upon the need for precision in the indictment where complete pre-trial discovery has been given. For example, if all of the witness statements identify uniformly and with precision the circumstances in which the offence charged is alleged to have occurred, it would be a pointless technicality to insist upon the indictment being amended to reflect that information. That is, however, a rare situation.[31]

And there is a general consensus that a distinction may be drawn "between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which must be provided by way of pre-trial discovery)."[32]

16. This Trial Chamber's view is that any confusion about the proper role of supporting materials diminishes when the focus is turned on the fact that two separate statutory provisions are in play. By its terms, Article 18(4) pertains only to the indictment, which it says shall contain a "concise statement of the facts and the crime." But the guarantees of Article 21 have broader application. Article 21(4)(a) says the accused must "be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him," while Article 21(4)(b) says that the accused must "have adequate time and facilities for the preparation of his defence." The supporting materials certainly cannot be used to satisfy Article 18's requirement that the *indictment* contain a concise statement of the facts and crime. But the discovery materials do play a role in fulfilling the defendant's right to be informed of the "nature and cause" of the charges against him, which at least one Trial Chamber has found is "a concept which includes not only the acts but also the evidence in support of the indictment."[33] And they obviously contribute to ensuring that the accused has an adequate opportunity to prepare his defence. *See, e.g.*, Rule 69 (C) ("the identity of the victim or witness shall be

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[30] *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof, 4 April 1997, paras.10-11.
[31] *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 15.
[32] *Krnojelac*, para. 12; *see, e g., Kvočka*, para. 14 (disagreeing with portions of *Kronojelac* but recognising this distinction as "valid").
[33] *Blaškić*, para. 11.

disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence").

17. Moreover, it must be kept in mind that the defendant has other avenues besides a motion challenging the form of the indictment for seeking additional particulars. Some Trial Chambers have endorsed the use of a motion for particulars where the indictment is not so vague as to be defective on its face, but where a defendant needs more information to prepare for trial.[34] These cases have held that, before submitting a motion for particulars, the defence must first make a direct request to the Prosecution for the information, specifying the counts in question, the reasons that the material already in the defence's possession is not sufficient, and the specific information that will remedy the inadequacy.[35] If the Prosecution fails to provide sufficient information, the Defence may then file a motion in the trial chamber, which will then consider whether the requested particulars are necessary "in order for the accused to prepare his defence and to avoid prejudicial surprise."[36] A motion for particulars is only properly directed at the indictment and is not to be used to obtain the discovery of evidentiary material.[37] But the extent of discovery already obtained is relevant to the issue of whether a defendant has enough information to prepare for trial and avoid prejudicial surprise.[38]

18. To sum up, the defendant's preparation for trial may begin with the indictment, but it does not end there. While it is clear that "the indictment must contain certain information which permits the accused to prepare his defence,"[39] it need not contain *all* of the information to which the accused will ultimately be entitled under the Rules. The primary focus at this stage must be on whether the indictment contains a concise, but complete, statement of the facts on which the charges are based.

19. With this in mind, the Trial Chamber will now address Mr. Martinović's objections. With regard to all of these objections, it is important to note that, in the time since this motion was filed, the Defence has received extensive discovery, including 137 witness statements. Defence counsel conceded at oral argument that he has not read all of the

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[34] *See, e.g., Prosecutor v. Delalić*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment ("*Delalić*"), 2 October 1996, para. 21; *Prosecutor v. Delalić*, Case No. IT-96-21-T, Decision on the Accused Mucić's Motion for Particulars ("*Mucić*"), para. 7; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motion on Form of Indictment, 14 Nov. 1995, para. 8.
[35] *See Tadić*, para. 8.
[36] *Mucić*, para. 9.
[37] *See id.*
[38] *See id.*
[39] *Blaškić*, para. 20,

witness statements yet (partly due to translation problems), and therefore could not argue that he remained in the dark about the specifics of the Prosecution's case even in light of those statements.

(a) Objections to Counts 2-8 (Unlawful Labour and Human Shields as Inhuman Treatment and Wilful Killing)

20. Objections AD-VIII, AD-IX, and AD-XV appear to refer to paragraphs 35, 36, and 44 of the indictment. Mr. Martinović contends that these portions of the indictment "fail to accurately list the alleged victims, as well as the time and the place of the occurrence of the criminal act" and that they lack "clarity," and contain only "generalisations."[40]

21. The Prosecution responds that paragraphs 35 through 44, when read together, are sufficiently concrete. In addition, the Prosecution argues that the supporting materials and additional witness statements provided in discovery give more details, and that the "widespread practice of using detainees for force labour and as human shields prevents the Prosecutor from being in a position to identify each and every victim of this conduct, and the specific time and place at which it occurred."

22. The Trial Chamber agrees with the Prosecutor that paragraphs 35 to 44 should be read together. While paragraphs 35, 36 and 44 contain fairly general allegations that Bosnian Muslim detainees were used for unlawful labour and as human shields, some of the other paragraphs provide more concrete examples. Paragraph 41 describes a particular incident

[40] The relevant paragraphs read as follows:

> 35. Between about April 1993 and at least through January 1994, MLADEN NALETILLIĆ VINKO MARTINOVIĆ and their subordinates forced Bosnian Muslim detainees from the various detention centres under the authority of the HVO to perform labour in military operations and to be used as human shields on the Bulevar and Šantićeva streets; Raštani, Stotina, and other locations along the front line in the municipality of Mostar.
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> 36. Following the HV and HVO attack on the city of Mostar on 9 May 1993, the confrontation line with the ABiH was settled along the Bulevar and Šantićeva streets. From May 1993 to February 1994, the KB was engaged in fighting along the Bulevar and Šantićeva streets and had control over particular sections of this confrontation line. This confrontation line was both the scene of intense small arms fire and artillery exchanges between the opposing factions and it was the main site to which Bosnian Muslim prisoners were taken to perform forced labour and to be used as human shields.
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> ...
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> 44. Throughout this period, MLADEN NALETILIĆ and VINKO MARTINOVIĆ and their subordinates also forced Bosnian Muslim detainees to perform labour in locations other than the front lines. The Bosnian Muslim detainees were forced, *inter alia*, to engage and participate in the following works: building, maintenance and reparation works in private properties of the members and commanders of the KB; digging trenches, building defences in the positions of the KB or other HV and HVO forces; and assisting the KB members in the process of looting houses and properties of Bosnian Muslims.

on 17 September 1993 in which, pursuant to Mr. Martinović's orders, several detainees were allegedly given imitation rifles and military clothing and forced to walk alongside a tank in combat. Paragraph 42 describes the alleged use of detainees as human shields on the same day, and lists by name three of the approximately ten detainees who were killed. Because the Prosecution intends to prove that these types of activities took place *regularly* throughout the relevant time period, the Prosecution cannot be expected to list each and every instance in the indictment. The allegation of regularity itself, combined with the specific examples given, puts the defendant on notice of the sort of case he will be called to answer and satisfies the requirement that the indictment contain a "concise" statement of the facts.

23. The witness statements and other discovery materials now in the Defence's possession are meant to contain the details of any other specific events during this time period that the Prosecution intends to present at trial.

(b) Objections to Counts 13 to 17 (Murder, Wilful Killing and Wilfully Causing Great Suffering of Nenad Harmandžic)

24. Counts 13 to 17 are based on the alleged torture and killing of Nenad Harmandžic by troops under Mr. Martinović's command in July 1993. In objections XIX and XX, Mr. Martinović objects that Counts 16 and 17 (cruel treatment, a violation of the Laws or Customs of War, and wilfully causing great suffering or serious injury, a Grave Breach of the Geneva Conventions) are charged in the alternative with counts 13, 14 and 15 (murder, a Crime Against Humanity, wilful killing, a Grave Breach of the Geneva Conventions, and murder, a Violation of the Laws and Customs of War). He argues that this deprives him of the right to know what he is charged with and inhibits the preparation of his defence. But we agree with the Trial Chamber in *Prosecutor v. Kvočka*, which held that alternative charging was permissible.[41] It is clear from the indictment that the Prosecution will attempt to prove Mr. Martinović responsible for the death of Harmandžic, but, if it is unable to prove that, then it will try to prove at least that Martinović was responsible for his subordinates' torture of the victim. The indictment is sufficient to put Mr. Martinović on notice of the nature of the Prosecution's case.

[41] *See Kvočka,* Decision on the Defence Preliminary Motion of the Form of the Indictment, Case No. IT-98-30-PT, 12 April 1999, para. 50; *see also Prosecutor v. Musema*, Decision on Prosecutor's Request for Leave to Amend the Indictment, Case No. ICTR-96-13-I, 18 November 1998, para. 7.

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(c) Objections to Counts 18 and 19 (Forcible Transfer and Destruction and Plunder of Property)

25. Objections XXI and XXII appear to address paragraphs 54 and 57. Mr. Martinović objects that these charges are "indefinite" and "general," and that "the names of the victims are not stated, nor the time and place of the commission of the criminal act" making it "impossible" for the defence to prepare for trial. [42]

26. The Prosecution responds that it "is not in a position to provide the Defence with the names of all victims and the dates of forcible transfer and plunder by MARTINOVIĆ's units." In support of its position, the Prosecution cites the decision of the Trial Chamber in *Prosecutor v. Blaškić* that "at the indictment stage an exhaustive list of plundered public or private property cannot be demanded because wars characteristically bring in their wake massive and large scale destruction."[43]

27. The Trial Chamber is of the view that this portion of the indictment, while close to the line, is not so vague as to render the indictment defective. The specific date (9 May 1993) on which the forced expulsions allegedly began is given, and they are said to have continued over the next six months. The indictment further specifies that two large waves of transfers occurred in May and July 1993. The events are all said to have occurred in a confined geographic area, in and around the city of Mostar. This is a very "concise statement of the facts," and while it is not vague, the Trial Chamber is not convinced that,

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[42] The relevant paragraphs provide as follows:

> 54. In the municipality of Mostar, MLADEN NALETILIĆ and VINKO MARTINOVIĆ were responsible for and ordered the forcible transfer of Bosnian Muslim civilians that started on the 9 May 1993 and continued until at least January 1994. The KB members under their command were prominent in the eviction, arrest and forcible transfers of Bosnian Muslim civilians throughout the relevant period, and particularly during the two large waves of forcible transfers that took place in May and July 1993. Once KB and other HVO units had identified persons of Muslim ethnic background, they arrested them, evicted them, plundered their homes and forcibly transferred them across the confrontation lines to the territories under ABiH control. The ABiH held a portion of the city which was under siege by HV and HVO forces, who were shelling intensely the area and preventing the arrival of humanitarian and basic supplies. MLADEN NALETELIĆ and VINKO MARTINOVIĆ commanded operations for this purpose and gave orders to their subordinates to proceed with the forcible transfers.
>
> 57. Following the HV and HVO attack on Mostar of 9 May 1993 and in the context of the subsequent campaign of persecution against the Bosnian Muslim population, the units under the command of MLADEN NALETILIĆ and VINKO MARTINOVIĆ plundered systematically the Bosnian Muslim houses and properties.

[43] *Blaškić*, para. 37.

standing alone, it would be sufficient to allow the defendant to prepare for trial: no specific examples of plunder or expulsion are provided, and not much indication is given as to the facts on which the Prosecution rests its theory of Mr. Martinovićs command responsibility. The Defence does not contend, however, that the witness statements and other material in its possession do not provide sufficient particulars to prepare its case. Accordingly, the logical next step is that the Defence review those materials.

(d) Challenges to Count I of the Indictment (Persecutions)

28. Although it is not crystal clear, it appears that the objections headed AD-IV, V, VI, and VII are concerned with the paragraphs supporting the persecution count, paragraphs 30, 32, 33, and 34. Paragraph 34, however, refers to paragraphs 35-58 – basically the rest of the indictment. Mr. Martinović contends in this set of objections that the indictment lacks "precise definition," is "quite general," and does not contain sufficient factual details.

29. The Prosecution counters that the indictment "need not contain the detailed information sought by the Defence."

30. The matters addressed in Paragraphs 30, 32, and 34 have largely been covered in the preceding discussion of the allegations of forced labour, illegal use of detainees as human shields, plunder, expulsion, and the torture and murder of Harmandžic. The indictment specifies the types of actions that are said to have made up the persecution, as well as the time period and geographic area in which these events are said to have occurred. Once again, the accused does not contend that he cannot prepare for trial even if the witness statements and other materials now in his possession are taken into account.

V. Conclusion

For the foregoing reasons,

TRIAL CHAMBER I,

PURSUANT to Rule 72,

HEREBY DENIES the Defendant Vinko Martinović's Objection to the Indictment.

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

Done this fifteenth day of February 2000,
At The Hague,
The Netherlands.

Almiro Rodrigues
Presiding Judge, Trial Chamber I

(Seal of the Tribunal)

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BEFORE A BENCH OF THE APPEALS CHAMBER

Before: Judge Antonio Cassese, Presiding

Judge Haopei Li

Judge Jules Deschênes

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 6 December 1996

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO

DECISION
ON APPLICATION FOR LEAVE TO APPEAL BY HAZIM DELIC
(DEFECTS IN THE FORM OF THE INDICTMENT)

The Office of the Prosecutor

Mr. Eric Ostberg

Ms. Teresa McHenry

Counsel for the Accused

Mr. Salih Karabdic for Hazim Delic

I

APPLICATION FOR LEAVE TO APPEAL

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In an Application filed with the Registry on 22 November 1996, the accused Hazim Delic seeks leave to appeal from the "Decision on Motion by the Accused Hazim Delic based on Defects in the Form of the Indictment" ("*Decision*"), rendered by Trial Chamber II on 15 November 1996 in the case of *the Prosecutor v. Zejnil Delalic, Zdravko Mucic, also known as "Pavo", Hazim Delic and Esad Landzo* (IT-96-21-T). In the *Decision*, the Chamber denied the accused's motion based on Defects in the Form of the Indictment.

The application for leave to appeal is made pursuant to Rule 72(B) of the Rules, which reads:

> (B) The Trial Chamber shall dispose of preliminary motions in *limine litis* and without interlocutory appeal, save
>
> > (i) in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as of right;
> >
> > (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.

The accused advances a number of arguments in support of his Application, which may, for convenience, be summarised as follows:

(a) That the Indictment has not established the Tribunal's jurisdiction in this case;

(b) That the Indictment is incomplete and/or violates the principle *nullum crimen sine lege;*

(c) That the Indictment is vague;

(d) That the Indictment fails to separate distinct charges and therefore subjects the accused to the danger of "double jeopardy" and/or falls foul of the principle *non bis in idem*;

(e) That the Indictment alleges facts which are false.

(a) That the Indictment has not established the Tribunal's jurisdiction in this case;

This argument raises a preliminary question which goes to the very issue of whether a Bench of the Appeals Chamber, consisting of three Judges, or the full Appeals Chamber consisting of five Judges, should hear the Application. The preliminary question is whether this is an interlocutory appeal based on lack of jurisdiction, where appeal lies as of right under Rule 72(B)(i), or whether it is not, in which case an appeal can only be brought if leave has first been obtained by a Bench of three Judges of the Appeals Chamber, upon serious cause being shown, under Rule 72(B)(ii).

In his Application, the accused argues that his objections to the form of the Indictment "mean that the jurisdiction of the Tribunal is not established, and they should be treated as objection for a lack of jurisdiction" (*Application, p.1, para. 1).* Accordingly, in his prayer, the Applicant proposes to the Appeal Chamber "to treat its Appeal as an appeal on right to appeal", i.e. as of right, "or alternatively ... to grant a leave to appeal". *Id. P.2.*

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The accused's reason for arguing that his objections to the form of the Indictment are objections based on lack of jurisdiction is based on the fact that the Indictment does not refer to the norms of international humanitarian law which the accused is alleged to have violated, but only to the pertinent Articles of the Tribunal's Statute. The accused argues that the Indictment, on the contrary, needs to refer to the norms of international humanitarian law and not simply to the Articles of the Statute, because the Statute is not a criminal code which legislates offences, but it simply authorises the Tribunal to prosecute what are already offences under international humanitarian law.

Thus the Applicant's first argument is that the Tribunal has not established its jurisdiction in this case.

(b) That the Indictment is incomplete and /or violates the principle *nullum crimen sine lege*;

The lack of any reference to the norms of international humanitarian law which are alleged to have been violated by the accused is also cited as an objection to the form of the Indictment on the grounds of incompleteness. The Applicant argues that it is difficult to defend against the Indictment when it does not mention the norms relied on; in particular, he argues that in these circumstances the principle *nullum crimen sine lege* is violated and his right to a fair trial is jeopardised.

(c) That the Indictment is vague

The accused avers, in addition, that the Indictment is not "a concise statement of facts and of the crime or crimes with which the accused is charged under the Statute" as required by Article 18(4) of the Statute. In particular, the accused complains that many charges contain mutually exclusive, alternative formulations of guilt, e.g. "knew" versus "had reason to know", "were about to commit" versus "committed", and "failed to prevent" versus "failed to punish". The accused considers that each charge should contain only one such formulation.

(d) That the Indictment fails to separate distinct charges and therefore subjects the accused to the danger of "double jeopardy" and/or falls foul of the principle *non bis in idem*;

The accused submits that the Indictment fails to separate distinct charges; in particular, it fails to separate charges for crimes individually committed from those committed by dint of being a superior. In other words, the accused is charged for certain offences both as a direct participant and as a superior, e.g. Paragraphs 35 (Counts 46 and 47), 36 (count 48) and 37 (count 49).

Thus the accused complains in his Application of a danger of "double jeopardy", i.e. of being punished twice for the same offence, in respect of his alleged position as direct participant and as a superior or commander.

The accused also complains of "double jeopardy" in respect of the cumulative presentation of the offences charged in the Indictment.

(e) That the Indictment alleges facts which are false.

The accused also complains that the Indictment offers no facts concerning Delic's position as Deputy Commander, nor does it demonstrate how a Deputy Commander can be responsible as a commander.

The accused also alleges wrongful characterisation of the conflict in Bosnia and Herzegovina.

II

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PROSECUTION RESPONSE

The Prosecutor filed her reply to the Application on 28 November 1996. In the "Prosecution Response to Delic's Application for Leave to Appeal the Decision of the Trial Chamber denying Motion on the Form of the Indictment" (*"Prosecution Response"),* the Prosecutor argues that the Accused has failed to demonstrate a grave error in the Decision of the Trial Chamber which would justify granting leave to appeal. The Prosecutor argues that:

> .... the Defence does not even attempt to demonstrate where the Trial Chamber erred in its consideration of the challenge to the form of the indictment. Rather, the accused merely restates his initial arguments, all of which were fully responded to in the Prosecutor's initial response to the motion, and all of which were fully considered and correctly rejected in the Trial Chamber's decision of 15 November 1996". *Prosecution Response, p.3.*

III

SCOPE OF RULE 72(B)(ii)

Rule 72(B)(ii) was first applied in the "Decision on Application for Leave to Appeal (Separate Trials)" of this Bench on 14 October 1996 regarding the accused Zejnil Delalic. As this Bench noted, a three-fold test of cumulative conditions is to be applied whenever an application for leave to appeal under Rule 72(B)(ii) is concerned:

> (1) Does the application relate to one of the issues covered by Rule 73 (A)(ii),(iii),(iv), (v).?
>
> (2) Is the application frivolous, vexatious, manifestly ill-founded, an abuse of the process of court or so vague and imprecise as to be unsusceptible of any serious consideration?
>
> (3) Does the application show a serious cause, namely does it either show a grave error in the decision which would cause substantial prejudice to the accused or is detrimental to the interests of justice or raise issues which are not only of general importance but are also directly relevant to the future development of trial proceedings, in that the decision by the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber?

IV

DISCUSSION

Applying the first of these tests, it is apparent that the Application of Hazim Delic relates to defects in the form of the Indictment which is one of the issues covered by Rule 73 (A), namely Rule 73(A)(ii), and is therefore within the interlocutory jurisdiction of Appeals Chamber.

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Turning to the second test, the Bench does not consider that the Application is frivolous, vexatious, manifestly ill-founded, an abuse of the process of court nor so vague and imprecise as to be unsusceptible of any serious consideration.

The Bench therefore turns to the third test: Does the application show a serious cause, namely does it either show a grave error in the decision which would cause substantial prejudice to the accused or is detrimental to the interests of justice or raise issues which are not only of general importance but are also directly relevant to the future development of trial proceedings, in that the decision by the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber?

The Applicant has raised five arguments in his Application, outlined here in section I, which will be analysed in turn.

(a) That the Tribunal has not established its jurisdiction in this case;

The first question which must be answered is whether this is an interlocutory appeal based on lack of jurisdiction, where appeal lies as of right under Rule 72(B)(i), or an appeal which can only be brought if leave has first been obtained from a Bench of three Judges of the Appeals Chamber, upon serious cause being shown, under Rule 72(B)(ii).

Having examined the Application, the Bench is of the view that this is not an appeal from the dismissal of an objection based on lack of jurisdiction. The accused's Motion before the Trial Chamber, which was entitled "Preliminary Motions of Accused Hazim Delic based on Defects in the Form of the Indictment", did not raise the issue of jurisdiction as an objection. The Trial Chamber's *Decision,* accordingly, did not consider the issue of whether or not it had jurisdiction to entertain the case. It is well settled that, since the Accused's Motion did not raise the issue of jurisdiction before the Trial Chamber, the issue cannot now be raised for the first time before the Appeals Chamber.

The Bench therefore considers that the Application is not to be treated as an appeal on jurisdiction which would lie as of right (assuming of course that the Trial Chamber had already pronounced on the matter), but as an appeal for which leave is required.

The Bench also notes, secondarily, that the Application to this Bench is headed "Appeal against Decision on Motion based on Defects in the Form of the Indictment", and that it addresses itself primarily to defects in the form of the Indictment. It does not therefore, even *prima facie*, purport to be an appeal based on lack of jurisdiction. This also justifies the Bench in treating the Application as an application for leave to appeal under Rule 72(B)(ii).

(b) That the Indictment is incomplete and/or violates the principle *nullum crimen sine lege;*

To the Accused's objection that the Indictment is incomplete and violates the principle of *nullum crimen sine lege*, the Trial Chamber replied:

> The Trial Chamber finds that the allegation that this Indictment violates the principle of *nullum crimen sine lege* does not hold. The Indictment cites the applicable provisions of the Statute which support the alleged criminal responsibility for the acts mentioned in the Indictment. In so doing, the Indictment puts the Defence on notice of the legal classification of the crime and sufficiently enables the accused to prepare his defence.(para. 21)

The Accused is no doubt correct when he states that the Tribunal's Statute does not create new offences

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but rather serves to give the Tribunal jurisdiction over offences which are already part of customary law. As the Secretary-General comments in his Report on the Tribunal's Statute (S/25704): "... the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence to some but not all States to specific conventions does not arise" (para. 34).

This does not, however, have any bearing on whether *the Indictment* should refer for each offence to both the pertinent Article of the Statute and the pertinent norm of international humanitarian law. Provided that it is clear in each count of the Indictment which serious violation of international humanitarian law is being charged, it matters little whether the Indictment refers to, for example, Article 2 of the Statute or to the relevant Articles of the Geneva Conventions of 1949. Indeed the Statute appears to favour the former approach; Article 18(4) mentions "a concise statement of facts and of the crime or crimes with which the accused is charged *under the Statute"*. Moreover, the Report of the Secretary-General to the Security Council of 1993 on the Statute of this Tribunal in his exposition of Articles 2,3,4 and 5 of the Statute clearly referred the crimes enumerated in them to their sources of international humanitarian law, for example, the Geneva Conventions of 1949, the Hague Convention (IV) of 1907, the Nuremberg Charter of 1945 and the Genocide Convention of 1948. The Bench takes the view, therefore, that Articles 2,3,4 and 5 of the Statute are shorthand for the corresponding norms of international humanitarian laws, and if there is any dispute as to those norms, that is a matter for trial, not for pre-trial objections to the form of the Indictment.

The Accused argues that it is difficult for him to defend against the Indictment when it does not mention the norms relied on. In particular, he says that in these circumstances the principle nullum crimen sine lege is violated and his right to a fair trial is jeopardised. In light of the above comments, the Bench does not consider this concern to be justified.

(c) That the Indictment is vague;

The defence further avers that the Indictment is not "a concise statement of facts and of the crime or crimes with which the accused is charged under the Statute" as required by Article 18(4) of the Statute.

In particular, the accused complains that many charges contain mutually exclusive alternative formulations of guilt, e.g. "knew" versus "had reason to know", "were about to commit" versus "committed", "failed to prevent" versus "failed to punish".

The Trial Chamber, in its *Decision,* did not fully address this issue, which the Accused raised in its Motion before the Trial Chamber in paragraph 5. The Bench considers, however, that this is not a grave error on the Trial Chamber's part. These sets of alternatives, recognised in military manuals and under international humanitarian law, do not render the Indictment fatally vague, although wherever possible the Prosecutor should make clear the precise line of conduct and mental element alleged.

(d) That the Indictment fails to separate distinct charges and therefore subjects the accused to the danger of "double jeopardy" and/or falls foul of the principle *non bis in idem*;

The Accused submits that a charge for crimes individually committed must be separated from a charge as a superior, whereas he is charged for certain offences, both as a direct participant and as a superior, for example Paragraphs 35 (Counts 46 and 47), 36 (count 48) and 37 (count 49).

The Trial Chamber, in response to this objection, stated:

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> "The Trial Chamber finds that the Indictment sufficiently informs the accused of the acts for which he is being charged both as a direct participant and as a superior. Moreover, the Indictment does separate the acts for which the accused is being held responsible as a direct participant and as a superior. The Indictment therefore fulfils its purpose in an adequate manner...." (*para. 18, Decision*).

The Trial Chamber therefore rejected the objection; in the view of this Bench, with reason.

It is worth noting, however, that there is one respect in which the Accused's concern is justified with respect to the distinction between being charged as a direct participant and being charged as a superior; namely the failure, in those counts of the indictment which charge command responsibility for the acts of subordinates, to refer to the statutory source for liability for the acts of subordinates, i.e. Article 7(3) of the Tribunal's Statute. While the Bench is of the view that the said sub-Article should be explicitly mentioned whenever it is relied on, nevertheless there is no possibility in this Indictment of the Accused being mistaken as to which Article is being referred to when the "knew or had reason to know" formula is employed.

The accused also complains of being charged on multiple occasions throughout the Indictment with two different crimes arising from one act or omission, namely being charged in each case with both a grave breach "and" a violation of the laws or customs of war for the same acts. On this matter, the Trial Chamber endorsed its reasoning on an identical issue in the *Tadic* case:

> "In any event, since this is a matter that will only be relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading". (*Prosecutor v. Tadic,* Decision on Defence Motion on Form of the Indictment at p.10 (No. IT-94-1-T, T.Ch.II, 14 Nov, 1995)

The Bench does not consider that the reasoning reveals an error, much less a grave one, justifying the granting of leave to appeal.

(e) That the Indictment alleges facts which are false.

The accused complains under this heading that the Indictment offers no facts concerning Delic's position as Deputy Commander, nor does it demonstrate how a Deputy Commander can be responsible as a commander. Also as a factual issue, the Accused avers that the Prosecutor has wrongfully characterised the conflict in Bosnia and Herzegovina.

The Bench considers that the Trial Chamber was correct to state that these are factual issues to be determined at trial. It should be noted with respect to the latter issue, that this has not been presented as an objection to the jurisdiction of the Tribunal, i.e. an objection based on the alleged wrongful characterisation of the armed conflict in Bosnia and Herzegovina, and so appeal on this issue does not lie as of right. Rather this being raised as an objection to the form of the indictment, leave to appeal is required, which is refused on the grounds that the objection raises factual issues to be determined at trial.

The accused raises two miscellaneous issues which, however, do not allege an error on the part of the Trial Chamber, much less a "serious cause" justifying leave to appeal, namely:

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(a) That the ex parte review of the Indictment under Rule 47 offends the principle audi alteram partes.

(b) that there must be a "reasonable suspicion" that the accused has committed the offences alleged.

The Bench does not consider that either of these arguments raise a "serious cause" justifying the granting of leave to appeal under Rule 72(B)(ii).

V

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 accused Hazim Delic for leave to appeal the Decision of 15 November 1996 denying his motion based on defects in the form of the Indictment.

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

_____

Antonio
Cassese

President

Dated this 6th day of December 1996

At The Hague

The Netherlands

[Seal
of
the
Tribunal]

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Before: **Judge Gabrielle Kirk McDonald, Presiding**

Judge Ninian Stephen
Judge Lal C. Vohrah
Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**
Decision of: **15 November 1996**

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON MOTION BY THE ACCUSED ESAD LANDZO BASED ON DEFECTS IN THE FORM OF THE INDICTMENT

The Office of the Prosecutor:
Mr. Eric Ostberg
Ms. Teresa McHenry

Counsel for the Accused:
Mr. Mustafa Brackovic, for Esad Landzo

I. INTRODUCTION

On 28 June 1996, the accused, Esad Landzo, submitted to 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") a Motion based on Defects in the Form of the Indictment ("Motion") pursuant to Rules 72 and 73 of the International Tribunalís Rules of Procedure and Evidence ("Rules"). The Office of the Prosecutor ("Prosecution") responded in writing to the Motion on 10 September 1996. The parties orally presented their arguments on 1 October 1996.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and the oral arguments of the parties, HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. Introduction

1. The indictment in which Esad Landzo is charged ("Indictment") includes a total of 49 counts against the accused and three other persons. It was originally confirmed on 21 March 1996. In the Indictment, the Prosecution asserts that the accused Esad Landzo is responsible for the alleged direct participation

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in the mistreatment and killing of several detainees in the Celebici camp (Counts 1-2, 5-6, 7-8, 9-10, 11-12, 15-17, 24-26, 27-29, 30-32, 36-37 and 46-47).

2. The Defence asks the Trial Chamber, pursuant to Rule 54, to order the Prosecution to amend the Indictment.

B. Applicable Provisions

3. The Motion is brought pursuant to Rule 72, which authorises the filing of preliminary motions, and Rule 73, which sets out a non-exhaustive list of the motions that an accused may submit. Rule 73 provides, inter alia, that an accused may make "objections based on defects in the form of the indictment." Articles 18 and 21 of the Statute and Sub-rule 47 (B) provide the foundation for the arguments articulated in the Motion. Article 18 provides in paragraph 4 :

Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Sub-rule 47 (B) states that "StChe indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged." In addition, sub-paragraph 4(a) of Article 21 provides that an accused is entitled "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".

C. Analysis

4. The Defence asserts that several counts of the Indictment are too general, imprecise and unclear, as they fail to establish which concrete acts were committed by the accused Esad Landzo himself, as opposed to those committed by "others". The Prosecution on the contrary opposes the Motion primarily on the ground that the Indictment is in accordance with Article 18(4) of the Statute and Sub-rule 47(B) of the Rules as it contains a "concise statement of the facts and the crime or crimes with which the accused is charged." The Prosecution notes that further detailed particulars can be found in the supporting materials.

5. The Trial Chamber does not consider the Indictment to be too general or imprecise. The standard the Indictment has to meet, as set out in the Statute, is that of containing a "concise statement of the facts". The Indictment before the Trial Chamber contains all the necessary information for the Defence to prepare its defence: the identity of the victim, the place and approximate time of the alleged crime and the means by which it was committed. It is the alleged direct participation in the acts that entails his personal criminal responsibility (Article 7(1) of the Statute). It is therefore unimportant at this stage to determine with greater detail the exact nature of his participation and what was the role of the "others" in the event.

6. Secondly, the Defence contends that due to the cumulative nature of the charges, the Indictment charges the accused, Esad Landzo, twice for one single criminal event. The Prosecution on the other hand stresses the fact that the separate charges reflect and address different aspects of the alleged criminal conduct of the accused Esad Landzo. The Prosecution also points out that challenges to the facts are not appropriate here, and that, in any event, the evidence the Prosecution has revealed to the Defence supports the allegations.

7. The Trial Chamber denies the Motion on this second ground, concerning the cumulative nature of the

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charges. An identical issue was raised in the case of Prosecutor v. Tadic, in which the Trial Chamber considered the matter to be relevant only to the penalty considerations, if the accused were ultimately to be found guilty of the charges in question:

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

Prosecutor v. Tadic, Decision on Defence Motion on Form of the Indictment at p. 10 (No. IT-94-1-T, T.Ch. II, 14 Nov. 1995). The Trial Chamber has previously applied the same reasoning in denying a challenge to this Indictment against the co-accused Zejnil Delalic. Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Decision on Motion by the Accused Zejnil Delalic based on Defects in the Form of the Indictment at p. 14 (No. IT-96-21-T, T.Ch. II, 2 Oct.1996) ("Delalic Indictment Decision")

8. Thirdly, the Defence argues that Counts 9 and 10 of the Indictment should be disregarded. The Defence contends that it has not been established for certain whether the alleged victim ever existed or not. The Prosecution asserts that the evidence currently in its possession and provided to the Defence supports exactly what was set out in the Indictment and that disputed matters of fact should be decided at trial, after a full opportunity for the presentation of evidence.

9. The Trial Chamber considers the existence or not of the person named as the victim in Counts 9 and 10 is a matter of fact that will have to be considered at the trial. A motion on the form of the indictment is not an appropriate way of challenging the evidence: "Whether or not the allegations listed in the Indictment are true ultimately will be decided at trial." Delalic Indictment Decision at p. 7.

10. Finally, the Defence asserts that due to the "time continuity" for the several criminal acts of the same kind, described in the various charges, all those acts should be considered as representing one extended criminal act, and should be treated as such. The Prosecution on the contrary considers every alleged offence to be a discrete event, with a separate victim, and a result of a separate exercise of the will of the accused Esad Landzo over an extensive time period.

11. The Trial Chamber is of the opinion that the possible existence of a relation between the different crimes is a matter that can be addressed at the time of sentencing. Such arguments are not appropriate in a motion on the form of the indictment and cannot be evaluated here. The separation of the acts into different charges clearly does not hinder the Defence in any way in the preparation of its defence.

III. DISPOSITION

For the foregoing reasons, THE TRIAL CHAMBER, PURSUANT to Rule 72, HEREBY DENIES in all respects the Motion by the Accused, Esad Landzo on Defects in the Form of the Indictment.

Gabrielle Kirk McDonald
Presiding Judge

Dated this fifteenth day of November 1996,

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At The Hague
The Netherlands

[Seal of the Tribunal]

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IN THE TRIAL CHAMBER

Before: Judge Gabrielle Kirk McDonald, Presiding

Judge Ninian Stephen

Judge Lal C. Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 2 October 1996

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON MOTION BY THE ACCUSED ZEJNIL DELALIC BASED ON DEFECTS IN THE FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr. Eric Ostberg

Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Residovic, for Zejnil Delalic

I. INTRODUCTION

On 3 July 1996, the accused, Zejnil Delalic, submitted to 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") a Motion Based on Defects in the Form of the Indictment ("Motion") pursuant to Rules 72 and 73 of the International Tribunal's Rules of Procedure and Evidence ("Rules"). The Office of the Prosecutor ("Prosecution") responded in writing to the Motion on 23 July 1996 (*"Prosecution's*

Response"). Prior to that date, the Defence had submitted several documents in support of a pending motion in which he requested provisional release. After determining that these documents were potentially relevant to the Motion, on 7 August 1996 the Trial Chamber directed the Prosecution to respond to the supplementary material. On 14 August 1996, the Prosecution submitted its Response to the Materials Filed by Delalic in Support of the Motion for Provisional Release as far as they Relate to his Motion on Defects in the Form of the Indictment (*"Response to Materials").* The parties orally presented arguments with regard to the Motion on 20 August 1996.

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

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. Background

1. The Indictment in which Zejnil Delalic is charged ("Indictment") includes a total of 49 counts against the accused and three other persons. It was originally confirmed on 21 March 1996. The Prosecution alleges in the Indictment that Zejnil Delalic was the Commander of the First Tactical Group of the Bosnian Muslim forces from June to November 1992 and that his responsibilities included authority over the Celebici camp and its personnel. In that capacity, Zejnil Delalic is charged in counts 13, 14, 33-35, 38, 39 and 44-48 with command responsibility for specific instances of killing, torture, cruel treatment, acts causing great suffering or serious injury, inhuman treatment, and unlawful confinement of civilians.

2. The Defence alleges variously that the Indictment is vague, undefined, contradictory, and ungrounded. The Motion specifically challenges paragraphs 2, 3 and 7, as well as the alleged lack of specificity of the underlying crimes for which Zejnil Delalic is charged with command responsibility. In bringing the Motion, the Defence seeks the rejection of all charges against Zejnil Delalic, or in the alternative, an order by the Trial Chamber for the Prosecution to submit a more precise Indictment.

3. The Prosecution opposes the Motion primarily on the ground that it raises questions of evidence which are not appropriate for consideration in a motion on the form of the indictment. In regard to the remaining challenges, the Prosecution maintains that the Indictment provides the accused with sufficient notice of the nature of the crimes with which he is charged and complies with Article 18(4) of the Statute of the International Tribunal ("Statute") and Sub-rule 47(B) of the Rules. The Trial Chamber will address each argument set forth in the Motion separately.

B. Applicable Provisions

4. The Motion is brought pursuant to Rule 72, which authorises the filing of preliminary motions, and Rule 73, which sets out a non-exhaustive list of the motions that an accused may submit. Rule 73 provides, *inter alia,* that an accused may make "objections based on defects in the form of the indictment." Articles 18 and 21 of the Statute and Sub-rule 47(B) provide the foundation for the arguments articulated in the Motion. Article 18, which details the process of investigation and preparation of an indictment, provides in paragraph 4:

> Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with

> which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Sub-rule 47(B) reiterates this concept, providing that "[t]he indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged." In addition, sub-paragraph 4(a) of Article 21 provides that an accused is entitled "to be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him", and sub-paragraph 4(b) allows an accused "adequate time and facilities for the preparation of his defence . . . ".

C. Analysis

1. Questions of Fact

5. The Defence argues that several statements in the Indictment are factually incorrect. These statements are found primarily in the second and third paragraphs of the Indictment. In response, the Prosecution argues that challenges to the validity of the facts should not be addressed by the Trial Chamber in a motion on defects in the indictment.

6. Paragraph 2 of the Indictment reads in relevant part:

> Beginning in the latter part of May 1992, forces consisting of Bosnian Muslims and Bosnian Croats attacked and took control of those villages containing predominantly Bosnian Serbs within and around the Konjic municipality. The attackers forcibly expelled Bosnian Serb residents from their homes, and held them at collection centres. Many of the women and children were confined in a local school or in other locations. Most of the men and some women were taken to a former JNA facility in Celebici . . . . There, the detainees were killed, tortured, sexually assaulted, beaten, and otherwise subjected to cruel and inhuman treatment. . . .

7. The Defence first asserts that the circumstances at the time dictate that forces loyal to the Government of Bosnia and Herzegovina could not have "attacked and taken control of" their own territory, but instead had "liberated" a previously taken, occupied and fortified area. Thus, the Defence claims, the Indictment is vague. However, this argument has no merit. The phrase "attacked and took control of" is simply a factual characterisation that does not suggest fault or authority of the accused. Moreover, this allegation is not the substance of the charges in the Indictment, as exhibited by its inclusion in the section entitled "Background". Finally, as a statement of fact, this phrase is not appropriately challenged via this motion. Indeed, inasmuch as this statement serves as a basis for any of the charges brought against the accused in the Indictment, it will fall upon the Prosecution to prove all of the necessary elements of those charges in order to support the Prosecution's interpretation of the facts. Accordingly, disagreement with the facts is not a sufficient basis on which to rest a claim that the Indictment is defective.

8. The second Defence challenge to this paragraph is that, as a whole, it is contradictory to the actual events that took place. The Defence maintains that because the capture of participants in armed conflict is not a violation of the Geneva Conventions [1], the Indictment is vague without a precise statement of which individuals were brought to collection centres. This argument may be disposed of in a similar manner as the first. As previously stated, a motion on the form of the indictment is inappropriate for

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factual challenges. In addition, because this paragraph only contains introductory information about the situation and does not make any specific charges against any of the accused named in the Indictment, there is no basis for a determination of vagueness. As previously stated, this paragraph simply provides the background information and does not purport to hold Zejnil Delalic liable for the actions articulated therein.

9. The Defence's final complaint regarding paragraph 2 of the Indictment, namely that it contradicts the later statement in paragraphs 9 and 10 of the Indictment that a state of international armed conflict and partial occupation existed in Bosnia and Herzegovina, is somewhat ambiguous. Because of the Defence's lack of elucidation on this issue, the Trial Chamber can only conclude that this assertion is based on the fact that all contingents named in the paragraph - Bosnian Croats, Bosnian Muslims, and Bosnian Serbs - are Bosnian nationals and the conflict at issue occurred in Bosnia and Herzegovina. This, however, does not reveal an inconsistency in the allegations. Simply because the particular exchange at issue in this Indictment directly involved Bosnians, it does not follow that the entire conflict in the area was not international. In order for a conflict to be deemed international, there is no requirement that international forces were activated in every area of the country; indeed, the Appeals Chamber of the International Tribunal has determined that "[i]t is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict." *Prosecutor v. Tadic,* Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (No. IT-94-1-AR72, App. Ch., 2 Oct. 1995). Because the Defence does not contest that the crimes alleged in this Indictment took place as a part of or result of the wider conflict occurring in Bosnia and Herzegovina, there is no basis for a claim of inconsistency.

10. The Defence alleges that the third paragraph of the Indictment also contains patently inaccurate information. This paragraph falls within the section entitled "The Accused" and states:

> Zejnil DELALIC, born 25 March 1948, co-ordinated activities of the Bosnian Muslim and Bosnian Croat forces in the Konjic area from approximately April 1992 to at least September 1992 and was the Commander of the First Tactical Group of the Bosnian Muslim forces from approximately June 1992 to November 1992. His responsibilities included authority over the Celebici camp and its personnel.

Contrary to these allegations, the Defence asserts that Zejnil Delalic was an ordinary soldier until 2 May 1992, when he was given special authorisation by the War Presidency and by the Commander of the Territorial Defence headquarters in Konjic to perform a part of the logistic affairs for six months. *Motion* at p. 2. On 9 May 1992, the Defence alleges, Zejnil Delalic was given a similar authorisation by the Minister of Defence of the Republic of Bosnia and Herzegovina. *Id.* The Defence states that he was appointed to the position of Co-ordinator between Konjic defence forces and the War Presidency on 18 May 1992 and, on 27 July 1992, he was appointed Commander of the First Tactical Group by the Republic of Bosnia and Herzegovina Armed Forces Headquarters. According to the Defence, this command group had a specific zone of activity and a specific military task. *Id.* Moreover, according to the Defence, the allegation in this paragraph that Zejnil Delalic had "authority over the Celebici camp" is not supported by the evidence that was submitted with the Indictment. The Defence grounds this argument in its belief that the witness statements relied on by the Prosecution cannot be treated as evidence because of their vagueness and inaccuracies and because the two witness statements on which the Prosecution relies are from witnesses who allegedly have ulterior motives in bringing such charges against Zejnil Delalic.

11. It is evidenced clearly by the Defence assertions that these objections are based on factual arguments and do not support a claim of a defective indictment. Indeed, the Defence concedes that the Prosecution relied on witness statements in support of its allegations. Moreover, the witness statements themselves

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purportedly serve as support at this stage for the Prosecution's allegation of *de facto* superior authority. As stated earlier, such arguments are not appropriate in a motion on defects in the form of the indictment and cannot be evaluated at this time. Instead, as the Prosecution correctly declares, "[d]isputed matters of fact must be decided at trial, after a full opportunity for the presentation of evidence." *Response to Materials* at p. 3. Whether or not the allegations listed in the Indictment are true ultimately will be determined at trial.

2. Allegations of Vagueness

12. The remainder of the Defence's challenges to the Indictment involve claims of vagueness. The Defence's first allegation regarding vagueness is found in its assertion that the Indictment does not contain particulars in respect to those named in the Indictment over whom Zejnil Delalic allegedly had superior authority. In a similar vein, the Defence cites paragraph 7 of the Indictment as "completely undefined" insofar as the Prosecutor claims, without further elaboration or support, that Zejnil Delalic was in a position of "superior authority to all camp guards and . . . other persons who entered the camp and mistreated detainees." The Defence also contests the statement that Zejnil Delalic "knew or had reason to know that subordinates . . . were mistreating detainees" and that he "failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators". The Defence next alleges that the factual description of the injuries attributable to the co-accused Hazim Delic and Esad Landzo should be precise in regard to time and place of occurrence and the manner in which they were committed. Specifically, the Defence calls for detailed information on the victims and a full description of the time, place, location and manner in which every individual crime was committed.

13. In response, the Prosecution argues that "[c]ertainly such detail is not required in the indictment, and indeed, such is not even required at trial." *Prosecution's Response* at p. 5. It is the Prosecution's view that if it is proved that Zejnil Delalic "held [the] several posts specifically set out in the indictment" having authority over the personnel and the camp, this is sufficient to establish that he was a superior. Moreover, the Prosecution argues that, in regard to the actions alleged by the co-accused Hazim Delic and Esad Landzo, the Indictment contains the appropriate concise statements of facts called for by both the Statute and Rules.

14. The International Tribunal has addressed challenges to indictments in three other decisions: *Prosecutor v. Tadic*, Decision on Defence Motion on Form of Indictment (No. IT-94-1-T, Tr. Ch. II, 14 Nov. 1995) (*"Tadic Indictment Decision"*); *Prosecutor v. \ukic,* Decision on Preliminary Motions of the Accused (No. IT-96-20-T, Tr. Ch. I, 26 Apr. 1996) (*"Dukic Preliminary Motion Decision"*); and most recently in regard to another accused in this case, *Prosecutor v. Delalic, Mucic, Delic, and Landzo,* Decision on the Accused Mucic's Motion for Particulars (No. IT-96-21-T, Tr. Ch. II, 26 June 1996) (*"Mucic Particulars Decision"*).

15. In the *Tadic* case, the defence argued that paragraphs four through twelve of the indictment were vague because they only listed approximate dates and did not give the accused a clear indication of the charges against him. The Trial Chamber found that the approximate dates listed in paragraphs five through twelve of that indictment fulfilled the requirement of the Rules. However, in coming to that determination, the Trial Chamber noted that if the defence determined that the material currently before it was not adequate to permit the preparation of the defence, it should seek further particulars under Rule 54. *Tadic Indictment Decision* at ¶ 8. The Trial Chamber found differently in regard to paragraph four of that indictment, which at that time provided [2]:

> Between about 23 May 1992 and 31 December 1992, Dusko TADIC participated with Serb forces in the attack, destruction and plunder of Bosnian Muslim and Croat

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residential areas, the seizure and imprisonment of thousands of Muslim and Croats under brutal conditions in camps located in Omarska, Keraterm and Trnopolje, and the deportation and/or expulsion of the majority of Muslim and Croat residents of opstina Prijedor by force or threat of force. During this time, Serb forces, including Dusko TADIC, subjected Muslims and Croats inside and outside the camps to a campaign of terror which included killings, torture, sexual assaults, and other physical and psychological abuse. By his participation in these acts, Dusko TADIC committed . . .

Count 1:

a CRIME AGAINST HUMANITY recognised by articles 5(h) (persecution on political, racial and/or religious grounds) and 7(1) of the Statute of the Tribunal; and,

Count 2:

a CRIME AGAINST HUMANITY recognised by articles 5(d) (deportation) and 7(1) of the Statute of the Tribunal; and,

Count 3:

a GRAVE BREACH recognised by Article 2(g) (unlawful deportation or transfer or unlawful confinement of a civilian) and 7(1) of the Statute of the Tribunal.

The Trial Chamber found that this paragraph did not give the accused a specific statement of the facts of the case and of the crimes with which he was charged because it alleged at least six distinct types of conduct over a period of seven months. The Trial Chamber determined that there should be a clear identification of particular acts of participation by the accused in such an attack. In regard to the third count, the Trial Chamber determined that the indictment failed to clarify which of the three different acts alleged - deportation, transfer, or confinement - were being charged against the accused. Accordingly, the Trial Chamber granted the Prosecution leave to amend the indictment if it desired to maintain the charge. *Id.* at ¶¶ 9-14.

16. In the *\ukic* case, Trial Chamber I reviewed the argument of the defence that the indictment was not specific because it made general allegations about the shelling of civilian targets in Sarajevo from May 1992 to about December 1995 without specifically stating the date, time, identity of those responsible, or targets. Trial Chamber I concluded that because of the serious nature of the allegations against the accused, he was entitled to receive all necessary information to prepare his defence and that the indictment did not demonstrate the appropriate level of precision required by the Trial Chamber in the *Tadic Indictment Decision*, noting specifically that it did not contain any identification of the acts or omissions of the accused \orde \ukic in the preparation or planning of his alleged criminal acts. Accordingly, the Trial Chamber invited the Prosecutor to make appropriate modifications to preserve the counts in the relevant part of the indictment. *\ukic Preliminary Motions Decision* at ¶¶16-18.

17. Most recently, this Trial Chamber reviewed a similar claim in the *Mucic Particulars Decision.* Because that decision addressed the current Indictment, it is perhaps the most relevant to this analysis. In that motion, the defence challenged, via a preliminary motion requesting full particulars, portions of paragraphs 7, 22, 29, 31, 33, 34, 35, 36 and 37. The allegations in the Indictment in regard to which the

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defence sought additional information fit into three categories: (1) the accused's knowledge of certain acts of his subordinates; (2) "the accused's failure to take necessary and reasonable measures to prevent or punish certain acts by his subordinates"; and (3) specific statements of certain acts by the accused and his subordinates. In reviewing the motion, the Trial Chamber first determined that the Indictment as stated against the accused Zdravko Mucic is not vague. Specifically, the Trial Chamber stated that the

> command responsibility charges against the accused (counts 13, 14, 33-35, 38, 39, 44, 45) are based on particular actions by his subordinates. The place, the approximate date and the names of the alleged victims are provided. On the issue of the involvement of the accused, the Prosecution asserts that Zdravko Mucic was the commander of the Celebici camp and therefore had command responsibility for the acts alleged. The direct responsibility charges (counts 46-49) relate to a prolonged course of conduct - *i.e.,* the inhumane conditions at the camp, the unlawful confinement of civilians and the plunder of property. The factual allegations underlying these charges indicate the approximate time period during which the conduct occurred, describe the underlying conduct with specificity and provide some information about the participation of the accused and others. In sum, each count of the indictment against Zdravko Mucic gives him warning of the nature of the crimes with which he is charged and sets out the factual basis of the charges. Thus, to the extent that the accused's motion seeks to challenge the indictment on vagueness grounds, it is rejected.

Mucic Particulars Decision at ¶ 6.

18. The standard set forth thus far by the Trial Chambers does not support the arguments of the Defence. In this case, the contested paragraphs give relatively specific dates of the occurrences with a range of the dates during which the incidents allegedly occurred. Moreover, all of the incidents are alleged to have occurred at or near the Celebici camp, and the manner in which the actions are described as occurring is adequately described at this stage of the proceedings. Moreover, by virtue of Zejnil Delalic having authority over the Celebici camp and its personnel - if this eventually proves true - there is a sufficient basis on which to base the claim that he knew or should have known of the mistreatment. Finally, as the Prosecution argues, it is nearly impossible to provide, as the Defence requests, a detailed description of a failure to take necessary and reasonable measures to prevent or to punish subordinates. As declared in the *Mucic Particulars Decision,* "[t]his request is more a search for the Prosecution's view of the applicable law than a solicitation of particular facts in the Prosecution's possession." *Mucic Particulars Decision* at ¶ 13.

19. In summary, unlike the challenged paragraph 4 of the *Tadic* indictment, the Indictment as against Zejnil Delalic articulates each charge specifically and separately. Moreover, there is a satisfactory identification of the particular acts of participation by Zejnil Delalic. Similarly, unlike the original *\ukic* indictment, the dates and actions over which Zejnil Delalic is said to have superior authority are relatively specific. Paragraph 7 of the Indictment simply describes the Prosecution's basis for believing the accused has command responsibility for the crimes that are subsequently described in the Indictment. This paragraph of the Indictment, read in conjunction with the third paragraph which names the accused as Commander of the First Tactical Group of the Bosnian Muslim forces with authority over the Celebici camp and its personnel, is not deficient. It contains a concise statement of the facts on which the charges are based as well as the crimes with which Zejnil Delalic is charged. As the Trial Chamber found in the *Mucic Particulars Decision,* the Indictment here is sufficient to put Zejnil Delalic on notice of the charges against which he must defend. Thus, taking into account the "summary nature" of an indictment and its purpose to "very succinctly demonstrate [ ] that the accused allegedly

committed a crime" [3], there has been no showing that the Indictment in this case is defective, and the Motion is rejected insofar as it challenges the Indictment on grounds of vagueness. However, the Defence may be justified in seeking additional information from the Prosecution.

3. Request for Particulars

20. In the alternative to a rejection of all charges against Zejnil Delalic, the Defence requests from the Prosecution more precision in the allegations in the Indictment and additional information. The Defence seeks particulars regarding: (1) the source of Zejnil Delalic's authority over Celebici camp, its guards, and all those who entered the camp and mistreated detainees; (2) the grounds for the allegation of Zejnil Delalic's authority over those named in the Indictment; (3) the allegations of injuries with which the co-accused Hazim Delic and Esad Landzo are charged; and (4) the specific dates of the alleged actions of the camp guards, visitors, and those named in the Indictment for whom Zejnil Delalic was responsible. The Prosecution contends that the Defence has in its possession all of the information it needs to prepare an adequate defence.

21. Such a request, sometimes referred to as a request for particulars, has been endorsed in both the *Tadic Indictment Decision* at ¶ 8 and the *Mucic Particulars Decision* at ¶ 7 for proceedings before the International Tribunal. These two Decisions taken together eloquently describe the process and standard to be employed by the Trial Chamber in evaluating such requests. Before submitting a motion for particulars, the defence must first make a direct request to the Prosecution for the information, specifying the counts in question, the reasons that the material already in the defence's possession is not sufficient, and the particular information that will remedy the inadequacy. *Tadic Indictment Decision* at ¶ 8. If the Prosecution fails to comply with the request, the defence may then submit a motion to the Trial Chamber that states "with particularity the respect in which a specified count, read in the light of the paragraph which precedes it, is said to require any and what further particulars." *Id.* In deciding a motion for particulars, the Trial Chamber considers whether the requested particulars are necessary "in order for the accused to prepare his defence and to avoid prejudicial surprise." *Mucic Particulars Decision* at ¶ 9 (*referring to* Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* at p. 823 (2d ed. 1992) and 11(2) *Halsbury's Laws of England* at ¶ 923 (1990)). Importantly, the Trial Chamber has noted that a motion for particulars is only properly directed to the sufficiency of the indictment and is not to be used to obtain the discovery of evidentiary material. *Id.* However, because discovery provides the defence with protection against prejudicial surprise at trial and gives it adequate information for preparing a meaningful defence, its availability is relevant to this analysis. *Id.*

22. Attached to its *Response to Materials*, the Prosecution in this case supplied supplemental evidence to the Trial Chamber in support of its arguments, particularly in relation to Zejnil Delalic's alleged position of authority. The Prosecution provided statements in which witnesses report that Zejnil Delalic was in charge of the Celebici camp and that as Co-ordinator he received a copy of an Investigative Commission's report indicating abuses in the camp. In addition, the Prosecution refers to statements and documentation, including a judgement from the Mostar Military Court, indicating that Zejnil Delalic became Commander of the First Tactical Group in June or early July and that during this time he had command over the Celebici camp. Moreover, there is documentation signed by Zejnil Delalic concerning the camp prisoners, and the Prosecution asserts that the Defence has been supplied with documents showing that, in his capacity as Commander of the First Tactical Group, Zejnil Delalic gave orders in August 1992 to his co-accused Zdravko Mucic, the Camp Commander. Finally, the

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Prosecution notes that it has evidence, including witness statements, indicating that Zejnil Delalic participated in a commanding role in the situation that resulted in the imprisonment of many of the detainees; that Zejnil Delalic acted as the head of the armed forces in the area; that Zejnil Delalic ordered that the camp be created; that he selected his co-accused Zdravko Mucic as the commander of the camp; that he had authority to release prisoners; and that he had authority over who entered and did not enter the camp. These documents, which were provided to the Defence, certainly provide enough information to Zejnil Delalic to allow him to prepare his defence in respect to the first two categories for which the Defence seeks particulars, and the Defence request for additional particulars is denied.

23. In regard to the third and fourth categories requesting additional information on the injuries attributed to the co-accused Hazim Delic and Esad Landzo and further specifics about the actions cited in the Indictment, there is also sufficient information on which Zejnil Delalic can prepare a defence. The Prosecution has included in the Indictment the names of those injured, the general time-frame in which the incidents allegedly occurred, and those who are alleged to be responsible for the actions. In addition, the Indictment sets forth with adequate specificity the injuries with which the co-accused Hazim Delic and Esad Landzo are charged and gives a relatively precise time period during which the incidents are alleged to have occurred. There is no basis for a finding that Zejnil Delalic will suffer from any prejudicial surprise in regard to these allegations. Accordingly, the Defence request for particulars in regard to the last two categories is also denied.

4. Cumulative Nature of the Charges

24. The Defence's final challenge to the Indictment is that the charges against Zejnil Delalic contain "several legal qualifications for the same actions, which without any base multiplies the responsibility of the accused." *Motion* at p. 6. The Defence argues that this is not permitted in many central European criminal law systems, including that of the former Yugoslavia. The identical issue was raised before the Trial Chamber in the *Tadic* case. There, the Trial Chamber declined to evaluate the argument on the basis that the matter is only relevant to the penalty considerations if the accused is ultimately found guilty of the charges in question:

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

Tadic Indictment Decision at ¶ 17. This reasoning is similarly applicable here. Accordingly, this challenge to the Indictment is also denied.

III. DISPOSITION

For the foregoing reasons,

the Trial Chamber,

pursuant to Rule 72,

HEREBY DENIES in all respects the Defence Motion on Defects in the Form of the Indictment.

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

Gabrielle
Kirk
McDonald

Presiding
Judge

Dated this second day of October 1996

at The Hague

The Netherlands

[Seal
of
the
Tribunal]

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1. *Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,* 12 August 1949, 75 UNTS 85; *Geneva Convention relative to the Treatment of Prisoners of War,* 12 August 1949, 75 UNTS 135; and *Geneva Convention relative to the Protection of Civilian Persons in Time of War,* 12 August 1949, 75 UNTS 287.

2. The Tadic Indictment was later amended effective 14 December 1995.

3. *Dukic Preliminary Motions Decision* at ¶ 16 (taking note of the nature of an indictment and rejecting Defence argument of defective indictment based on allegedly incorrect nature of indictment).

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International Criminal Tribunal for Rwanda
CHAMBER I

OR: ENG

Before: Judge Laïty Kama, Presiding
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry: Mr. K. M. Mindua

Decision of: 4 September 1998

THE PROSECUTOR
versus
PAULINE NYIRAMASUHUKO
and
ARSENE SHALOM NTAHOBALI

Case N°: ICTR-97-21-I

DECISION ON THE PRELIMINARY MOTION BY DEFENCE COUNSEL ON DEFECTS IN THE FORM OF INDICTMENT

Office of the Prosecutor:

Mr. James Stewart

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: JOHN KINEYEY
SIGNATURE: DATE: 8.9.1998

Counsel for the Defence:

Ms Frédérique Poitte

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the TRIBUNAL"),

SITTING AS Trial Chamber I composed of Judge Laïty Kama presiding, Judge Lennart Aspegren and Judge Navanethem Pillay;

CONSIDERING that Arsene Shalom Ntahobali (the "accused") was arrested in Kenya on 24 July 1997 and transferred to the seat of the Tribunal on the same day, pursuant to an order confirmed by Judge Yakov Ostrovsky on 29 May 1997;

CONSIDERING that the accused made his initial appearance on 17 October 1997 pursuant to Rule 62 of the Tribunal's Rules of Procedure and Evidence (the "Rules") and pleaded not guilty to all seven counts in the indictment;

CONSIDERING that Defence Counsel filed a preliminary motion on 19 February 1998, pursuant to Rule 73 (A) (iii) of the Rules, seeking an order to amend paragraphs 3.1 to 3.12 and counts 1 to 7 in the indictment;

CONSIDERING that the Prosecutor opposed Defence Counsel's motion and filed a written response dated 23 February 1998, with the Registry;

HAVING heard the Parties at a hearing on 25 February 1998.

On the amendment of the indictment

An interpretation of the relevant provisions of the Statute and the Rules.

1. Article 17(4) of the Statute of the Tribunal (the "Statute") states that once the Prosecutor has established that a prima facie case exists against the accused, she shall prepare an indictment containing a concise statement of facts and the crime or crimes with which the accused is being charged.

2. Furthermore, Rule 47(A) of the Rules states that if the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime she shall prepare and forward an indictment for confirmation.

3. The Tribunal refers to its decision of 25 November 1997, in the case of Prosecutor versus Gérard Ntakirutimana (ICTR -96-17-T). There that the term "prima facie" as envisaged in Article 17(4) of the Statute was defined as sufficient information which justifies a reasonable suspicion that the suspect did in fact commit the crime or crimes for which he is charged and the term "sufficient evidence"in Rule 47(A) of the rules was interpreted to mean essential facts, that when supported by

evidence, could result in a conviction. This did not mean conclusive evidence or evidence beyond a reasonable doubt.

4. Furthermore, Article 20(4)(a) of the Statute stipulates that the accused must be informed in detail of the nature and cause of the charge or charges against him. Rule 47(B) of the Rules states that an indictment shall contain the name and particulars of the suspect, a concise statement of the facts of the case and the crime or crimes for which the accused is charged.

5. The Tribunal, after having considered Articles 17(4) and 20(4)(a) of the Statute and Rules 47(A) and (B) of the Rules, finds that the indictment at the time of its confirmation must set out a prima facie case against the accused and the allegations therein must constitute an offence within the jurisdiction of the Tribunal. The indictment must also identify the suspect and inform him or her in a clear and concise manner the nature of the charges against him or her and the facts on which they are based.

Two decisions rendered by the ICTY

6. The Tribunal notes two decisions by the UN International Criminal Tribunal for the former Yugoslavia (the "ICTY")

7. In the case of The Prosecutor versus Duško Tadić (IT-94-I-T), the ICTY, in its decision of 14 November 1995, found that Rule 47(B) of the Rules had been complied with since the indictment identified the accused, stated paragraph by paragraph the facts of each offence and specified clearly the particular provisions of international humanitarian law that have been violated.The ICTY in this case also found that paragraph 4 of the indictment lacked the necessary degree of specificity in that it did not provide the accused with any specific or concise statement of facts of the case and of the crimes with which he is charged.

8. In the case The Prosecutor versus Zejnil Delalic and others (IT-96-21-T), the ICTY in its decision of 26 April 1996, stated that the principal function of of the indictment is to notify the accused in a summary manner as to the nature of the crimes of which he is charged and to present the factual basis for the accusations.

Review of the indictment

9. The Tribunal maintains that an indictment containing the charge against the accused must set out precise and specific allegations against him. The indictment must inform the accused, with sufficient clarity and certainty the nature of the charges against him and the essential facts on which they are based.

10. The Tribunal notes that, although the accused at the time of preparing his defence has the benefit of disclosure pursuant to Rules 66(A)(i) and (ii) of the Rules, the indictment still plays an integral part in the preparation of his defence. The supporting materials that accompany the indictment and the copies of witness statements made available to the accused are basically the evidence that amplifies and supports the various counts in the indictment. The indictment can therefore be seen as a foundation of the Prosecutor's case against the accused.

11. The Defence Counsel submitted that the indictment is defective because "..it fails to specify the period, place, victims, or perpetrators and, further, to define the role played by the accused in any of the events alleged to engage his criminal responsibility." (paragraph 40 of Defence motion)

12. The Prosecutor submitted that the indictment is not defective and on reading the indictment one must take into account the facts described in the indictment and the supporting material, as well as the particular circumstances of the conflict in Rwanda. (paragraph 27 of Prosecutor's response)

13. The Tribunal refers to its decision of 24 November 1997 in the case of Prosecutor versus Ferdinand Nahimana (ICTR-96-11-T), wherein it stated that "...the accused must be able to recognise the circumstances and the actions attributed to him in the indictment and in the supporting material...". Whilst it is essential to read the indictment together with the supporting material, the indictment on its own must be able to present clear and concise charges against the accused, to enable the accused to understand the charges.This is particularly important since the accused does not have the benefit of the supporting material at his initial appearance.

The time frame the alleged offences were committed

14. The Defence Counsel submitted that paragraph 3.1 of the indictment lacks precision because it refers to a period "...between the 1st of April and July 31st 1994." Defence Counsel also submitted that paragraphs 3.2, 3.3, and 3.4 which refer to "During the events referred to in this indictment...." and paragraphhs 3.8; 3.9 and 3.11 which refer to "During the period of events referred to to in paragraph 3.1..." are also vague and lack legal precision.

15. The Prosecutor submitted that the supporting material which was made available to the accused pursuant to Rule 66(i) of the Rules, completes the information concerning these periods in question. The Prosecutor, in paragraphs 31, 32, 33 and 34 of her written response cites the relevant portions of the supporting material to illustrate her submission.

16. The Tribunal finds that the indictment and the supporting material, if read together, sufficiently indicates the time frame the alleged offences took place.

The sites and locations at which the offences were allegedly committed

17. The Defence Counsel submitted that the indictment is vague and imprecise because counts 1 to 5 fail to give sufficient information of the various sites and locations of the alleged offences. In support of her submission, the Defence Counsel referred to various terms and expressions such as "..near.."; "..in the Prefecture.." and "..various locations.." to illustrate the vagueness and imprecision in the description of the sites where the alleged offences had taken place.

18. The Prosecutor submitted that there is sufficient information in the indictment and in the supporting documention to enable the accused to identify the sites where the alleged offence had taken place.The Prosecutor, in support of her submission quoted certain parts of the supporting documentation in her written response.

19. The Defence Counsel, in response to the allegation that a roadblock was set up near the house of the accused, as alleged in paragraph 3.8 of the indictment, averred that the home of the accused is located about one hundred metres from a military camp.

20. The Tribunal finds that the indictment if read with the supporting material sufficiently indicates where the offences allegedly took place. The various extracts from witness statements that form part of the supporting material indicate with sufficient specificity the various sites and locations of the alleged offences. Furthermore, the Defence Counsel's submission that the home of the accused is near a military camp is a matter for evidence at trial and should not be raised at this stage of the proceedings.

The alleged role played by the accused

Count 1

21. *Count 1* of the indictment charges the accused with Genocide. In respect of this count, the Defence Counsel submitted that :

(i) the indictment contains no act attributable to the accused that can be construed as an act of genocide and it merely concludes that the accused killed members of the Tutsi population without specifying when, how and under what circumstances these murders were allegedly committed;

(ii) Article 2 of the Statute defines acts of Genocide as being committed with intent to destroy, in whole or in part a national, ethnic, racial, or religious group. It is therefore essential for the indictment to provide the factual circumstances that make it possible to characterise such a situation.

22. The Prosecutor submitted that :

(i) pursuant to Article 6(1) of the Statute a person who planned, instigated, ordered, committed or aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the Statute shall be individually responsible for that crime;

(ii) paragraphs 3.8 to 3.12 of the indictment and the various extracts from witness statements that are referred to in the supporting document that accompany the indictment indicate with precision the alleged acts committed by the accused that not only comprise the crime of Genocide but also Crimes against Humanity and violation of Article 3 common to the Geneva Conventions and or Additional Protocol II.

23. The Tribunal finds that the indictment when read with the supporting material sufficiently indicates the alleged conduct of the accused that constitutes genocide.

Count 2

24. *Count 2* or the indictment charges the accused with complicity in genocide. In respect of this count the Defence Counsel submitted that :-

(i) the Prosecutor alleges that the accused acted with certain accomplices who are, members of the militia and soldiers, all of whom are unknown to her.This is evident in Paragraph 3.8 of the indictment where the Prosecutor refers to "..soldiers and other unknown accomplices.."and in paragraph 3.9 of the indictment where the Prosecutor refers to "..members of the militia known as interahamwe, as well as that of soldiers..". This count is therefore vague and lacks precision;

(ii) pursuant to Article 2(3) of the Statute, Genocide and Complicity in Genocide are separate offences and constitute separate and distinct acts. The Prosecutor has erred in that she charges the accused as a ring leader in *count 1* and as an accomplice in *count 2* for the same crime of genocide based on the same circumstances of time and place and on the same vague allegations

25. The Prosecutor submitted that paragraphs 3.8 to 3.12 of the indictment, as well as extracts from the various witness statements referred to in the supporting material sufficiently identify the accomplices the accused is alleged to have acted with.

26. The Tribunal notes that the supporting material indicates that the accused allegedly acted with co- accused, Pauline Nyiramasuhuko, a person named Kazungu as well as the interahamwe and accordingly finds that sufficient identification is made in respect of some of the accomplices.

27. The Tribunal notes that in the cases of the Prosecutor v. Duško Tadić (IT-94-I-T; decision on the defects in the form of the indictment) and Zejnnil Delalić and three others (IT-96-21-T; decision on the defects in the form of the indictment), the ICTY held that where an accused is

charged with more than one offence on the same set of facts, this matter is only relevant to sentencing if the accused is ultimately convicted of the charges in question. The Tribunal adopts this view and finds that similar reasoning is applicable here.

Count 3

28. *Count 3* of the indictment charges the accused with crimes against humanity, pursuant to Article 3(a) of the Statute.

29. In respect of this count, the Defence Counsel submitted that the concept of a crime against humanity presupposes that the act was committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The facts mentioned in 3.1 to 3.12 of the concise statement of facts in the indictment are insufficient to allow for the characterisation of such a situation and it also fails to establish the direct or personal participation of the accused in widespread or systematic killings or rapes of Tutsi victims.

30. In response, the Prosecutor submitted that the widespread or systematic attacks against the Tutsi civilian population is demonstrated prima facie in paragraph 3.3 of the indictment and in the supporting material. The supporting material also sufficiently indicates the accused's participation in systematic killings.

31. The Tribunal finds that there is sufficient information in the supporting material to support the allegation that there was a wide spread or systematic attack against the Tutsi population and the accused participated in this widespread or systematic attack.

Counts 4 ; 5 and 7

32. *Counts 4, 5 and 7* charge the accused with serious violations of Article 3 common to the Geneva Conventions and of additional protocol II, pursuant to Articles 4 (a) and 4 (e) of the Statute.

33. The Defence Counsel submitted that counts 4, 5 and 7 of the indictment do not give the accused a clear indication of the violations of the Geneva Conventions with which he is charged.There is no indication as to how, where and against whom these acts were allegedly committed.

34. The Prosecutor submitted that sufficient information in respect of counts 4, 5 and 7 are given in the various extracts of witness statements referred to in the supporting material.

35. The Tribunal finds that the supporting material is sufficient to enable the accused to

ascertain the acts which are alleged to connstitute violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, with which he is charged in counts 4, 5 and 7 of the indictment.

FOR THESE REASONS,

THE TRIBUNAL

DISMISSES the defence motion seeking an order to amend the indictment.

Arusha, 4 September 1998

Laity Kama	Lennart Aspegren	Navanethem Pillay
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

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International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994

Case No: ICTR-98-37-A

Date: 8 June 1998

Original: English

IN THE APPEALS CHAMBER

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

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

Decision of: **8 June 1998**

PROSECUTOR

v.

THÉONESTE BAGOSORA AND 28 OTHERS

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

The Prosecutor:
Louise Arbour
Bernard A. Muna

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 ("ICTR"), hereby issues its decision with respect to the Prosecutor's *ex parte* Notice of Appeal, filed on 6 April 1998[1] ("Notice of Appeal"), seeking to appeal from the Decision of Judge Tafazzal Hossain Khan[2], ("Decision"), dismissing an indictment against Théoneste Bagosora and 28 Others, filed on 31 March 1998 ("Indictment").

2. In her Notice of Appeal, the Prosecutor requests the Appeals Chamber to provide appropriate relief by quashing Judge Khan's Decision, declaring him competent to review the Indictment and remanding for a review of the Indictment on the merits.

3. This Appeals Chamber decision will also dispose of two additional motions filed by two individuals named in the Indictment. On 23 April 1998, Counsel for Anatole Nsengiyumva filed a motion seeking leave for the applicant to be joined as a party in the Appeal, or alternatively, leave to appear before the Appeals Chamber as *amicus curiae* and make submissions on, *inter alia*, whether an appeal lies from the Decision and whether the Appeals Chamber is competent to hear it, whether parties affected by such an appeal should be excluded from the proceedings, and whether such an appeal could be disposed of *ex parte*.[3] Counsel for Théoneste Bagosora filed on 1 May 1998, a motion arguing that the present appeal was inadmissible and seeking leave

[1] Notice of Appeal (Article 24 and Rule 108), *The Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR 98-37-I, 3 April 1998.
[2] Dismissal of Indictment, *The Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR 98-37-I, 31 March 1998.
[3] Motion by the Defence for Leave and/or Orders to be Enjoined in or be Invited as Amicus Curiae in an Appeal by the Prosecutor, *The Prosecutor v. Théoneste Bagosora and 28 Others* Case No. ICTR 98-37-I, 23 April 1998.

to be heard by the Appeals Chamber on the matter.[4] In separate orders of 29 April and 26 May 1998, the Appeals Chamber stayed consideration of the motions pending determination of whether an appeal lies from the Decision.[5]

[4] "Preliminary Motion regarding an appeal lodged by the Prosecutor against a decision of 30 March 1998 by Judge Tafazzal Hossein KHAN" [*sic*] *The Prosecutor v. Théoneste Bagosora and 28 Others,* Case No. ICTR 98-37-I, 1 May 1998.

[5] Order on Motion by the Defence in the Matter of Prosecutor v. Anatole Nsengiyumva Seeking Orders for Joinder or Leave to Appear as Amicus Curiae in an Appeal *The Prosecutor v. Théoneste Bagosora and 28 Others,* Case No. ICTR 98-37-I, 29 April 1998; Order on Motion by the Defence in the Matter of Prosecutor v. Théoneste Bagosora *The Prosecutor v. Théoneste Bagosora and 28 Others* Case No. ICTR 98-37-I, 26 May 1998.

II. LEGAL AND FACTUAL BACKGROUND

1. Procedural History

4. On 6 March 1998, pursuant to Article 17 of the Statute of the ICTR ("Statute") and Rule 47 of the Rules of Procedure and Evidence of the ICTR ("Rules"), the Prosecutor submitted to Judge Khan for review the Indictment, charging the indictees with the commission of various offences within Articles 2, 3 and 4 of the Statute. Sixteen of those individuals were the subjects of indictments pending before the ICTR.

5. On 31 March 1998, Judge Khan ("Confirming Judge") issued his Decision. He found that before reviewing the merits of the Indictment, he had first to determine two issues of jurisdiction, namely whether the Prosecutor could submit the Indictment, and whether a confirming judge had jurisdiction to confirm it under Article 18 of the Statute and Rule 47 of the Rules. He divided the twenty-nine individuals charged into three groups: the "First Group" of eleven persons who had been previously indicted and had made initial appearances and entered pleas before Trial Chambers of the ICTR pursuant to Rule 62 of the Rules; the "Second Group" of five persons previously indicted who remained at liberty; and the "Third Group" of thirteen persons who had not been indicted and who were at liberty. The Appeals Chamber will use the same terms to refer to these different categories of indictees.

6. The Confirming Judge considered that the charges contained in the Indictment related to substantially the same facts and offences alleged in the Indictments already existing against the First and Second Groups ("First Group Indictments" and "Second Group Indictments"). Only one new crime, conspiracy to commit genocide, was added to those contained in the First and Second Group Indictments.[6] He rejected, therefore, the Prosecutor's argument that the Indictment should be reviewed under Rule 47 and found that the proper course to follow would be for the Prosecutor to seek leave to amend the First and Second Group Indictments under Rule 50, or to withdraw them

[6] Decision at p.10.

pursuant to Rule 51 and resubmit the Indictment for consideration, or to follow the procedure in Rule 72, governing the submission of preliminary motions. In his view, the use of the procedure provided by Rule 47 would be an unwarranted usurpation of the jurisdiction of the Trial Chambers seized of the First Group Indictments and would circumvent the express provisions of the Rules that guarantee the right of the Defence to be heard. He further held that the submission of the Indictment for confirmation was a wrongful attempt on the part of the Prosecutor to join the accused in the three Groups, seeking to impinge on the jurisdiction of the Trial Chambers and contravene the rights of the accused of the First Group to a fair and expeditious trial without undue delay.[7] The Confirming Judge, therefore, declined jurisdiction over the First Group.

7. In respect of the Second Group, the Confirming Judge found that as the accused had been previously indicted but had not yet made initial appearances, jurisdiction lay with the Judges who had confirmed the Second Group Indictments ("Confirming Judges"). He, therefore, declined jurisdiction over the Second Group.

8. As to the Third Group, the Confirming Judge held that he was competent to review the Indictment but that consideration for the rights of the accused in the First Group militated against joining them with the Third Group in the Indictment. Noting the Prosecutor's unwillingness to sever the Indictment, he declined to review the substantive elements of the Indictment, also in relation to the Third Group.[8]

9. The Confirming Judge, therefore, dismissed the Indictment and, at the request of the Prosecutor, ordered its non-disclosure in the interests of protecting future prosecutorial investigations.

10. In her Notice of Appeal, the Prosecutor listed twenty grounds of appeal and reserved the right to enter such further grounds as the Appeals Chamber may permit.

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[7] Decision at pp. 10 and 11 "...the mandatory Rules for joinder of the accused...the only legal procedure...".
[8] Decision at pp. 11-12.

11. The Prosecutor, citing the nature and the importance of the proceedings, sought an expedited, *ex parte* hearing on the matter and requested the Appeals Chamber to order the stay of any trial proceedings in relation to the First and Second Group Indictments.

12. In an *Ex Parte* Scheduling Order of 23 April 1998, the Appeals Chamber ordered the Prosecutor to submit within seven days a brief addressing the question of whether an appeal lies from the Decision. The Chamber further ordered that the matter would be resolved expeditiously thereafter without oral argument and denied the request to stay proceedings.[9]

13. The Prosecutor filed her appellate brief[10] ("Appellant's Brief") on 30 April 1998. In the Appellant's Brief the Prosecutor asserts a number of grounds as justifying admission of the appeal and requests the Appeals Chamber to schedule a date for the submission of a brief on the merits and a date for oral arguments on the appeal.

[9] *Ex Parte* Scheduling Order, *The Prosecutor v. Théoneste Bagosora and 28 Others,* Case No. ICTR 98-37-I, 23 April 1998.

[10] Appellant's Brief by the Prosecutor in Support of the Admissibility of the Appeal of the Dismissal by Judge Khan of the Indictment against Bagosora and 28 Others of 31 March 1998 *The Prosecutor v. Théoneste Bagosora and 28 Others,* Case No. ICTR 98-37-I, 30 April 1998.

2. The Notice of Appeal

14. The Notice of Appeal is based on the Prosecutor's contention that the Indictment represents a critical component of a new Prosecutorial strategy. It is argued, therefore, that the dismissal of the Indictment by the Confirming Judge prejudices the ability of the Prosecutor to discharge her mandate under the Statute, which prejudice has a similar consequential impact on the ICTR.

15. In support of her submission that the Decision hinders her in the performance of her statutory functions, the Prosecutor lists twenty grounds of appeal and reserved the right to enter such further grounds as the Appeals Chamber may permit. The Appeals Chamber considers that many of these grounds overlap or are insufficiently distinguished to constitute separate foundations for an appeal from the Decision.

16. The Appeals Chamber will summarise the Prosecutor's grounds below.

17. The Prosecutor contends that the Confirming Judge made various errors of fact and of law by declining jurisdiction to consider the Indictment and by thereafter dismissing the Indictment. The Prosecutor considers as errors of law, *inter alia*, the findings that the Trial Chambers and Confirming Judges had jurisdiction over, respectively, the First and Second Groups,[11] the holding that the submission of the Indictment constituted an infringement of such jurisdiction[12] and that the Prosecutor should properly have proceeded under Rules 50, 51 or 72 of the Rules,[13] the finding that an individual could be charged only once with the same offences arising from the same or substantially the same facts,[14] and the holding that an accused in the First Group has a right to be heard on the amendment of an indictment.[15]

18. The Prosecutor submits that the Confirming Judge failed to consider sufficiently the grounds for the employment of the *ex parte* procedure under Rule 47

[11] *Ibid.*, at pp. 2-3, paras. 4, 7.
[12] *Ibid.*, paras. 5, 8.
[13] *Ibid.*, paras. 3, 10, 11,12.
[14] *Ibid.*, paras. 12,13.
[15] *Ibid.*, at p.4, para. 17.

and that he considered factors extraneous to his jurisdiction under Rule 47, thereby further erring in law.[16]

19. In addition, the Prosecutor submits that the Confirming Judge erred in law and in fact by, *inter alia*, holding that the Indictment contained only one substantial new charge[17] and made errors of fact occasioning a miscarriage of justice by finding that the submission of the Indictment under Rule 47 and the form of the Indictment were intended to circumvent or deny the rights of the accused[18].

[16] *Ibid.*, at p.4, paras. 16, 20.
[17] *Ibid.*, at p.3, para. 14.
[18] *Ibid.*, at p.3, paras. 6 and 9

3. Applicable Provisions

20. The Notice of Appeal is filed pursuant to Article 24 of the Statute and Rule 108 of the Rules. Article 24 provides:

Article 24
Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
   a) an error on a question of law invalidating the decision; or
   b) an error of fact which has occasioned a miscarriage of justice.

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

21. Rule 108 provides:

Rule 108
Notice of Appeal

(A) Subject to Sub-rule (B), a party seeking to appeal a judgement or sentence shall, not more than thirty days from the date on which the judgement or sentence was pronounced, file with the Registrar and serve upon the other parties a written notice of appeal, setting forth the grounds.

(B) Such delay shall be fixed at fifteen days in case of an appeal from a judgement dismissing an objection based on lack of jurisdiction or a decision rendered under Rule 77 or Rule 91.

22. Particular reference is made in the Appellant's Brief to Sub-rule 15(A), which provides:

Rule 15

Disqualification of Judges

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

III. DISCUSSION

23. In the Appellant's Brief, the Prosecutor argues that an appeal from the Decision lies as of right, a contention that is essentially founded on two propositions. Based on a broad reading of Article 24 of the Statute, it is argued that an appeal is allowed in the instant case. It is further submitted that the Appeals Chamber has an inherent right to entertain the appeal.[19] The Appeals Chamber will employ this framework in considering the arguments advanced by the Prosecutor in the Appellant's Brief.

1. A Liberal Interpretation of Article 24 of the Statute

24. In support of her first proposition, that Article 24 is sufficiently broad to encompass appeals such as the instant case, the Prosecutor submits that her mandate justifies a liberal reading of Article 24. It is then argued that such a reading would overcome the limitations on the right of appeal contained in the express terms of Article 24. These two elements will be addressed sequentially.

a. A broad reading of Article 24 is justified

25. The Prosecutor contends that the ICTR Statute must be interpreted liberally in light of its objects and purposes and in accordance with Article 31 of the *Vienna Convention on the Law of Treaties*,[20] such a construction being merited by the context in which the Statute was adopted and the objectives of the establishment of the ICTR.[21] It is submitted that the "grave implications" of the Decision on the Prosecutor's ability to discharge her mandate under the Statute jeopardises the achievement of those

[19] *Supra n.* 10 at para. 10.
[20] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *United Nations Treaty Series* 331.
[21] *Supra n.* 10 at paras. 11-13.

objectives and is thus in contradiction to the purposes of the ICTR. It is argued that the Decision thereby constitutes a miscarriage of justice.[22]

26. The Prosecutor argues, moreover, that Article 1 of the Statute itself supports a broad right of appeal. Article 1 states that the "the ICTR 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" within the relevant timeframe.[23] The Prosecutor asserts that the term "prosecute" involves not only actions by the Office of the Prosecutor, but also encompasses the activities by the judicial organ of the ICTR, contending that the Appeals Chamber, as an organ of the ICTR, must enjoy "the full complement of jurisdiction conferred on the Tribunal as an institution", except where there is clear expression in the Statute to the contrary.[24]

27. The Appeals Chamber finds these arguments devoid of merit. The execution of the Prosecutor's mandate is clearly not adversely affected by the Decision, as the Rules provide a variety of remedies to cure the effects of the dismissal of the Indictment. The Appeals Chamber considers that the dismissal of the Indictment is, therefore, not an obstacle to the achievement of the mandate of the ICTR and rejects the contention that it constitutes a miscarriage of justice.

28. The Appeals Chamber agrees with the Prosecutor on the applicability, *mutatis mutandis*, of the *Vienna Convention on the Law of Treaties* to the Statute. The relevant part of Article 31 reads as follows:

> A treaty shall be interpreted in good faith in accordance with *the ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose (emphasis added). [25]

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[22] *Ibid.*, at paras. 39 - 43.
[23] *Ibid.*, at paras. 44 - 45.
[24] *Ibid.*, at paras. 44-50.
[25] *Supra n. 20,* Article 31 (1).

29. The Appeals Chamber considers that, in the instant case, it is not necessary to engage in an interpretation of the *object and purpose* of the Statute of the ICTR. In the instant case, the Appeals Chamber finds that it cannot abandon the *ordinary meaning of the terms* of those provisions. Rather, it may only interpret them in light of such an ordinary meaning.

30. With respect to the jurisdiction of the Appeals Chamber, it is axiomatic that the Statute delimits the jurisdiction of the organs of the ICTR. Article 15 of the Statute states that the Prosecutor "shall be responsible for...prosecution" within the terms of Article 1 of the Statute, while Articles 17 and 18 stipulate the procedure for initiating investigations and prosecutions. By the ordinary meaning of the terms in Article 1 of the Statute, therefore, it is the Prosecutor who is charged with responsibility for prosecuting persons charged with criminal offences. Moreover, it is clear from the Statute, *inter alia*, Articles 18 and 19 and 21 through 25, that the involvement of the Trial and Appeals Chambers in prosecutions is limited to an adjudicatory one. The parameters of this function are determined by reference to the aforementioned provisions of the Statute, which are intended to establish a means of balancing the mandate and the discretion of the Prosecutor with the need to ensure respect for the rights of the accused. Although an organ of the ICTR, the Prosecutor is considered to be a party. In relation to the Prosecutor, therefore, the judiciary fulfils a role analogous to the checks and balances necessary to maintain the separation of powers in most national systems. Accordingly, the competence of the Chambers and the Prosecutor form distinct and independent components of the ICTR's jurisdiction under Article 1, rather than encompassing the full ambit of the institution's mandate to prosecute.

31. In raising this question, the Prosecutor essentially contends that the jurisdiction of the Trial and Appeals Chambers of the ICTR may be construed as being defined by reference to the manner in which the Prosecutor elects to discharge her mandate. In addition to finding that it is without legal foundation, the Appeals Chamber is of the view that such a submission deserves further comment. The Appeals Chamber considers that the implication of such a contention can only be that it will have jurisdiction over a matter where such jurisdiction is considered by the Prosecutor to be

necessary to the execution of her statutory functions. The Appeals Chamber finds that such a perception of its competence is not only legally flawed, but places a construction on the relationship between the Chambers and the Prosecutor that offends against the most fundamental principles which guarantee the independence of both organs. Following the establishment of the ICTR by the Security Council of the United Nations, the Prosecutor enjoys sole discretion in the execution of her mandate. Similarly, it is the sole prerogative of the Trial and Appeals Chambers, by applying the Statute and the Rules, to determine the limits of their own competence.

32. The logical consequence of the interpretation advanced in the Appellant's Brief would be that where the Trial or Appeals Chambers refused to grant any relief requested by the Prosecutor, the Chambers would thereby be obstructing her mandate. Clearly such a proposition is untenable, both in law and in policy. It is axiomatic that justice must be done and must be seen to be done. Thus, a predicate of the effective discharge of the ICTR's mandate is an impartial dispensation of justice. The Prosecutor's construction of the competence of the Chambers, rather than fulfilling that objective, would imperil its very achievement.

33. The Prosecutor's arguments for a teleological interpretation of the Statute, therefore, do not support such a broad interpretation of Article 24. Nevertheless, in view of the Prosecutor's submissions concerning the critical nature of the Indictment, the Appeals Chamber considers it appropriate to review the contentions concerning that provision.

b. <u>The present appeal implicitly falls within Article 24 of the Statute</u>

34. In the view of the Prosecutor, the language of Article 24 provides the Prosecutor with a general right of appeal from decisions of Trial Chambers, such a right being unlimited and unqualified.[26] It is claimed that the general nature of the right

[26] *Supra n.10* at paras. 16, 17.

derives from the non-exhaustive phrasing of Article 24,[27] which, it is asserted, is devoid of any language which would qualify the circumstances under which the Prosecutor may appeal decisions originating from the Trial Chamber.[28] Article 24, it is said, provides that the Appeals Chamber may hear appeals against decisions taken by the Trial Chambers from "persons convicted by the Trial Chambers" or from "the Prosecutor" *simpliciter*. However, this reading of Article 24, which would grant the Prosecutor an unfettered right of appeal, while that of the accused is limited, would violate the principle of equality of arms. Indeed, the principle of equality of arms requires that the parties enjoy corresponding rights of appeal.

35. Consistent with this principle, the Appeals Chamber finds that, in the instant case, where the matter affects the rights of the accused, the Prosecutor can have no greater power of appeal than accused persons.

36. While this finding is in itself sufficient to dispose of the Prosecutor's Notice of Appeal, in the interests of justice, the Appeals Chamber will consider the Prosecutor's remaining arguments.

37. Following the argument that Article 24 of the Statute grants an unlimited right of appeal, the Prosecutor construes the terms of that provision as implicitly allowing an appeal in the instant case. It is argued that a dismissal of an indictment under Rule 47 constitutes a final decision within the meaning of Article 24, as the Decision, by placing in peril the Prosecutor's strategy for the achievement of her mandate, has an effect analogous to a decision finally disposing of a matter.[29] In the view of the Appeals Chamber, however, the Rules provide ample recourse for the Prosecutor. Accordingly, the Appeals Chamber finds the Prosecutor's argument in this regard to be unfounded.

38. Further, the Prosecutor argues that a single judge is subject to the jurisdiction of the Appeals Chamber in the same manner as Trial Chambers, and that, therefore,

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[27] *Ibid.*, at para. 21.
[28] *Ibid.*, at paras. 14 - 18.
[29] *Ibid.*, at para. 28.

decisions of a single judge may be appealed under Article 24.[30] The Prosecutor argues that under Articles 10 and 18 of the Statute, a single judge is an integral part of the Trial Chamber and that the Rules implicitly envisage appeals from decisions of a single judge, as they provide that Trial Chambers and single judges shall have concurrent jurisdiction in certain circumstances.[31] While it is true that a single judge acting under Article 18 of the Statute and Rule 47 is always a member of a Trial Chamber, he is not acting as such during the review proceedings under these provisions. Rather, he is acting solely in his own capacity as a confirming judge.

39. The Prosecutor contends, moreover, that the ICTR and the International Criminal Tribunal for the former Yugoslavia ("ICTY") have expanded the scope of appellate jurisdiction beyond that expressly conferred by the Statute of either Tribunal. The Prosecutor cites Sub-rule 72(B)(ii) of the ICTY Rules which provides for appeals against decisions on preliminary motions other than those based on lack of jurisdiction[32] and Sub-rule 73(B) which provides for appeals against decisions on motions other than preliminary motions.[33] Such Rules, however, do not appear in the ICTR Rules. It is obvious that the Appeals Chamber of the ICTR can apply only the Rules of the ICTR.

40. It is further argued in the Appellant's Brief that this is a general trend of adopting Rules concerning appellate jurisdiction which is consistent with developments in international law that assertedly grant a right of appeal against decisions which raise questions of jurisdiction or of admissibility.[34] The Prosecutor contends that the Decision, by declining jurisdiction, raises such a question and should, therefore, be appealable. All of the examples cited by the Prosecutor, however, allow an appeal by both parties. Indeed, the Appeals Chamber notes that even in the proposed provision of the Draft Statute for the International Criminal Court[35] relating to appeal from the confirmation or the denial of an indictment, the introductory paragraph stipulates that

[30] *Ibid.*, at paras 41, 42.
[31] *Ibid.*, at paras. 24-26
[32] *Ibid.*, at para. 33.
[33] *Ibid.*, para. 36.
[34] *Ibid.*, at para. 37.

"*either party* may appeal any of the following interlocutory decisions" (emphasis added). Moreover, the Prosecutor's reliance on this particular example should be viewed in the overall context of that provision, which is merely a draft proposal.

41. Even if this was not sufficiently compelling to dispose of this leg of the Prosecutor's argument, the Appeals Chamber would refer to its earlier findings that the ICTR Rules contain provisions to cure any perceived adverse effects of the Decision on the Prosecutor.

42. Notwithstanding its finding that no appeal lies in this matter, the Appeals Chamber considers that to interpret Article 24 of the Statute in a manner consistent with the submissions of the Prosecutor would broaden the scope of the right of the Prosecutor to appeal to a dimension that was not envisaged by the drafters of the Statute or the Rules. Accordingly, the Chamber rejects the Prosecutor's proposition that the present appeal would lie under a broad construction of Article 24 of the Statute.

2. An Inherent Right of Appeal

43. The Prosecutor's alternative argument, that the appeal may be entertained pursuant to an inherent right of appeal, is founded on two contentions.

a. What is not prohibited is permitted

44. The Prosecutor asserts that there are no provisions in the Statute or Rules which preclude an appeal against the Decision. In her view, Article 24 does not exclude appeals which fall outside of the express provisions of its text, as "nothing in the Statute or the Rules expressly excludes the jurisdiction of the Appeals Chamber to

[35] Proposed Article 73 bis, Draft Statute for the International Criminal Court, cited as A/AC.249/1998/CRP.14, 1 April 1998 (excerpts), Cited in *Ibid.*, at para. 37.

hear such an appeal."[36] In support of this thesis, the Prosecutor asserts that there is established in the practice of international courts and tribunals a principle that "'what is not specifically prevented by the rules may be applied by the Court'".[37] Thus, it is argued, where the ICTR Statute is silent with respect to a particular competence, such competence may, nevertheless, be exercised.

45. The Appeals Chamber regards as unhelpful the reliance by the Prosecutor upon this principle. Clearly, the ICTR may apply what is not specifically prohibited by the Rules only where this would be consistent with the objects and purposes of the Statute. Such is not a circumstance presented by the instant appeal.

b. The practice of courts in national jurisdictions

46. The Prosecutor submits that an inherent right of appeal may be founded on the practice of courts in national jurisdictions. It is argued that a survey of national law indicates the existence of a general principle of law that, in the absence of an express provision to the contrary, a right of appeal generally lies from the decisions of a lower court.[38] The Prosecutor cites provisions from the Codes of Criminal Procedure of the civil law jurisdictions of France, Senegal and Germany, where decisions of lower courts dismissing an indictment may always be appealed to a superior court,[39] and the remedies of *mandamus* and *certiorari* in the common law jurisdictions of the United States and the United Kingdom.[40]

47. In the view of the Prosecutor, the Appeals Chamber may extrapolate an analogue of such rules to find jurisdiction in the instant appeal. The Prosecutor argues that general principles of law may be applied by international courts, citing, *inter alia*,

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[36] *Ibid.*, at para. 42.
[37] *Ibid.*, at para. 32, citing Application of the Genocide Convention (Provisional Measures) Order of 13 September 1993, (1993) *I.C.J. Reports*, at p.396, and *Corfu Channel Case* (Preliminary Objection), (1948) *I.C.J. Reports*, at p.28.
[38] *Ibid.*, at para. 51.
[39] *Ibid.*, at paras. 53 - 57.
[40] *Ibid.*

Article 38 of the Statute of the International Court of Justice and the jurisprudence of the ICTY.[41]

48. The Appeals Chamber notes, however, that each of the rules cited by the Prosecutor is based on an explicit statutory provision in the national jurisdiction concerned. The Appeals Chamber, therefore, finds them inapplicable in the instant matter.

49. The *obiter dicta* of Judge Sidhwa in his Separate Opinion on the Defence Motion for Interlocutory Appeal on Jurisdiction in the *Tadić* case are instructive, but not dispositive, in respect of the Prosecutor's overall assertion of her inherent right of appeal. Judge Sidhwa stated:

> "The law relating to appeals in most national jurisdictions is that no appeal lies unless conferred by statute. The right to appeal a decision is part of substantive law and can only be granted by the law-making body by specific enactment. Where the provision for an appeal or some form of review by a higher forum is not regulated by the statute under which an order is passed, there is usually some omnibus statute providing for appeals in such cases. The courts have no inherent powers to create appellate provisions or acquire jurisdiction where none is granted."[42]

50. The Appeals Chamber finds that the contentions of the Prosecutor, which would allow her the sole right of appeal, do not establish that it is competent to assert an inherent power of jurisdiction for this Notice of Appeal.

51. In addition to its findings on the substantive arguments concerning Article 24 that are adduced by the Prosecutor, the Appeals Chamber finds that the other principal provision relied upon by the Prosecutor in submitting her Notice of Appeal, Rule 108, does not apply in the case at issue. Rule 108 prescribes only the time-limit for the filing of a Notice of Appeal; it does not create a right of appeal. Moreover, it addresses

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[41] *Ibid.*, at paras. 59-62.
[42] Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, 2 October 1995, para. 6.

specific situations, namely where a party is seeking to appeal a "judgement or sentence" or "a judgement dismissing an objection based on lack of jurisdiction or a decision rendered under Rule 77 or Rule 91". Rule 108 does not apply to a decision of a single judge acting under Rule 47.

52. In concluding her submissions in the Appellant Brief, the Prosecutor argues that the Appeals Chamber is the correct forum to hear the present appeal, referring to Article 24 of the Statute and Part Six (Rules 73 - 106) and Sub-rule 15(A) of the Rules. Considering its findings, the Appeals Chamber considers it unnecessary to address these contentions.

53. The Appeals Chamber, thus, rejects the Prosecutor's application for leave to appeal the Decision.

IV. DISPOSITION

THE APPEALS CHAMBER, for the foregoing reasons, unanimously:

REJECTS the Prosecutor's Notice of Appeal from Judge Khan's Decision dismissing the Indictment against Théoneste Bagosora and 28 others,

REJECTS the motions filed, respectively by the accused Anatole Nsengiyumva and the accused Théoneste Bagosora, there being no ground to further consider the said motions.

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

Gabrielle Kirk McDonald
Presiding Judge

Judge Shahabuddeen appends a Declaration to this Decision.

Dated this eighth day of June 1998,
At Arusha,
Tanzania

[Seal of the Tribunal]

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UNITED
NATIONS

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994

Case No: ICTR-98-37-A

Date: 8 June 1998

Original: English

IN THE APPEALS CHAMBER

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

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

Decision of: **8 June 1998**

PROSECUTOR

v.

THÉONESTE BAGOSORA AND 28 OTHERS

DECLARATION OF JUDGE MOHAMED SHAHABUDDEEN ON THE ADMISSIBILITY OF THE PROSECUTOR'S APPEAL FROM THE DECISION OF A CONFIRMING JUDGE DISMISSING AN INDICTMENT AGAINST THÉONESTE BAGOSORA AND 28 OTHERS

The Prosecutor:
Louise Arbour
Bernard A. Muna

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My reason, which I think is sufficient, for agreeing with the decision to reject the Prosecutor's Notice of Appeal is that, as a matter of construction, Article 24 of the Statute does not, in my opinion, visualise an appeal being made when there is no case in existence between the Prosecutor and an accused. The Decision of the Reviewing Judge, which is sought to be appealed from, was not made in such a case; it was concerned with the prior question whether there should be such a case.

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

Judge Mohamed Shahabuddeen

Dated this eighth day of June 1998,
At Arusha,
Tanzania

[Seal of the Tribunal]

ICTR-97-21-I

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UNITED NATIONS **NATIONS UNIES**

ICTR
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International Criminal Tribunal for Rwanda
CHAMBER I

OR: ENG

Before: Judge Laïty Kama, Presiding
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry: Mr. K. M. Mindua

Decision of: 4 September 1998

THE PROSECUTOR
versus
PAULINE NYIRAMASUHUKO
and
ARSENE SHALOM NTAHOBALI

Case N°: ICTR-97-21-I

DECISION ON THE PRELIMINARY MOTION BY DEFENCE COUNSEL ON DEFECTS IN THE FORM OF INDICTMENT

Office of the Prosecutor:

Mr. James Stewart

Counsel for the Defence:

Ms Frédérique Poitte

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: JOHN KINEYEN
SIGNATURE: ..... *DATE:* 8.9.1998

ICTR-96-17-T

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the TRIBUNAL"),

SITTING AS Trial Chamber I composed of Judge Laïty Kama presiding, Judge Lennart Aspegren and Judge Navanethem Pillay;

CONSIDERING that Arsene Shalom Ntahobali (the "accused") was arrested in Kenya on 24 July 1997 and transferred to the seat of the Tribunal on the same day, pursuant to an order confirmed by Judge Yakov Ostrovsky on 29 May 1997;

CONSIDERING that the accused made his initial appearance on 17 October 1997 pursuant to Rule 62 of the Tribunal's Rules of Procedure and Evidence (the "Rules") and pleaded not guilty to all seven counts in the indictment;

CONSIDERING that Defence Counsel filed a preliminary motion on 19 February 1998, pursuant to Rule 73 (A) (iii) of the Rules, seeking an order to amend paragraphs 3.1 to 3.12 and counts 1 to 7 in the indictment;

CONSIDERING that the Prosecutor opposed Defence Counsel's motion and filed a written response dated 23 February 1998, with the Registry;

HAVING heard the Parties at a hearing on 25 February 1998.

On the amendment of the indictment

An interpretation of the relevant provisions of the Statute and the Rules.

1. Article 17(4) of the Statute of the Tribunal (the "Statute") states that once the Prosecutor has established that a prima facie case exists against the accused, she shall prepare an indictment containing a concise statement of facts and the crime or crimes with which the accused is being charged.

2. Furthermore, Rule 47(A) of the Rules states that if the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime she shall prepare and forward an indictment for confirmation.

3. The Tribunal refers to its decision of 25 November 1997, in the case of Prosecutor versus Gérard Ntakirutimana (ICTR -96-17-T). There that the term "prima facie" as envisaged in Article 17(4) of the Statute was defined as sufficient information which justifies a reasonable suspicion that the suspect did in fact commit the crime or crimes for which he is charged and the term "sufficient evidence"in Rule 47(A) of the rules was interpreted to mean essential facts, that when supported by

evidence, could result in a conviction. This did not mean conclusive evidence or evidence beyond a reasonable doubt.

4. Furthermore, Article 20(4)(a) of the Statute stipulates that the accused must be informed in detail of the nature and cause of the charge or charges against him. Rule 47(B) of the Rules states that an indictment shall contain the name and particulars of the suspect, a concise statement of the facts of the case and the crime or crimes for which the accused is charged.

5. The Tribunal, after having considered Articles 17(4) and 20(4)(a) of the Statute and Rules 47(A) and (B) of the Rules, finds that the indictment at the time of its confirmation must set out a prima facie case against the accused and the allegations therein must constitute an offence within the jurisdiction of the Tribunal. The indictment must also identify the suspect and inform him or her in a clear and concise manner the nature of the charges against him or her and the facts on which they are based.

Two decisions rendered by the ICTY

6. The Tribunal notes two decisions by the UN International Criminal Tribunal for the former Yugoslavia (the "ICTY")

7. In the case of The Prosecutor versus Duško Tadić (IT-94-I-T), the ICTY, in its decision of 14 November 1995, found that Rule 47(B) of the Rules had been complied with since the indictment identified the accused, stated paragraph by paragraph the facts of each offence and specified clearly the particular provisions of international humanitarian law that have been violated.The ICTY in this case also found that paragraph 4 of the indictment lacked the necessary degree of specificity in that it did not provide the accused with any specific or concise statement of facts of the case and of the crimes with which he is charged.

8. In the case The Prosecutor versus Zejnil Delalic and others (IT-96-21-T), the ICTY in its decision of 26 April 1996, stated that the principal function of of the indictment is to notify the accused in a summary manner as to the nature of the crimes of which he is charged and to present the factual basis for the accusations.

Review of the indictment

9. The Tribunal maintains that an indictment containing the charge against the accused must set out precise and specific allegations against him. The indictment must inform the accused, with sufficient clarity and certainty the nature of the charges against him and the essential facts on which they are based.

10. The Tribunal notes that, although the accused at the time of preparing his defence has the benefit of disclosure pursuant to Rules 66(A)(i) and (ii) of the Rules, the indictment still plays an integral part in the preparation of his defence. The supporting materials that accompany the indictment and the copies of witness statements made available to the accused are basically the evidence that amplifies and supports the various counts in the indictment. The indictment can therefore be seen as a foundation of the Prosecutor's case against the accused.

11. The Defence Counsel submitted that the indictment is defective because "..it fails to specify the period, place, victims, or perpetrators and, further, to define the role played by the accused in any of the events alleged to engage his criminal responsibility." (paragraph 40 of Defence motion)

12. The Prosecutor submitted that the indictment is not defective and on reading the indictment one must take into account the facts described in the indictment and the supporting material, as well as the particular circumstances of the conflict in Rwanda. (paragraph 27 of Prosecutor's response)

13. The Tribunal refers to its decision of 24 November 1997 in the case of Prosecutor versus Ferdinand Nahimana (ICTR-96-11-T), wherein it stated that "...the accused must be able to recognise the circumstances and the actions attributed to him in the indictment and in the supporting material...". Whilst it is essential to read the indictment together with the supporting material, the indictment on its own must be able to present clear and concise charges against the accused, to enable the accused to understand the charges.This is particularly important since the accused does not have the benefit of the supporting material at his initial appearance.

The time frame the alleged offences were committed

14. The Defence Counsel submitted that paragraph 3.1 of the indictment lacks precision because it refers to a period "...between the 1st of April and July 31st 1994." Defence Counsel also submitted that paragraphs 3.2, 3.3, and 3.4 which refer to "During the events referred to in this indictment...." and paragraphhs 3.8; 3.9 and 3.11 which refer to "During the period of events referred to to in paragraph 3.1..." are also vague and lack legal precision.

15. The Prosecutor submitted that the supporting material which was made available to the accused pursuant to Rule 66(i) of the Rules, completes the information concerning these periods in question. The Prosecutor, in paragraphs 31, 32, 33 and 34 of her written response cites the relevant portions of the supporting material to illustrate her submission.

16. The Tribunal finds that the indictment and the supporting material, if read together, sufficiently indicates the time frame the alleged offences took place.

The sites and locations at which the offences were allegedly committed

17. The Defence Counsel submitted that the indictment is vague and imprecise because counts 1 to 5 fail to give sufficient information of the various sites and locations of the alleged offences. In support of her submission, the Defence Counsel referred to various terms and expressions such as "..near.."; "..in the Prefecture.." and "..various locations.." to illustrate the vagueness and imprecision in the description of the sites where the alleged offences had taken place.

18. The Prosecutor submitted that there is sufficient information in the indictment and in the supporting documention to enable the accused to identify the sites where the alleged offence had taken place.The Prosecutor, in support of her submission quoted certain parts of the supporting documentation in her written response.

19. The Defence Counsel, in response to the allegation that a roadblock was set up near the house of the accused, as alleged in paragraph 3.8 of the indictment, averred that the home of the accused is located about one hundred metres from a military camp.

20. The Tribunal finds that the indictment if read with the supporting material sufficiently indicates where the offences allegedly took place. The various extracts from witness statements that form part of the supporting material indicate with sufficient specificity the various sites and locations of the alleged offences. Furthermore, the Defence Counsel's submission that the home of the accused is near a military camp is a matter for evidence at trial and should not be raised at this stage of the proceedings.

The alleged role played by the accused

Count 1

21. *Count 1* of the indictment charges the accused with Genocide. In respect of this count, the Defence Counsel submitted that :

(i) the indictment contains no act attributable to the accused that can be construed as an act of genocide and it merely concludes that the accused killed members of the Tutsi population without specifying when, how and under what circumstances these murders were allegedly committed;

(ii) Article 2 of the Statute defines acts of Genocide as being committed with intent to destroy, in whole or in part a national, ethnic, racial, or religious group. It is therefore essential for the indictment to provide the factual circumstances that make it possible to characterise such a situation.

22. The Prosecutor submitted that :

(i) pursuant to Article 6(1) of the Statute a person who planned, instigated, ordered, committed or aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the Statute shall be individually responsible for that crime;

(ii) paragraphs 3.8 to 3.12 of the indictment and the various extracts from witness statements that are referred to in the supporting document that accompany the indictment indicate with precision the alleged acts committed by the accused that not only comprise the crime of Genocide but also Crimes against Humanity and violation of Article 3 common to the Geneva Conventions and or Additional Protocol II.

23. The Tribunal finds that the indictment when read with the supporting material sufficiently indicates the alleged conduct of the accused that constitutes genocide.

Count 2

24. *Count 2* or the indictment charges the accused with complicity in genocide. In respect of this count the Defence Counsel submitted that :-

(i) the Prosecutor alleges that the accused acted with certain accomplices who are, members of the militia and soldiers, all of whom are unknown to her.This is evident in Paragraph 3.8 of the indictment where the Prosecutor refers to "..soldiers and other unknown accomplices.."and in paragraph 3.9 of the indictment where the Prosecutor refers to "..members of the militia known as interahamwe, as well as that of soldiers..". This count is therefore vague and lacks precision;

(ii) pursuant to Article 2(3) of the Statute, Genocide and Complicity in Genocide are separate offences and constitute separate and distinct acts. The Prosecutor has erred in that she charges the accused as a ring leader in *count 1* and as an accomplice in *count 2* for the same crime of genocide based on the same circumstances of time and place and on the same vague allegations

25. The Prosecutor submitted that paragraphs 3.8 to 3.12 of the indictment, as well as extracts from the various witness statements referred to in the supporting material sufficiently identify the accomplices the accused is alleged to have acted with.

26. The Tribunal notes that the supporting material indicates that the accused allegedly acted with co- accused, Pauline Nyiramasuhuko, a person named Kazungu as well as the interahamwe and accordingly finds that sufficient identification is made in respect of some of the accomplices.

27. The Tribunal notes that in the cases of the Prosecutor v. Duško Tadić (IT-94-I-T; decision on the defects in the form of the indictment) and Zejnnil Delalić and three others (IT-96-21-T; decision on the defects in the form of the indictment), the ICTY held that where an accused is

charged with more than one offence on the same set of facts, this matter is only relevant to sentencing if the accused is ultimately convicted of the charges in question. The Tribunal adopts this view and finds that similar reasoning is applicable here.

Count 3

28. *Count 3* of the indictment charges the accused with crimes against humanity, pursuant to Article 3(a) of the Statute.

29. In respect of this count, the Defence Counsel submitted that the concept of a crime against humanity presupposes that the act was committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The facts mentioned in 3.1 to 3.12 of the concise statement of facts in the indictment are insufficient to allow for the characterisation of such a situation and it also fails to establish the direct or personal participation of the accused in widespread or systematic killings or rapes of Tutsi victims.

30. In response, the Prosecutor submitted that the widespread or systematic attacks against the Tutsi civilian population is demonstrated prima facie in paragraph 3.3 of the indictment and in the supporting material. The supporting material also sufficiently indicates the accused's participation in systematic killings.

31. The Tribunal finds that there is sufficient information in the supporting material to support the allegation that there was a wide spread or systematic attack against the Tutsi population and the accused participated in this widespread or systematic attack.

Counts 4 ; 5 and 7

32. *Counts 4, 5 and 7* charge the accused with serious violations of Article 3 common to the Geneva Conventions and of additional protocol II, pursuant to Articles 4 (a) and 4 (e) of the Statute.

33. The Defence Counsel submitted that counts 4, 5 and 7 of the indictment do not give the accused a clear indication of the violations of the Geneva Conventions with which he is charged.There is no indication as to how, where and against whom these acts were allegedly committed.

34. The Prosecutor submitted that sufficient information in respect of counts 4, 5 and 7 are given in the various extracts of witness statements referred to in the supporting material.

35. The Tribunal finds that the supporting material is sufficient to enable the accused to

ascertain the acts which are alleged to connstitute violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, with which he is charged in counts 4, 5 and 7 of the indictment.

FOR THESE REASONS,

THE TRIBUNAL

DISMISSES the defence motion seeking an order to amend the indictment.

Arusha, 4 September 1998

Laity Kama Presiding Judge	Lennart Aspegren Judge	Navanethem Pillay Judge

(Seal of the Tribunal)

IN TRIAL CHAMBER II

Before:
Judge Antonio Cassese, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge David Hunt

Registrar:
Dorothee de Sampayo Garrido-Nijgh

Decision of:
5 October 1999

PROSECUTOR

v

Radoslav BRDJANIN

DECISION ON MOTION TO DISMISS INDICTMENT

The Office of the Prosecutor:

Ms Joanna Korner
Mr Michael Keegan
Ms Ann Sutherland

Counsel for the Accused:

Mr John Ackerman

I Introduction

1. The accused (Radoslav Brdanin) has been charged with a crime against humanity, based upon persecutions on political, racial or religious grounds.[1]

2. The indictment alleges that:

(i) In 1992, actions were taken in certain areas of Bosnia and Herzegovina, including the Autonomous Region of Krajina ("ARK"), which resulted in the death or forced departure of most of the Bosnian Muslim and Bosnian Croat populations from those areas.[2]

(ii) These actions were taken by police units, paramilitary groups, Territorial Defence units

and units of the Yugoslav People's Army.[3]

(iii) Crisis Staffs (later re-designated War Presidencies) were created at both the regional and municipal level as the bodies responsible for the execution of the majority of these actions.[4]

(iv) In May 1992, the ARK Crisis Staff publicly declared itself as the highest organ of authority at the regional level and that the implementation of its directions and orders was mandatory.[5]

(v) The essential members of the ARK Crisis Staff acted in concert in planning, instigating, ordering, committing or otherwise aiding and abetting the complete range of operations related to the conduct of the hostilities and destruction of Bosnian Muslim, Bosnian Croat and other non-Serb communities in the Autonomous Region of Krajina.[6]

(vi) The accused was a member of the ARK Crisis Staff, becoming its President, and as such was responsible for managing the work of the Crisis Staff, the implementation and co-ordination of Crisis Staff decisions and conclusions, reporting activities, and for signing its decisions and orders. He also convened, chaired and controlled the agenda of its sessions. In addition, he played a significant role in the propagation of the propaganda campaign that was an essential element in the success of the plan to create a Serbian state.[7]

(vii) As such President, the accused had individual responsibility (within the meaning of Article 7.1 of the Tribunal's Statute)[8] for the physical take-over of the ARK municipality, the violent attacks on Bosnian Muslim and Bosnian Croat villages and areas, the forcible removal of non-Serbs from those areas, the killing and physical maltreatment of Bosnian Muslims and Bosnian Croats, the detention of non-Serbs in camps and other detention centres, and the forced transfer or deportation of Bosnian Muslims and Bosnian Croats from the area of the ARK. Each of those acts was done in order to achieve the expulsion of the Bosnian Muslim, Bosnian Croat and non-Serb populations from the area of the ARK because of their political, racial and religious identity. His was the most important position of executive authority in the ARK.[9]

(viii) The ARK Crisis Staff also had the authority to direct the Regional Centre for Public Security and the Public Prosecutor to investigate, arrest and prosecute any persons believed to have committed crimes within the ARK, whether in the camps or elsewhere, but it failed to take necessary and reasonable measures to prevent such crimes or to have the perpetrators thereof punished.[10]

(ix) As the President of the ARK Crisis Staff, the accused also had superior authority and thus responsibility (within the meaning of Article 7.3 of the Tribunal's Statute)[11] for the events described in paragraph (vii).[12]

3. Detailed particulars are given over ten paragraphs of the indictment of the allegation that the accused initiated a "three part plan" –[13]

(1) to create impossible conditions, involving pressure and terror tactics, that would have the effect of encouraging the non-Serbs to leave the area; (2) to deport and banish those who

were reluctant to leave; and (3) to liquidate those non-Serbs who remained and who did not fit into the concept of the Serbian State.

The execution of that plan is alleged to have included –[14]

(1) the denial of fundamental rights to Bosnian Muslims and Croats, including the right to employment and freedom of movement;
(2) the wanton destruction of Bosnian Muslim and Bosnian Croat villages and areas, including the destruction of religious and cultural buildings in the areas attacked;
(3) the killing of Bosnian Muslims, Bosnian Croats and other non-Serbs;
(4) causing serious bodily or mental harm to Bosnian Muslims, Bosnian Croats and other non-Serbs;
(5) detaining Bosnian Muslim and Bosnian Croats under conditions of life calculated to bring about the physical destruction of a part of those populations; and
(6) the forced transfer or deportation of Bosnian Muslim and Bosnian Croats from areas of Bosnia and Herzegovina that had been proclaimed as part of the Serbian Republic of Bosnia and Herzegovinia.

4. This indictment was reviewed by Judge Rodrigues, and confirmed by him on 14 March 1999. The accused was detained on 6 July and transferred to The Hague where his initial appearance before the Tribunal took place on 12 July. Because of delays in assigning counsel, the time for filing motions pursuant to Rule 72 of the Rules of Procedure and Evidence ("Rules") was extended until 2 September.[15]

II The application

5. On 31 August, a "Motion to Dismiss Indictment" ("Motion") was filed by the accused, alleging that none of the material presented by the prosecution to Judge Rodrigues in support of the indictment pursuant to Rule 47(B) provides support for the allegations in the indictment – in particular, that they did not establish that the accused had any authority over military matters in the ARK, that he played any part in ethnic cleansing or in the camps in the area, that he ordered (or could have ordered) any deportations, or that he knew or had reason to know that any of these things had been done – and that there is no indication in the material as to how the accused voted at meetings of the Crisis Staff and whether he supported or rejected decisions of the Crisis Staff. It is alleged that the material presented by the prosecution in fact establishes the contrary of what is alleged in the indictment – that the Bosnian Serb and Serb forces were in fact controlled by the General Staff of the Army of the Republika Srpska, through the Commanding General of the First Krajina Corps, and that those forces included the former Territorial Defence units, paramilitary forces and police forces engaged in combat operations.

6. The accused has argued that:

(1) the confirmation procedure is jurisdictional, and there can be no jurisdiction if that procedure is not properly followed,[16] and
(2) the Tribunal has jurisdiction to try him upon any one count in an indictment only when the supporting material supports the existence of that count,[17]

hence his reliance upon Rule 72(A)(i) of the Rules. These are arguments which only became apparent in

the accused's Reply to the prosecution's Response to his Motion.

III Analysis and Rulings

7. The Trial Chamber does not accept either of these arguments of the accused. The first of the arguments may be disposed of briefly.

8. Assuming (without deciding) that it is open to the Trial Chamber to determine whether the procedure laid down by the Tribunal's Statute and the Rules for the confirmation of an indictment has been followed, the accused has produced no evidence that the procedure was not followed on this occasion. All that the accused has alleged is that Judge Rodrigues was in error in his finding that the supporting material provided a *prima facie* case against him,[18] and that the Statute and Rules "were not properly followed since an indictment was confirmed where there was no supporting evidence in the supporting materials".[19] However, even if it be accepted for the purposes of argument that the supporting material did not establish a *prima facie* case, an error made by the judge in the resulting decision which he made does *not* establish that he did not properly follow the procedure. This first argument of the accused confuses form and substance. His real argument is the second.

9. Traditionally, the jurisdiction of a criminal court to try a particular person upon indictment is founded upon, and invoked by, the indictment itself, which must plead as material facts the fundamental elements of its jurisdiction – its competence as to subject-matter (*ratione materiae*), persons (*ratione personae*), territory (*ratione loci*) and time (*ratione temporis*).[20] The fundamental elements of this Tribunal's jurisdiction are set out in Articles 1 to 8 of its Statute. Article 1 provides:

> **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.

Articles 2 to 5 define the particular offences which the Tribunal has power to try. Article 6 gives to the Tribunal jurisdiction over natural persons. Article 7 provides the definition of individual criminal responsibility quoted earlier, which is consistent with the liability of accessories generally.[21] Article 8 defines the Tribunal's temporal and territorial jurisdiction consistently with Article 1.

10. There has not been, and there could not be, any submission that the indictment in the present case does not plead sufficient material facts to invoke the jurisdiction of the Tribunal to try the accused upon the charge laid. Where such a submission is made in relation to what is traditionally regarded as the jurisdiction of a criminal court, the court would examine the facts alleged in the indictment; it would not examine whether there was evidence available to the prosecution to establish the truth of those facts so alleged.

11. The accused, however, argues that the Tribunal's Statute and the Rules impose requirements beyond what has traditionally been required to invoke the jurisdiction of a criminal court. For this argument, it is necessary to examine the particular provisions to which reference has been made. Article 18.4 provides:

> Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19.1 provides:

> The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

Rule 47, so far as it is said to be relevant, provides:

> [...]
>
> (B) The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar and indictment for confirmation by a Judge, together with supporting material.[22]
>
> [...]
>
> (D) The Registrar shall forward the indictment and accompanying material to the designated Judge, who will inform the Prosecutor of the date fixed for review of the indictment.
>
> (E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 19, paragraph 1, of the Statute, whether a case exists against the suspect.

12. It is clear that, *so far as the Statute itself is concerned*, it is only the indictment which needs to disclose a *prima facie* case. The Statute is thus in conformity with the traditional concept that the jurisdiction of a criminal court is founded upon, and invoked by, the indictment and the indictment alone. The Statute makes no reference to the supporting materials, which are introduced for the first time in Rule 47. It needs perhaps to be emphasised that the rules which the judges are authorised by Article 15 of the Statute to adopt may relate only to –

> [...] the *conduct* of the pre-trial phase of the proceedings [...] and other appropriate matters.[23]

The rules cannot themselves alter what is provided by the Statute.

13. The purpose of Rule 47(E), in ensuring that there is material available to support the material facts pleaded in the indictment, is in effect to equate the confirming judge to the grand jury (or committing magistrate) in the common law system or to the *juge d'instruction* in some civil law systems.[24] However, the supporting material may not be used to fill in any gaps which may exist in the material facts so pleaded when determining whether a *prima facie* case exists in accordance with Article 19.1 of the Statute.[25] That Article imposes a quite separate requirement upon the confirming judge.

14. It could perhaps be that, as the accused suggests,[26] at least one purpose of the confirmation process is –

> [...] to place a judicial authority between the Prosecutor and a potential defendant so that persons are not indicted and arrested upon whim, caprice or fanciful expectations.

But such a purpose does *not* impose any requirement upon the existence of the jurisdiction of the Tribunal beyond those requirements already imposed by the Statute. Article 19.2 makes it reasonably clear that the Statute requires the review and confirmation of the indictment in order to justify the issue of an arrest warrant.[27] It is *not* to provide a limitation upon the Tribunal's jurisdiction.

15. Again, therefore, even if it be accepted for the purposes of argument that the supporting material did not establish the *prima facie* case pleaded in the indictment, the jurisdiction of the Tribunal still depends solely upon what is pleaded in the indictment. Whether there is evidence to support any charge pleaded in the indictment is an issue to be determined – as in both the common law and civil law systems - by the Trial Chamber, at the conclusion of the trial or (if the issue is raised) at the close of the prosecution case.[28]

16. There is no jurisprudence within this Tribunal which is directly in point. The decision of the Appeals Chamber in the *Tadic Jurisdiction Appeal*[29] does not deal with the issue. There are a number of decisions of the Appeals Chamber on appeal from the Rwanda Tribunal in which it has had to determine whether a particular motion challenges the jurisdiction of that Tribunal (the availability of an appeal depending upon that circumstance), but they are of no assistance in relation to the present issue.[30]

17. There is, however, one decision of a Trial Chamber in this Tribunal which could perhaps be interpreted as referring to the issue. In *Prosecutor v Djukic*,[31] the accused applied urgently to the Trial Chamber after the trial was said to have begun for an order that he be released, upon two grounds – first, "the lack of evidence supporting the indictment" and, secondly, the gravity of his medical condition. In response, the prosecution applied for leave to withdraw the indictment upon the second of those grounds, to which the accused objected, requesting that the indictment be

withdrawn upon the first ground. The Trial Chamber ruled that an indictment could never be withdrawn upon medical grounds, no matter how critical. After considering that the Trial Chamber, notwithstanding that medical condition, could ensure that the accused would enjoy the equitable trial to which he was entitled, it then stated:

> **CONSIDERING** furthermore that the withdrawal of the indictment as requested by the defence counsel S...C also may not be accepted; that such a request is, in fact, not relevant at this stage of the proceedings; that the issue of alleged sufficient or insufficient evidence could only be reviewed at a later date, either during the review of the preliminary motions or during the trial proper;
>
> **CONSIDERING** therefore that leave to withdraw the indictment cannot be granted,
>
> [...].

The accused was nevertheless granted a provisional release upon the basis of his medical condition.

18. There is, with respect, some confusion apparent in the decision of the Trial Chamber – (1) between the sufficiency of the supporting material produced for the purposes of confirmation (to which the accused appears to have been referring) and the sufficiency of the evidence produced in the trial to establish the charges laid, and (2) between a request by an accused that the indictment be withdrawn and an application by him that it be dismissed for insufficient evidence. Nor, with respect, is it clear what was intended by the phrase "the review of the preliminary motions", or how such a "review" could take place during the trial itself. This Trial Chamber sees no support in that decision for the present application.

19. The prosecution relies upon a decision of a Trial Chamber of the Rwanda Tribunal which, it is suggested, ruled that Rule 72 cannot be used in order to challenge the decision of a single judge confirming an indictment: *Prosecutor v Nahimana*.[32] What the Trial Chamber said was this:[33]

> [...] the Chamber considers that neither Rule 47 nor Rules 72 and 73 of the Rules permit appeals against a decision rendered by a single Judge to confirm an indictment. Only in special circumstances can a preliminary motion raising objections against the form of the confirmation of an indictment be applied as an indirect means to obtain a review by a Trial Chamber of a confirming decision.

As no evidence has been produced in the present case that there has been an irregularity in the *form* of the confirmation proceedings, it is unnecessary to decide here whether a Trial Chamber can entertain a challenge as to the form of those proceedings. Although this Trial Chamber agrees with what appears to be implicit in that decision – that the insufficiency of the supporting material does not provide a basis for challenging the jurisdiction of the Tribunal – it prefers to base its decision upon the wording of the Statute, and it does not necessarily accept the reasoning of the Trial Chamber in *Nahimana* for that conclusion.

20. The Trial Chamber is satisfied that an insufficiency of the supporting material is irrelevant to the issue of the Tribunal's jurisdiction. The challenge to that jurisdiction must therefore fail.

21. There is no provision in the Rules of Procedure and Evidence which permits a Trial Chamber to review the actual decision made by the confirming judge, by way of appeal or in any other way. Indeed, care is taken in the Rules to keep the functions of the confirming judge and of the Trial Chamber apart. For example, Rule 15(C) provides:

> The Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61, shall not sit as a member of the Trial Chamber for the trial of that accused.

Rule 50 provides that amendments to the indictment up to the time when evidence is presented to the Trial Chamber may not be permitted by the Trial Chamber but only by the confirming judge or another judge assigned by the President, and only thereafter by the Trial Chamber.

22. That is not to suggest that, if for any reason the Trial Chamber were to become aware of the contents of the supporting material presented by the prosecution to the confirming judge, its members would thereby automatically be disqualified from subsequently sitting on the trial of the accused. The intention of this division of functions is to avoid any contamination spreading from the *ex parte* nature of the confirming procedure to the Trial Chamber. Where the Trial Chamber has permitted an indictment to be amended, and thus must for the purpose of confirming that amended indictment review for itself the supporting material, that review is performed *inter partes*, in open court in the presence of the accused, and the amended indictment may be confirmed only after hearing both parties.[34] The possibility of contamination spreading from the *ex parte* nature of the confirming procedure is therefore effectively eliminated.[35]

23. The fact nevertheless remains that there is no basis in the Rules of Procedure and Evidence upon which the Trial Chamber could review the decision of the confirming judge that the material provided by the prosecution to that judge supports the material facts pleaded in the indictment. The function of the Trial Chamber is, as stated earlier, to determine whether the evidence produced at the trial is sufficient to establish the charges pleaded in the indictment.

IV Disposition

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24. For the foregoing reasons, the Trial Chamber dismisses the Motion.

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

Dated this 5th day of October 1999,
At The Hague,
The Netherlands.

Judge David Hunt
Pre-Trial Judge
(at the request of the Presiding Judge)

[Seal of the Tribunal]

1. Statute of the Tribunal, Article 5.
2. Paragraph 9.
3. Paragraph 9.
4. Paragraphs 8, 10.
5. Paragraph 8.
6. Paragraph 14
7. Paragraphs 12, 16.
8. Article 7.1 provides:
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.
9. Paragraphs 14, 16, 35.
10. Paragraphs 15, 36.
11. Article 7.3 provides:
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.
12. Paragraph 36.
13. Paragraph 22.
14. Paragraph 23.
15. Order Granting Extension of Time under Rule 72, 4 Aug 1999.
16. Reply of Radoslav Brdanin to Prosecution's Response to Motion to Dismiss Indictment ("Reply"), 15 Sept 1999, par 7.
17. *Ibid*, par 5.
18. Motion to Dismiss Indictment, 31 Aug 1999, pars 7-8.
19. Reply, par 13.
20. The validity of the instrument by which the court is established was considered as an issue of jurisdiction in *Prosecutor v Tadic* (1995) I ICTY JR 353 at 365-375 (pars 9-22), but that is not an issue here.
21. *Prosecutor v Furundžija*, Case IT-95-17/1-T, 10 Dec 1998, at pars 234-235.
22. This is not the occasion to consider whether the degree of satisfaction on the part of the Prosecutor required by Rule 47 (B) is consistent with Article 18.4 of the Statute.
23. The emphasis has been added.
24. *Prosecutor v Kordic,* Case IT-95-14-I, Decision on Review of Indictment, 10 Nov 1995, at p 3; *Prosecutor* v *Miloševic*, Case IT-99-37-I, Decision on Review of Indictment and Application for Consequential Orders, 24 May 1999, par 2.
25. *Prosecutor v Krnojelac* Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, par 15.
26. Reply, par 6.
27. Article 19.2 provides:
Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.
28. Rule 98*bis* ("Motion for Judgment of Acquittal"), where a submission is made that there is no case to answer.

29. *Prosecutor v Tadic* (1995) I ICTY JR 353.
30. See, for example: *Prosecutor v Rutaganda*, Case ICTR-96-3-A, 8 June 1998; *Nsengiyuma v Prosecutor*, Case ICTR-96-12-A, 3 June 1999; *Kanybashi v Prosecutor*, Case ICTR-96-15-A, 3 June 1999.
31. Case IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 Apr 1996.
32. Case ICTR-96-11-T, 24 Nov 1997. The rules referred to are the same in substance as the similarly numbered rules in this Tribunal's Rules of Procedure and Evidence.
33. (at par 6).
34. Rule 50(A)(iii).
35. *Prosecutor v Krnojelac*, Decision of Prosecutor's Response to Decision of 24 February 1999, 20 May 1999, pars 11-12.

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IN THE APPEALS CHAMBER

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

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
16 November 1999

PROSECUTOR

v.

RADOSLAV BRDANIN
MOMIR TALIC

DECISION ON INTERLOCUTORY APPEAL FROM DECISION ON MOTION TO DISMISS INDICTMENT FILED UNDER RULE 72

The Office of the Prosecutor:

Ms. Joanna Korner

Counsel for the Appellant:

Mr. John Ackerman for Radoslav Brdjanin

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 ("International Tribunal"),

NOTING the Decision on Motion to Dismiss Indictment ("Decision"), issued by Trial Chamber II on 5 October 1999, whereby the Trial Chamber dismissed Radoslav Brdjanin's ("Appellant") challenge to the confirmation of the indictment against him, *inter alia* on the ground that there is no basis in the Rules of Procedure and Evidence of the International Tribunal to permit a Trial Chamber to review the decision of the confirming Judge regarding the existence of a *prima facie* case against the accused;

NOTING the Interlocutory Appeal from Decision on Motion to Dismiss Indictment, filed by the

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Appellant on 12 October 1999 ("Interlocutory Appeal"), whereby he submits that his challenge to the confirmation of the indictment constitutes a challenge to jurisdiction under Rule 72 (B)(i), and in the alternative requests that it should be treated as an application for leave to appeal under Rule 72 (B)(ii);

NOTING the Prosecution's Response to the Interlocutory Appeal ("Prosecution's Response"), filed on 21 October 1999, whereby the Office of the Prosecutor ("Prosecution") contends that the Interlocutory Appeal does not properly fall within the terms of Rule 72 (B)(i) and should also be dismissed under Rule 72 (B)(ii), and further gives notice of its intention to seek to amend the indictment against the accused before the confirming Judge;

NOTING the Reply to the Prosecution's Response and Motion for Protective Order, filed by the Appellant on 25 October 1999 ("Motion for Protective Order"), whereby the Appellant seeks a protective order prohibiting the Prosecution from seeking to amend the Indictment until the Appeals Chamber has entered a decision in this matter;

NOTING the Prosecution's Response to Motion for Protective Order filed on 29 October 1999, whereby the Prosecution opposes the Motion for Protective Order;

CONSIDERING that the issue to be decided by the Appeals Chamber at this stage is whether the Interlocutory Appeal was properly filed under Rule 72;

CONSIDERING that, before the Trial Chamber, the Appellant argued both a procedural and a substantive error in support of his challenge to the confirmation of the indictment;

CONSIDERING that the Appellant's argument in relation to procedure, as correctly stated by the Trial Chamber, confuses form with substance, and that the error alleged by the Appellant thus goes to substance;

CONSIDERING that, assuming *arguendo* the existence of a substantive error in the *prima facie* assessment of the material before him by the confirming Judge, such an error could not be considered as going to jurisdiction within the meaning of Rule 72 (B)(i);

CONSIDERING THEREFORE that a challenge to the confirmation of an indictment on this basis cannot be regarded as constituting a challenge to jurisdiction within the ambit of Rule 72 (B)(i);

CONSIDERING FURTHER that the Interlocutory Appeal does not involve any of the categories contemplated in Rule 72 (A), referred to in Rule 72 (B)(ii);

CONSIDERING THEREFORE that the Interlocutory Appeal cannot be treated as an application for leave to appeal under Rule 72 (B)(ii);

CONSIDERING that, under these circumstances, there is no ground for granting the Motion for Protective Order;

HEREBY REJECTS the Interlocutory Appeal as improperly filed pursuant to Rule 72 **AND DISMISSES** the Motion for Protective Order.

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

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Mohamed Bennouna
Presiding Judge

Dated this sixteenth day of November 1999
At The Hague,
The Netherlands.

[Seal of the Tribunal]

International Criminal Tribunal for the Former Yugoslavia
IN TRIAL CHAMBER II

Decision

Trial Chamber

Decision

PROSECUTOR
v.

MOMIR TALIC

Decision of: 10 December 1999

DECISION ON MOTION FOR RELEASE

DECISION ON MOTION FOR RELEASE

The Office of the Prosecutor: Ms.Joanna Korner, Mr.Michael Keegan, Ms.Ann Sutherland

Counsel for the Accused:M Xavier de Roux

Before: Judge David Hunt, Pre-Trial Judge
Registrar: Dorothee de Sampayo Garrido-Nijgh

M Michel Pitron

1. The accused Momir Talic ('Accused') has filed a document entitled 'Motion for Release' ('Motion'), in which h

[...] hold a session urgently to rule on the unlawfulness of his detention and to order his immediate release. [FN1]1

As it is clear from the Motion on its face that the application is misconceived, there is no need to have an oral hearing.

2. The relevant facts are as follows:

(1) On 14 March 1999, and pursuant to Article 19 of the Tribunal's Statute and Rule 47 of

the Rules of Procedure and Evidence ('Rules'), Judge Rodrigues confirmed an indictment against the Accused and others, charging them (apparently jointly) with a crime against humanity, based upon persecutions on political, racial or religious grounds. [FN2] On the same day, warrants were signed pursuant to Rules 47 and 55 for the arrest of the Accused.

(2) On 25 August, the Accused was arrested and, upon that arrest, he was provided with a copy of the indictment against him. On the same day, and in accordance with Rule 57, the Accused was transferred to The Hague.

(3) The Accused made his initial appearance on 31 August. On the same day, an order was made pursuant to Rule 64 that the Accused be detained in the United Nations Detention Unit in The Hague.

(4) On 14 October, the Accused filed a motion to dismiss the indictment ('Motion to Dismiss'), in which he argued that the confirming judge had erred in being satisfied that the material provided to him by the prosecution demonstrated a prima facie

case against the Accused. He conceded that his argument was 'substantially the same' as that put forward by his co-accused Radoslav Brdanin

(5) On 5 October, however, the Trial Chamber had already held on Brdanin's motion that the jurisdiction of the Tribunal did not depend upon whether the s [FN3], and that there was no provision in the Rules which permitted a Trial Chamber to review the actual decision made by the confirming judge by way of appeal or in any other way. [FN4]

(6) In its response to the Accused's Motion to Dismiss, and filed on 21 October, the prosecution stated: [FN5]

[...] the Prosecution gives notice that it is the present intention to apply to the confirming Judge (within 28 days) under Rule 50(A)(ii) for leave to amend the Indictment.

In a document filed on 29 October, the Senior Trial Attorney for the prosecution confirmed the intention of the prosecution to seek an amendment to the original indictment against this Accused and Radoslav Brdanin, and said:

The amendment will add a number of new charges to the original indictment.

The reasons for the proposed amended indictment are:

1. The nature of the evidence has changed and developed since the original indictment was confirmed by his Honour Judge Almiro Sim5es Rodrigues on 14 March 1999; and

2. The indictment needs to be brought into accord with the current jurisprudence of the Tribunal.

(7) On the basis that, in the circumstances, it was premature to determine the Motion to Dismiss, an order was made on 4 November deferring a decision thereon until the result was known of the application to amend.

(8) On 16 November, an interlocutory

appeal by Brdanin against the Brdanin Dismissal Decision was rejected by the Appeals Chamber, which considered that any substantive error by the confirming judge in the assessment of the supporting material did not go to the jurisdiction of the Tribunal [FN6]

(9) An amended indictment against this Accused and Radoslav Brdanin was lodged with the confi

3. Upon the basis of that material, the Accused has asserted that --

(i) More than three months after his detention, he 'still does not exactly know with what crimes he is charged which allegedly justify the most serious infringement of his rights, that is the deprivation of his liberty'.

(ii) By recognising that the indictment 'had' to be amended, the prosecution also recognised the validity of his argument that the initial indictment 'did not contain sufficient elements on which to base a prima facie case of responsibility against him'.

(iii) By not filing a motion for leave to amend the indictment within the twentyeight days promised, the prosecution 'reaffirms this state of fact, namely that [it] does not possess the aforesaid elements'.

4. The first assertion, that the Accused's rights have been infringed, is based upon Article 21.4(a) of the Tribunal's Statute, which provides that any accused is entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him. The failure to comply with that right was in part responsible for the dismissal of an indictment in one case, Jean-Bosco Barayagwiza v The Prosecutor, in the International Criminal Tribunal for Rwanda. [FN7]

5. In the present case, however, there is no basis at all for the Accused's assertion that he still does not know what the charge against him is. Until there is any amendment to it by leave, the charge in the indictment against the Accused remains the same as that to which he pleaded at his initial appearance on 31 August, six days after his arrest. He was in fact informed of that charge even earlier, when he was provided with the copy of the indictment upon his arrest.

6. Nor is there any basis for the Accused's assertion that the prosecution, by seeking leave to amend, has recognised the validity of his argument that the indictment does not demonstrate a prima facie case. Because the facts pleaded in the indictment in this case clearly do demonstrate the existence of a prima facie case against the Accused, this assertion must therefore have been intended as a reference back to the argument in his

Motion to Dismiss, that the confirming judge had erred in being satisfied that the material provided to him by the prosecution demonstrated a prima facie case against the Accused.

7. It was made clear, both in the prosecution's response to that motion and in the documents by which its intention to seek leave to amend was made known to the Accused, that the prosecution stands by its arguments (a) that a Trial Chamber has no power to review the decision of the confirming judge, [FN8] and (b) that in any event the supporting material produced to the confirming judge was sufficient for the purposes of the Rules and justified the confirmation of the indictment.

8. Again, there is no basis for the assertion that, by the failure of the prosecution to file a motion for leave to amend the indictment within the twentyeight days promised, it had re-affirmed that it did not have the "elements' on which to base a prima facie case against him. Again, because the facts pleaded in the indictment in this case clearly do demonstrate the existence of a prima facie case against the Accused, this must also have been intended as a reference back to the argument in his Motion to Dismiss.

9. Leave to amend the indictment prior to the commencement of the presentation of evidence can only, in the circumstances of this case, be made to the confirming judge. [FN9] Application for such leave is made ex parte, and nothing is disclosed until leave to amend is granted. [FN10] In the present case, the application was made ex parte within the time promised.

10. All three assertions by the Accused are rejected.

11. The Accused also seeks separately to enforce another right which, it is submitted, arises out of Article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention'), which provides:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

This right of a detainee to have the lawfulness of his detention reviewed by a court is a norm enshrined also in other international human rights instruments. [FN11] This particular provision appears to have been selected by the Accused because it has been applied by the European Court of Human Rights in a way which, it is submitted, requires a Trial Chamber of this Tribunal to determine whether the supporting material provided by the prosecution to the confirming judge supported the charge.

12. In Brogan v United Kingdom, [FN12] the European Court of Human Rights said:

By virtue of paragraph (4) of Article 5, arrested or detained persons are entitled to a review hearing upon the procedural and substantive conditions which are essential for the 'lawfulness', in the sense of the Convention, of their deprivation of liberty. This means that, in the instant case, the applicants should have had available to them a remedy

allowing the competent court to examine not only compliance with the procedural requirements set out in section 12 of the 1984 Act but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.

The Accused has submitted that, in accordance with Article 5(4), 'the Judge [[scil Trial Chamber] is duty-bound to evaluate the detention of an accused within the context of the charges brought against him'.

13. The passage upon which the Accused relies must, however, be considered in the context of the circumstances with which the European Court of Human Rights was concerned in that case. The applicants had been arrested and detained pursuant to s 12(1) of the Prevention of Terrorism Act 1984, of Northern Ireland. That section permits a constable to --

[...] arrest without warrant a person who he has reasonable grounds for suspecting to be [...] a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism [...].

The statute provides that such a person may be detained for up to fortyeight hours after his arrest, and that this period may be extended up to a maximum of five days. A person detained pursuant to such an arrest is deemed by the statute 'to be in legal custody when he is so detained'.

14. The jurisprudence of Northern Ireland has interpreted this provision as permitting an arrest even though there may not necessarily be any intention to charge the suspected person, and in circumstances where there may well never be any judicial investigation. [FN13] The European Court of Human Rights held that the constable making the arrest was nevertheless required by the statute to have 'a reasonable suspicion' that the person being arrested is or had been concerned in the commission, preparation or instigation of acts of terrorism and that, in deciding whether that suspicion was reasonable in the circumstances, the court examining those circumstances pursuant to a writ of **habeas corpus** 'must be told something about the sources and grounds of the suspicion'. [FN14]

15. The European Court of Human Rights, when discussing the remedy of **habeas corpus**, said this: [FN15]

Habeas corpus is a procedure whereby a detained person may make an urgent application for release from custody on the basis that his detention is unlawful.

The court hearing the application does not sit as a court of appeal to consider the merits of the detention: it is confined to a review of the lawfulness of the detention. The scope of this review is not uniform and depends on the context of the particular case and, where appropriate, the terms of the relevant statute under which the power of detention is exercised. The review will encompass compliance with the technical requirements of such a statute and may extend, inter alia, to an inquiry into the reasonableness of the

suspicion on which the arrest is based.

This passage fully explains the reference in the passage upon which the Accused relies to an examination by the court of 'the reasonableness of the suspicion grounding the arrest'. Because the terms of the statute under which the applicants in that case were detained permitted an arrest to be effected (a) without warrant, (b) upon the basis of a reasonable suspicion only and (c) without any necessary intention to charge the person arrested, it is easy to understand why the scope of the review to be conducted in that particular case was held to extend to an inquiry into the reasonableness of that suspicion. [FN16]

16. Those circumstances with which the European Court of Human Rights was concerned in that case bear no relationship at all to the circumstances of the detention of the Accused in this case pursuant to the order of this Tribunal. Article 19 of the Tribunal's Statute provides:

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19.2 makes it clear that the Statute requires the review and confirmation of the indictment in order to justify the issue of the arrest warrant. [FN17]

17. The arrest of the Accused was therefore not effected merely upon a reasonable suspicion by the person arresting him that he was in some way concerned with the commission of a crime. Rather, the Accused was arrested under the authority of warrants of arrest issued by a judge of this Tribunal after being satisfied that a prima facie case against him had been established by the Prosecutor. There has already been a judicial review of the very basis upon which the warrants of arrest were issued and which justified the arrest and detention of the Accused. There has been no suggestion that the circumstances in which the Accused was arrested are relevant to the lawfulness of his detention. In those circumstances, the European Court of Human Rights decision does not call for any further examination by the Tribunal of the reasonableness of the decision to arrest and detain the Accused. As earlier stated, the Trial Chamber has determined that it has no power to review the actual decision of the confirming judge by way of appeal or in any other way.

18. For these reasons, the detention of the Accused is lawful, and he has no right to have the decision of the confirming judge reviewed. The Motion for Release is refused.

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

Dated this 10 day of December 1999,

At The Hague,

The Netherlands.

Judge David Hunt

Pre-Trial Judge

[Seal of the Tribunal]

Talic

[FN1].. Motion, 1 Dec 1999, par 4.

[FN2].. The original indictment remains sealed. The various indictments which have been filed are discussed in more detail in Prosecutor v

[FN3].. Decision on Motion to Dismiss Indictment, 5 Oct 1999 ('Br

[FN4].. Ibid, par 23.

[FN5].. Prosecution's Response to 'Motion to Dismiss the Indictment' Filed by Counsel for the Accused Momir Talic, p 2.

[FN6].. Prosecutor v Brdanin, Case IT-99-36-AR72, Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed under Rule 72, 16 Nov 1999, p 3.

[FN7].. ICTR-97-19-AR72, 3 Nov 1999.

[FN8].. This argument has already been upheld by the Trial Chamber in the Brdanin Dismissal Decision, at par 23.

[FN9].. The recent amendments to Rule 50 do not affect that position so far as this case is concerned.

[FN10].. Prosecutor v KRNOJELAC, Case IT-97-25-PT, 20 May 1999, par 11.

[FN11].. Universal Declaration of Human Rights, Articles 8 and 9; International Covenant on Civil and Political Rights, Article 9(4); American Convention on Human Rights, Article 7(6); and African Charter on Human and Peoples' Rights, Article 7(1)(a). The terms of these provisions are quoted in Prosecutor v Brdanin, Case IT-99-36-PT, Decision on Petition for a Writ of **Habeas Corpus** on Behalf of Radoslav Brdanin, 8 Dec 1999, par 3, footnote 5.

[FN12].. (1988) 11 EHRR 117, at par 65; sub nom: Case of Brogan & Ors, ECHR judgment of 29 November 1998, Series A, no. 145-B, at par 65.

[FN13].. Judgment of the ECHR, par 36. There was no challenge to this interpretation.

[FN14].. Ibid, par 35.

[FN15].. Ibid, par 40 [reference to cited authority has been omitted].

[FN16].. It is significant that the European Court of Human Rights was prepared to say only that such a review may extend to such an inquiry.

[FN17].. Prosecutor v Brdanin, Case IT-99-36-PT, Decision on Motion to Dismiss Indictment, 5 Oct 1999, par 14.
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International Criminal Tribunal for Rwanda
Trial Chamber 1

THE PROSECUTOR
v.

FERDINAND NAHIMANA

ICTR-96-11-T

Decision of: 24 November 1997

Original: English

DECISION ON THE PRELIMINARY MOTION FILED BY THE DEFENCE BASED ON DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor: Mr. James Stewart, Mr. Alphonse Van

Counsel for the Defence: Mr. Jean-Marie Biju-Duval, Ms. Diane Sénéchal

Before: Presiding Judge Navanethem Pillay, Judge Laïty Kama, Judge William H. Sekule

Registry: Ms. Prisca Nyambe, Mr. Antoine Mindua

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the TRIBUNAL"),

SITTING AS Trial Chamber I composed of Judge Navanethem Pillay as Presiding Judge, Judge Laïty Kama and Judge William H. Sekule;

TAKING INTO ACCOUNT that the accused, Ferdinand NAHIMANA, was arrested in the Republic of Cameroon on 27 March 1996 pursuant to an international warrant of arrest issued by the General Prosecutor of the Republic of Rwanda, and subsequently indicted by the Tribunal on 11 July 1996;

CONSIDERING the Registrar's letter of 12 July 1996 to the Minister of Justice of the Republic of Cameroon by which the Registrar submitted the Tribunal's warrant of arrest and order for surrender along with a copy of the Tribunal's indictment and a statement of the rights of the accused to the Cameroonian authorities with a request for service of the these instruments on the accused;

TAKING NOTE OF THE FACT that the accused was subsequently transferred to the Tribunal's Detention Facilities in Arusha on 23 January 1997 and made his initial appearance before the Tribunal on 19 February 1997 pursuant to Rule 62 of the Rules;

HAVING NOW BEEN SEIZED of a preliminary motion filed by the Defence on 17 April 1997 pursuant to Rules 72 and 73 of the Rules of Procedure and Evidence ("the Rules"), in which Counsel for the Defence raises a number of objections on the form of the Prosecutor's indictment of 12 July 1996 and the basis of the Tribunal's Decision of that same date confirming the indictment, and also against the manner in which the warrant of arrest and the indictment were served on the accused;

HAVING RECEIVED the Prosecutor's brief of 29 May 1997, submitted to the Registry on 13 June 1997, in reply to the Defence Counsel's preliminary motion;

HAVING FURTHER RECEIVED the Defence Counsel's response filed on 18 August 1997 to the Prosecutor's aforementioned brief;

HAVING HEARD the parties during the hearing held on Wednesday 27 August 1997;

CONSIDERING Articles 17(4) and 18 of the Tribunal's Statute (the "Statute") and Rules 5, 47, 55, 72 and 73 of the Rules;

AFTER HAVING DELIBERATED

1. In its written submission, filed pursuant to Rule 72(B), the Defence argues that the indictment as well as the subsequent proceedings should be nullified and that the accused, accordingly, should be released for the following three reasons:

(i) the indictment is defective by virtue of the inaccurate manner in which the facts and the counts are stated in the indictment and because of the cumulation of counts based on the same acts which, in the Defence Counsel's argument, is in violation of the principle of non-bis-in-idem;

(ii) the Judge's decision confirming the indictment is defective due to the lack of sufficient evidence in the supporting documentation to substantiate the charges brought against the accused;

(iii) the service of the warrant of arrest and the indictment on the accused is defective since the accused was neither provided with a copy of these instruments nor with a statement of his rights before his transfer to the Tribunal's Detention Facilities.

2. The Trial Chamber will first consider point (ii) relating to the decision confirming the indictment and point (iii) on the manner of service of the indictment

A. ON THE OBJECTION BASED ON DEFECTS IN THE CONFIRMATION OF THE INDICTMENT

3. With respect to point (ii) relating to the decision confirming the indictment, the Chamber strongly maintains that the procedure indicated in Rule 72 (B) refers

solely to defects in the form of the indictment and could not be used as grounds to challenge the decision rendered by the confirming Judge.

4.. In his written and oral submissions, the Defence contends that the confirming Judge did not have sufficient evidence or justification to provide reasonable grounds for believing that the suspect had committed the crimes charged against the accused in the indictment, and thus could not legitimately have confirmed the indictment pursuant to Article 18(1) of the Statute and Rule 47(D) of the Rules.

5. The Prosecutor, in her brief, argued to the contrary that the confirming Judge did, in fact, have enough material before him to determine that a prima facie case had been established by the Prosecutor. She further asserted that the confirming Judge's discretionary power to review the indictment and decide whether or not there existed sufficient evidence to justify a confirmation of the indictment is not and indeed cannot be subject to appeal and that, anyway, such appeal is inadmissible short of any provision to this effect in the Statute and the Rules.

6. The Trial Chamber observes initially that what the Defence is really asking for is a measure of re-examination or review of the decision by which the Judge confirmed the indictment pursuant to Rule 47 of the Rules. On this point, however, the Chamber considers that neither Rule 47 nor Rules 72 and 73 of the Rules permit appeals against a decision rendered by a single Judge to confirm an indictment. Only in special circumstances can a preliminary motion raising objections against the form of the confirmation of an indictment be applied as an indirect means to obtain a review by a Trial Chamber of a confirming decision.

7. The Trial Chamber further recalls that the test to be made by the confirming Judge in establishing whether or not a prima facie case has been made out by the Prosecutor is inherently different from the Trial Chamber's evaluation of the evidence brought forward by the parties during trial. At the stage of confirmation of an indictment, notably, the confirming Judge is only required to assess whether or not the Prosecutor has provided documentation of facts carrying sufficient weight to justify a reasonable inference that the suspect has committed crimes falling within the Tribunal's jurisdiction, but which do not have to amount to conclusive evidence of these crimes.

8. The purpose of the confirmation, in other words, is merely to ensure that the investigations carried out by the Prosecutor have reached an acceptable level of probability to justify a belief that the suspect may have committed certain crimes, without going into any specific evaluation of the culpability of the suspect. The autonomous power of discretion exercised by the confirming Judge in this endeavour is by its very nature subjective and could therefore be reviewable in circumstances where, the confirming decision was in flagrant violation of the Statute and/or the Rules or was inconsistent with the fundamental principles of fairness, and had entailed a miscarriage of justice. Under such circumstances only could there be room for consideration of annulment pursuant to the principle included in Rule 5 of the Rules. However, none of these circumstances apply in the present case.

9. Trial Chamber, thus, rejects the Defence Counsel's quest for annulment of the indictment and release of the accused on the basis of defects in the confirmation of the indictment.

B. ON THE OBJECTION BASED ON DEFECTS IN THE MANNER OF SERVICE OF THE INDICTMENT

10. The Defence Counsel has further suggested that, contrary to the provisions in Article 19 of the Statute and Rule 55 of the Rules, the warrant of arrest, the indictment and the statement of the rights of the accused were never served on the accused by the Cameroonian authorities during the period he was detained in Cameroon and that, consequently, the indictment should be rendered null and void and the accused released.

11. The Prosecutor, in response, argues that no evidence has been brought forward so far to support the allegation that the accused was not properly served with the relevant instruments as requested in the Registrar's letter of 12 July 1996 to the Cameroonian Minister of Justice. The presumption is, therefore, that the Cameroonian authorities acted in conformity with the Registrar's request and actually did serve the documents on the accused. Even if this were not the case, however, the Prosecutor holds that lack of service of the indictment on the accused could never result in annulment of this instrument, as the control of internal acts of compliance by a sovereign State falls outside the Tribunal's jurisdiction.

12. The Trial Chamber reminds that the Registrar's obligation under Rule 55(B) of the Rules is to transmit the warrant of arrest and order for surrender to the national authorities together with a copy of the indictment and a statement of the rights of the accused, and to instruct the national authorities to read out these documents to the accused upon his arrest in a language he understands. Having done so, which in this case is verified by production in Court of a copy of the Registrar's aforementioned letter to the Cameroonian Minister of Justice, the Registrar has complied fully with the requirements contained in Rule 55. The Chamber is not in possession of any verified information of whether or not the warrant of arrest and the accompanying documents were actually served by the Cameroonian authorities on the accused. Even if this did not take place, however, the Chamber cannot but regret this fact, but failure of the Cameroonian authorities to serve the documents on the accused does not constitute any intentional breach of the Statute or the Rules by the Registrar and thus cannot entail the nullification of the indictment as requested by the Defence.

13. The Trial Chamber underscores the need to respect the rights of the accused during all stages of the trials but is unable to verify whether or not the relevant instruments in this case were actually served on the accused. The Chamber notes, however, that any possible defect in the service of these documents was remedied as soon as possible, namely upon the accused's transfer to the Tribunal's Detention Facilities in Arusha, by which time the accused was given a copy of the indictment and the supporting material was submitted to the Defence Counsel. It should also be noted that during the initial appearance hearing, the accused did not not raise any objection with regard to the indictment, but rather pleaded not guilty.

14. For these reasons, the Trial Chamber is of the opinion that the rights of the accused in the present case were respected as far as possible, irrespective of whether or not the warrant of arrest, the indictment and a statement of the rights of the accused were served on the accused in Cameroon by the Cameroonian authorities. The Chamber refuses, therefore, to terminate and nullify the

proceedings before it as a consequence of acts of State over which it has no knowledge or control.

C. ON THE OBJECTIONS BASED ON DEFECTS IN THE FORM OF THE INDICTMENT

15. Rule 72(B) of the Rules includes a non-exhaustive list of pre-trial motions which the accused may bring forward prior to the trial on its merits, and paragraph (ii) of this provision establishes in particular that the accused may file a motion to challenge the form of the indictment, which is what the accused has done in the present case.

16. Article 20(4)(a) of the Statute stipulates that the accused must be informed promptly and in a language he or she understands of the nature and cause of charges against him or her, and Rule 47(B) of the Rules incorporates this obligation by establishing that the indictment shall set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime with which the suspect is charged.

17. The Defence Counsel claims in his written and oral submissions that the indictment should be declared null and void because of serious defects in the form of the indictment. More particularly, the Counsel maintains that the imprecise and erroneous manner in which the facts are stated in the indictment effectively obstruct his possibilities of preparing the defence. He submits, moreover, that the Prosecutor's cumulation of charges based on the same action by the accused is in violation of the principle of non-bis-in-idem. In conclusion, the Counsel requests that if the indictment is not annulled, the Prosecutor should at least amend it, in order to include a precise statement of facts for each charge.

18. The Prosecutor has responded in essence, firstly, that the statement of facts in the indictment, concise as it is, does satisfy the requirements of the Statute and the Rules and amply enables the accused to understand and prepare his defence against the charges brought against him. Any request for further details beyond what has already been given to the Defence is but an unjustified request for particulars, which should have been addressed directly to the Prosecutor. Secondly, the Prosecutor argues that the principle of non-bis-in- idem is inapplicable in cases, such as the present, where the accused has not already been prosecuted or convicted abroad of any of the crimes for which he now stands indicted before this Tribunal. However, both in her written submissions and oral arguments during the hearing, the Prosecutor signified her willingness to amend the indictment, if the Tribunal so requested.

19. The Trial Chamber notes initially that there is an important distinction to be made between defects in the form and defects in the merits of the indictment. At this stage of the proceedings, the Chamber is bound to examine and dispose of defects in the form only, whereas defects on the merits of the indictment may raise questions of evidence and facts which more appropriately should be considered during trial. For this reason,the Trial Chamber will only deal with objections raised against the vagueness, the lack of sufficient indication of time and against the lack of specification of the charges raised against the accused in the indictment. The Chamber will thereafter consider the objection raised by the Defence regarding the non-bis-in-idem principle.

20. As a general observation, the Trial Chamber holds that the accused must be able to recognize the circumstances and the actions attributed to him in the indictment and the supporting material, and must be made to understand how and when his actions under the particular circumstances constituted one or more crimes covered by the Tribunal's jurisdiction. Furthermore, the Trial Chamber interprets the word 'concise statement of the facts' in Rule 47 to mean a brief statement of facts but comprehensive in expression. From this perspective, then, the Chamber will address the various objections raised by the Defence.

On the objections based on the vagueness and imprecision of the facts in the indictment.

21. The Defence submitted that the indictment is vague due to factual imprecision in the indictment. The statement of facts in the indictment does not give the accused the possibility of knowing in detail the nature and cause of the charge against him. The Defence, in his oral submission, pointed out that the indictment must contain express statements and not just a hypothesis. He further submitted that there are approximately forty seven possible combinations of interpretation of the charges and of the statement of facts in the indictment.

22. The Prosecutor's response is that every indictment is concise in nature and the indictment win this case is sufficient to inform the accused of the charges against him. The indictment complies with Article 17 of the Statute and Rule 47 of the Rules.

23. The Trial Chamber notes that in the case before the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") against Delalic, Mucic, Delic and Landzo, IT-96-21-T, the Chamber of first instance held that a particular paragraph of the indictment: "did not give the accused a specific statement of facts of the case and of the crimes with which he was charged because it alleged at least six different types of conduct over a period of seven months''. The Trial Chamber in this case went on to state that: "there should be a clear identification of particular acts of participation by the accused''.

24. The Defence further submitted that Count 1 of the charge is vague in that it merely states that the accused conspired with "others" without even knowing who it is alleged that he conspired with.

25. The Prosecutor's response was that the count cannot be void for the sole reason that the identity of the alleged co-conspirator or co-conspirators is not mentioned

26. This Trial Chamber is of the view that in order for the accused to fully understand the charge against him he needs to know who he is alleged to have conspired with. The Trial Chamber notes the decision in the case before the ICTY of the Prosecutor against Tihomir Blaskic, case number IT-95-14-PT, in which it was stated that: "expressions such as "including but not limited to" or "among others" are vague and subject to interpretation and they do not belong in an indictment when it is issued against the accused''.

27. The Trial Chamber therefore holds that Count 1 should be amended so as to indicate the names of the people with whom the accused is alleged to have conspired to commit genocide.

On the lack of any specific time-frame of the alleged crimes in the indictment

28. With regard to the date and time the offences stated in Count 1 were allegedly committed, the Defence points out that reference is made to the period "between 1 January 1994 and approximately 31 July 1994''. The Tribunal notes, in fact, that the Prosecutor refers to the same period of time in Counts 2, 3 and 4 of the indictment. The Defence submits that such information does not meet the requirement of precision, insofar as it does not enable the accused to place in time the specific acts or omissions he is being asked to answer for.

However, in response to this argument, the Prosecutor submits that the description of a time-frame as provided in the various counts is sufficient to place in time the acts and crimes with which the accused is charged.

29. The Trial Chamber observes that in addition to making specific reference to the period "1 January 1994 to approximately 31 July 1994", the Prosecutor also refers in the concise statement of facts contained in the indictment to other periods of time as follows:

(a) In paragraph 3.2 the Prosecutor refers to "In or around 1993'';

(b) In paragraph 3.3 the Prosecutor refers to "During the time of the events alleged in the indictment'';

(c) In paragraph 3.6 the time is referred to as "From a date unknown to the Prosecutor'''

30. The Chamber acknowledges that, given the particular circumstances of the conflict in Rwanda and the alleged crimes, it could be difficult to determine the exact times and places of the acts with which the accused is charged. It is of the opinion, nonetheless, that the temporal and geographic references given by the Prosecutor are not sufficiently precise to enable the accused to unmistakably identify the acts or the sequence of acts for which he is criminally charged in the indictment. The Trial Chamber therefore suggests that the Prosecutor amends the statement of facts in the indictment so as to include more specific indications of the time when and the place where the alleged crimes were committed by the accused.

On the Vagueness of the Counts Against the Accused

31. The Defence submits that the charges stated in Count 2 are vague and do not clearly indicate whether the accused is charged individually under Article 6.1 of the Statute or under Article 6.3 as a superior, or under both provisions.

32. The Prosecutor responded that the accused was, in fact, charged under both provisions and that this had been formulated in the indictment in the simplest possible way; the Prosecutor avers in Count 2 that the accused has, amongst others, committed a crime pursuant to "Articles 6(1) and/or 6(3)" of the Statute.

33. The Chamber considers that, as did Trial Chamber 1 of the ICTY in the case of Dukic, in view of the seriousness of the allegations against the accused, he has every right to obtain, and in the most precise manner, the necessary information on the charges against him so as to enable him to prepare his defence effectively and efficiently. In other words, an indictment must always have the appropriate degree of precision.

The Chamber notes that the wording of the charges in question is not precise enough in that it does not provide the accused with information that would enable him to establish a link between his acts and the charges against him. The Chamber therefore suggests that the Prosecutor specifies which acts of the accused are covered by Article 6(1) and which fall under Article 6(3) of the Statute, or if there is a cumulation of charges.

34. The Chamber observes the same degree of vagueness in the expression "other persons" contained in Count 1. The Chamber is, in fact, of the opinion that this expression must be clarified by mentioning the names or other identifying information concerning the persons with whom the accused allegedly conspired to commit genocide.

On the Principle of Non-bis-in-idem

35. The Defence contends that the cumulation of charges against the accused in the indictment entails a violation of the principle of non-bis-in-idem, since he appears to be charged several times for the same act. The Defence further asserts that this principle applies not only in instances where a person is tried before several courts for the same acts, but also in instances where a person is charged several times for the same act before the same court.

36. The Prosecutor responded that the non-bis-in-idem principle does not applyat this stage of the proceedings.

37. The Chamber is of the opinion that under Article 9 of the Statute, the principle of non-bis-in idem cannot be invoked, as does the Defence, when raising a matter of cumulation of charges, whether the offender has committed several acts each of which constitutes an offence or whether a single act constitutes more than one offence, as distinguished in the legal systems of the Roman-Continental tradition. In fact, Article 9 of the Statute stipulates that:

"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.

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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 Iinternational Tribunal for Rwanda shall take into acount the extent to which any penalty imposed by a national court on the same person for the same acts has already been served."

In any case and as far as the cumulation of charges is concerned, it is the highest penalty that should be imposed. However, it is evident that we are not at this stage yet.

Finally, it should be pointed out in this regard that in the Delalic case, Trial Chamber 1 of the ICTY dismissed the objection raised by the Defence regarding the cumulation of charges on the grounds that the question was only relevant to the penalty if the accused is ultimately found guilty, (see ICTY Decision on the preliminary motion filed by the accused Delalic on defects in the form of the indictment, paragraph 24.)

FOR THESE REASONS,

THE TRIBUNAL

REQUESTS the Prosecutor, especially as she does not object thereto, to amend the following parts of the indictment in order to:

(i) specify the time-frames indicated in paragraphs 3.2, 3.3 and 3.6 of the statement of facts; and to

(ii) identify some or all of the persons with whom the accused is alleged to have conspired to commit genocide in Count 1; and finally to

(iii) identify on the one hand the acts or sequence of acts for which the accused himself is held individually responsible for having committed direct and public incitement to genocide, and on the other hand, the acts or sequence of acts of his subordinates for which he is held responsible as their superior.

INVITES her to make the amendment within 30 days from the date of this Decision.

DISMISSES the Defence Counsel's motion on all other points.

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Arusha, 24 November 1997

Navanethem Pillay, Presiding Judge

Laïty Kama, Judge

William H. Sekule, Judge

Seal of the Tribunal

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International Criminal Tribunal for Rwanda
Trial Chamber II

THE PROSECUTOR
v.

ANDRÉ NTAGERURA

ICTR-96-10-I

Decision of: 28 November 1997

Original: English

DECISION ON THE PRELIMINARY MOTION FILED BY THE DEFENCE BASED ON DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor: Mr. Frédéric Ossogo, Ms. Valentina Tsoneva

Counsel for the Defence: Mr. Fakhy N<a Kaba Konate

Before: Presiding Judge William H. Sekule, Judge Tafazzal H. Khan, Judge Yakov A. Ostrovsky

Registry: Mr. Frederik Harhoff

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the TRIBUNAL"),

SITTING AS Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge, Judge Tafazzal H. Khan and Judge Yakov Ostrovsky;

TAKING INTO ACCOUNT that the accused, André NTAGERURA, was arrested in the Republic of Cameroon on 28 March 1996 pursuant to an international warrant of arrest issued by the General Prosecutor of the Republic of Rwanda;

CONSIDERING THE FACT that the Prosecutor, on 17 April 1996, issued a request to the Cameroonian authorities for provisional measures pursuant to Rule 40 of the Rules of Procedure and Evidence ("the Rules"), and that the accused was subsequently indicted by the Tribunal on 10 August 1996;

CONSIDERING the Registrar's letter of 12 August 1996 to the Minister of Justice of the Republic of Cameroon by which the Registrar submitted the Tribunal's warrant of arrest and order for surrender along with a copy of the Tribunal's indictment and a statement of the rights of the accused to the Cameroonian authorities with a request for service of the these instruments on the accused;

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TAKING NOTE OF THE FACT that the accused was subsequently transferred to the Tribunal's Detention Facilities in Arusha on 23 January 1997 and made his initial appearance before the Tribunal on 20 February 1997 pursuant to Rule 62 of the Rules;

HAVING NOW BEEN SEIZED of a preliminary motion filed by the Defence on 21 April 1997 pursuant to Rules 72 and 73 of the Rules of Procedure and Evidence ("the Rules"), in which Counsel for the Defence requested an urgent order for disclosure of evidence and further raised a number of objections against the form of the Prosecutor's indictment of 10 August 1996 and the Tribunal's Decision of that same date confirming the indictment, and also against the manner in which the warrant of arrest and the indictment were served on the accused;

HAVING RECEIVED the Prosecutor's brief submitted to the Registry on 29 July 1997 in response to the Defence Counsel's preliminary motion;

CONSIDERING the Decision rendered on 24 November 1997 by Trial Chamber I on the preliminary motion filed by the Defence based on defects in the form of theindictment in the Prosecutor vs Ferdinand Nahimana (Case No. ICTR-96-11-T);

HAVING HEARD the parties during the hearing held on Wednesday, 8 October 1997;

CONSIDERING Articles 17(4) and 18 of the Tribunal's Statute (the "Statute") and Rules 5, 47, 55, 72 and 73 of the Rules;

AFTER HAVING DELIBERATED

1. In its written submission, filed pursuant to Rule 72(B), the Defence calls for an urgent motion for disclosure of the supporting material, and further argues that the indictment of 10 August 1996 as well as the Tribunal's decision confirming the indictment and the warrant of arrest and order for surrender of that same day should be declared null and void, and that the accused, accordingly, should be released for the following reasons:

(i) the Judge's decision confirming the indictment is defective due to the lack of sufficient evidence in the supporting documentation to substantiate the charges brought against the accused;

(ii) the service of the warrant of arrest and the indictment on the accused is defective since the accused was neither provided with a copy of these instruments nor given a statement of his rights before his transfer to the Tribunal's Detention Facilities;

(iii) the indictment is defective by virtue of the vague and inaccurate manner in which the facts and the time-references are stated in the counts of indictment and because of the cumulation of counts based on the same acts which, in the Defence Counsel's argument, is in violation of the principle of non-bis-in-idem.

2. The Trial Chamber will now consider these points in the same order.

A. ON THE REQUEST FOR AN URGENT ORDER FOR DISCLOSURE BY THE PROSECUTOR OF THE SUPPORTING MATERIAL

3. In his preliminary motion, the Defence Counsel claims that he has not received all of the supporting material attached to the indictment, which effectively has impeded the accused from preparing his defence and exercising his rights as set forth in Rule 73 of the Rules. For this reason, the Defence Counsel argues, the Trial Chamber should issue a separate and extremely urgent order for disclosure of this material by the Prosecutor to the Defence.

4. The Prosecutor replied in her brief that the supporting material was in fact submitted to the Defence on 23 April 1997, albeit in a redacted form in so far as the names and identifying information of the witnesses had been made illegible pending a decision of the Trial Chamber for protection of the Prosecutor's witnesses.

5. The Trial Chamber notes at this point that the Defence Counsel's request for disclosure has been partly exhausted by the Prosecutor's submission of the redacted supporting material on 23 April 1997 and will therefore abstain from addressing this issue further in a separate order.

The Trial Chamber notes, however, that both parties were in brief excess of the time-limits set forth in Rules 66 and 73 of the Rules as they existed in April 1997 and takes this opportunity to remind the parties of their obligation to duly comply at all times with the requirements of the Rules.

6. The Trial Chamber finds that, in the interests of justice and given the importance of the issues raised in the Defence Counsel's pre-trial motion, and also taking into account that the excess by both parties of the time-limits was insignificant as it were, the motion should be heard and the Trial Chamber will thus continue the examination thereof.

B. ON THE OBJECTIONS BASED ON DEFECTS IN THE FORM OF THE INDICTMENT

7. As the substance of the issues raised in the Defence Counsel's motion in this case to a large extent is similar to the preliminary motion filed on 17 April 1997 by the Defence in the Prosecutor vs. Ferdinand Nahimana (Case No. ICTR-96-11-T), the Trial Chamber's present deliberations concerning the objections against the form of the indictment will follow the line of reasons provided in the Tribunal's decision of 24 November 1997 in that said case.

8. Article 20(4)(a) of the Statute stipulates that the accused must be informed promptly and in a language he or she understands of the nature and cause of charges against him or her, and Rule 47(B) of the Rules incorporates this obligation by establishing that the indictment shall set forth the name and particulars of the

suspect and a concise statement of the facts of the case and of the crime with which the suspect is charged.

9. In his written and oral statements, the Defence Counsel maintains that the imprecise and erroneous manner in which the facts are stated in the indictment could not possibly justify the confirmation of the indictment by the confirming Judge and effectively obstructs his possibilities of preparing the defence. For these reasons, the Defence Counsel maintains, the decision confirming the indictment as well as the indictment itself should be declared null and void and the accused be released.

10. The Prosecutor has responded in essence that the statement of facts in the indictment, concise as it is, does satisfy the requirements of the Statute and the Rules and amply enables the accused to understand and prepare his defence against the charges brought against him. However, both in her written submissions and oral arguments during the hearing, the Prosecutor signified her willingness to amend the indictment, if the Tribunal so requested.

11. The Trial Chamber notes initially that there is an important distinction to be made between defects in the form and defects in the merits of the indictment. Pursuant to the applicable provision in April 1997 (Rule 73 of the Rules), the Chamber is bound to examine and dispose of defects in the form only, whereas defects in the merits of the indictment may raise questions of evidence and facts which more appropriately should be considered during trial. For this reason, the Trial Chamber will only deal with objections raised against the vagueness, the lack of sufficient indication of time and against the lack of specification of the charges raised against the accused in the indictment.

12. As a general observation, the Trial Chamber holds that the accused must be able to recognize the circumstances and the actions attributed to him in the indictment and the supporting aterial, and must be made to understand how and when his actions under the particular circumstances constituted one or more crimes covered by the Tribunal's jurisdiction. Furthermore, the Trial Chamber interprets the word 'concise statement of the facts' in Rule 47 to mean a brief statement of facts but comprehensive in expression. From this perspective, then, the Chamber will address the various objections raised by the Defence.

On the Objections Based on the Vagueness and Imprecision of the Facts and the Counts in the Indictment.

13. The Defence submitted that the indictment is vague due to the vast factual imprecision in the statement of facts and in the counts, which does not give the accused the possibility of knowing in detail the nature and cause of the charges brought against him. In his oral submission, thus, he pointed out that the indictment must contain express statements and not just a hypothesis.

The Defence further contended that Count 1, 2 and 3 of the indictment are ambiguous in that they charge the accused with killing or causing serious bodily or mental harm to members of the Tutsi population, which effectively impedes the accused from knowing whether he is supposed to have committed genocide, conspired to commit

genocide and being an accomplice in genocide by killing or by causing mental harm to Tutsi victims, or both in combination.

In addition, the Defence Counsel argued that the accused is charged twice with complicity in genocide (Counts one and six) without any indication of the factual difference between these two Counts.

14. The Prosecutor's response was in principle that every indictment is concise in nature and the indictment in this case is sufficient to inform the accused of the charges against him. The present indictment, accordingly, does comply with Article 17 of the Statute and Rule 47 of the Rules.

The Prosecutor more specifically argued that Counts 1, 2 and 3 in the indictment hold the accused responsible for the "killing or (inclusive and not exclusive) causing serious bodily or mental harm to members of the Tutsi population" (see par. 54 of the Prosecutor's brief). The Trial Chamber understands this to mean that the crimes are charged in the alternative in all three Counts.

The Prosecutor finally contended that the two counts of complicity in genocide are inherently different in that Count three charges the accused for being personally responsible for the alleged complicity in genocide under Article 6(1) of the Statute, whereas Count six holds the accused responsible for acts of complicity in genocide committed by his subordinates under Article 6(3) of the Statute.

15. The Trial Chamber notes that although charges in the alternative in one and the same Count is an acceptable way of framing the charges in an indictment against an accused, the Prosecutor's response in her written brief seems to be misleading in that it claims that the charge of killing is inclusive of the charge of causing serious bodily or mental harm to members of the Tutsi population. If this is the case, however, the charges in Counts 1,2 and 3 should reflect this more adequately by indicating that the accused is charged with killing and causing serious bodily or mental harm to the victims. It then remains a matter of assessing the evidence during trial whether or not there is sufficient proof to establish that the accused committed genocide, conspiracy to genocide and complicity in genocide by killing and also by causing serious bodily or mental harm to members of the Tutsi population or, alternatively, whether he committed the alleged crimes only by way of one of these acts.

The Trial Chamber recognises that in the case before the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") against Delalic et al, Case No. IT-96-21-T, the Chamber of first instance held that "there should be a clear identification of particular acts of participation by the accused''. This quest for clarity is particularly relevant when it comes to the two Counts of complicity in genocide, since it would seem that an accused cannot be held individually responsible in one and the same Count for the killing of a victim while in the same time being charged for complicity in that same killing.

This Trial Chamber concurs with this view and calls upon the Prosecutor to clarify how exactly the accused is alleged to have committed the crimes included in Counts 1, 2 and 3.

On the Objections Raised Against the Identification of the Co-conspirators and the Accomplices

16. The Defence Counsel also objected against the imprecision in the indictment of the identification of the co-conspirators and accomplices of the accused in allegedly commiting genocide in that the indictment does not include any identification thereof.

17. The Prosecutor responded in her written brief that this information is contained in the supporting material and thus is available to the accused.

18. The Trial Chamber notes the decision in the case before the ICTY of the Prosecutor vs. Tihomir Blaskic, Case No. IT-95-14-PT, in which it was stated that: "expressions such as "including but not limited to" or "among others" are vague and subject to interpretation and they do not belong in an indictment when it is issued against the accused''.

19. In line with the reasons expressed in these decisions, this Trial Chamber is of the view that in order for the accused to fully understand the charge against him he needs to know who he is alleged to have conspired with and who are his alleged accomplices. While the Trial Chamber concedes that the information is indeed available in the supporting material, the Chamber is never the less of the opinion that the indictment should be framed so as to indicate directly and indepen-dently of the supporting material all or at least some of the persons with whom the accused is alleged to have conspired to commit genocide and also with whom he is alleged to have conspired to commit genocide.

On the Lack of Any Specific Time-frame of the Alleged Crimes in the Indictment

20. The Defence points out in his motion that the references of time are made to the period between 1 January 1994 and approximately 31 July 1994. The Defence submits that such informa-tion does not meet the requirement of precision, insofar as it does not enable the accused to place in time the specific acts or omissions he is being asked to answer for.

21. In response to this argument, the Prosecutor submits that the descriptions of a time-frame as provided in the various counts are sufficient to place in time the acts and crimes with which the accused is charged and that they fall anyway within the ratione temporis of the Tribunal's juris-diction.

22. The Tribunal notes, in fact, that the Prosecutor refers to the same period of time in all six Counts of the indictment. The Trial Chamber observes that in addition to making specific reference to the period 1 January 1994 to approximately 31 July 1994, the Prosecutor also refers in the concise statement of facts contained in the indictment to other periods of time as follows:

(a) In paragraphs 9 and 12 the Prosecutor refers to "From 1991 through the

period referred to in this indictment"

(b) In paragraphs 15 and 16 the Prosecutor refers to "During the period referred to in this indictment'';

23. The Chamber acknowledges that, given the particular circumstances of the conflict in Rwanda and the alleged crimes, it could be difficult to determine the exact times and place of the acts with which the accused is charged. It is of the opinion, nonetheless, that the temporal and geographic references given by the Prosecutor are not sufficiently precise to enable the accused to identify the acts or the sequence of acts for which he is criminally charged in the indictment. The Trial Chamber therefore suggests that the Prosecutor amends the statement of facts and the Counts in the indictment so as to include more specific indications of the time when and the place where the alleged crimes were committed by the accused.

On the Principle of Non-bis-in-idem

24. The Defence contends that the cumulation of charges against the accused in the indictment entails a violation of the principle of non-bis-in-idem, since he appears to be charged several times for the same act. The Defence further asserts that this principle applies not only in instances where a person is tried before several courts for the same acts, but also in instances where a person is charged several times for the same act before the same court.

25. The Prosecutor argues that the principle of non-bis-in-idem does not apply at this stage of the proceedings and is inapplicable in cases, such as the present, where the accused has not been prosecuted or convicted abroad of any of the crimes for which he now stands indicted before this Tribunal

26. The Chamber is of the opinion that under Article 9 of the Statute, the principle of non-bis-in idem cannot be invoked, as does the Defence, when raising a matter of cumulation of charges, whether the offender has committed several acts each of which constitutes an offence or whether a single act constitutes more than one offence, as distinguished in the legal systems of the Roamn-Continental tradition. In fact, Article 9 of the Statute stipulates that:

"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 Iinternational Tribunal for Rwanda shall take into acount the extent to which any penalty imposed by a national court on the same person for the same acts has already been served."

In any case and as far as the cumulation of charges is concerned, it is the highest penalty that should be imposed. However, it is evident that we are not at this stage yet.

Finally, it should be pointed out in this regard that in the Delalic case, Trial Chamber 1 of the ICTY dismissed the objection raised by the Defence regarding the cumulation of charges on the grounds that the question was only relevant to the penalty if the accused is ultimately found guilty. Decision on the preliminary motion filed by the accused Delalcic on defects in the form of the indictment, paragraph 24.

C. ON THE OBJECTION BASED ON INSUFFICIENT SUPPORT FOR CONFIRMATION OF THE INDICTMENT

27. In his written and oral submissions, the Defence contends that the confirming Judge did not have sufficient evidence or justification in the supporting material to provide reasonable grounds for believing that the suspect had committed the crimes charged against the accused in the indictment, and thus could not legitimately have confirmed the indictment pursuant to Article 18(1) of the Statute and Rule 47(D) of the Rules.

28. The Prosecutor, in her brief, argued to the contrary that the confirming Judge did, in fact, have enough material before him to determine that a prima facie case had been established by the Prosecutor. She further asserted that the confirming Judge's discretionary power to review the indictment and decide whether or not there existed sufficient evidence to justify a confirmation of the indictment is not and indeed cannot be subject to appeal and that, anyway, such appeal is inadmissible short of any provision to this effect in the Statute and the Rules.

29. The Trial Chamber observes initially that what the Defence is really asking for is a measure of re-examination or review of the decision by which the Judge confirmed the indictment pursuant to Rule 47 of the Rules. On this issue, however, the Chamber recognizes the fact that neither Rule 47 nor Rules 72 and 73 of the Rules permit appeals against a decision rendered by a single Judge to confirm an indictment. The Chamber wishes to emphasise, in this regard, that only under special circumstances can a preliminary motion raising objections against the form of the confirmation of an indictment be applied as an indirect means to obtain a review by a Trial Chamber of a confirming decision.

30. The Trial Chamber recalls that the test to be made by the confirming Judge in establishing whether or not a prima facie case has been made out by the Prosecutor is inherently different from the Trial Chamber's evaluation of the evidence brought forward by the parties during trial. At the stage of confirmation of an indictment,

notably, the confirming Judge is only required to assess whether or not the Prosecutor has provided enough documentation of facts to justify a reasonable inference that the suspect has committed crimes falling within the Tribunal's jurisdiction, but these facts do not have to amount to conclusive evidence of the alleged crimes at this stage of the proceedings.

31. The purpose of the confirmation, in other words, is merely to ensure that the investigations carried out by the Prosecutor have reached an acceptable level of probability to justify a belief that the suspect may have committed certain crimes, without going into any specific evaluation of the culpability of the suspect. The discretion thereby exercised by the confirming Judge is by its very nature autonomous and subjective and therefore not reviewable under the present circumstances, short of any specific provisions to this effect in the Statute or the Rules. For this same reason, furthermore, the confirming Judge is not compelled to expose or explain in great detail the grounds on which the indictment was confirmed, but may confine him- or herself to a reference to the material tendered by the Prosecutor.

Only if the confirming decision would appear to be manifestly inconsistent with fundamental principles of fairness and had entailed a miscarriage of justice could there have been room for consideration by the Trial Chamber of annulment pursuant to the principle included in Rule 5 of the Rules, but this is not at all the case in the present instance.

32. Trial Chamber, thus, rejects the Defence Counsel's quest for annulment of the indictment and release of the accused on the basis of defects in the confirmation of the indictment.

D. ON THE OBJECTION BASED ON INCORRRECT SERVICE OF THE INDICTMENT ON THE ACCUSED

33. The Defence Counsel has further suggested that, contrary to the provisions in Article 19 of the Statute and Rule 55 of the Rules, the warrant of arrest, the indictment and the statement of the rights of the accused were never properly served on the accused by the Cameroonian authorities during the period he was detained in Cameroon and that, consequently, the indictment should be rendered null and void and the accused released.

34. The Prosecutor, in response, argues that no evidence has been brought forward so far to support the allegation that the accused was not properly served with the relevant instruments as requested in the Registrar's letter of 12 July 1996 to the Cameroonian Minister of Justice. The presumption is, therefore, that the Cameroonian authorities acted in conformity with the Registrar's request and actually did serve the documents on the accused. Even if this were not the case, however, the Prosecutor holds that lack of service of the indictment on the accused could never result in annulment of this instrument, as the control of internal acts of compliance by a sovereign State falls outside the Tribunal's jurisdiction.

35. The Trial Chamber reminds that the Registrar's obligation under Rule 55(B) of the Rules is to transmit the warrant of arrest and order for surrender to the national authorities together with a copy of the indictment and a statement of the

rights of the accused, and to instruct the national authorities to read out these documents to the accused upon his arrest in a language he understands. Having done so, the Registrar has complied fully with the requirements contained in Rule 55. The Chamber is not in possession of any verified information of whether or not the warrant of arrest and the accompanying documents were actually served by the Cameroonian authorities on the accused or when this might possibly have taken place. Even if this did not take place, however, the Chamber cannot but regret this fact, but failure of the Cameroonian authorities to serve the documents on the accused does not constitute any intentional breach of the Statute or the Rules by the Registrar and thus cannot entail the nullification of the indictment as requested by the Defence.

36. The Trial Chamber underscores the need to respect the rights of the accused during all stages of the trials but is unable to verify whether or not the relevant instruments in this case were actually served on the accused. The Chamber notes, however, that any possible lack of service of these documents was remedied as soon as possible, namely upon the accused's transfer to the Tribunal's Detention Facilities in Arusha, by which time the accused was given a copy of the indictment and the supporting material was submitted to the Defence Counsel. It should also be noted that during the initial appearance hearing, the accused did not not raise any objection with regard to the indictment, but rather pleaded not guilty.

37. For these reasons, the Trial Chamber is of the opinion that the rights of the accused in the present case were respectedas far as possible, irrespective of whether or not the warrant of arrest, the indictment and a statement of the rights of the accused were properly served on the accused in Cameroon by the Cameroonian authorities. The Chamber refuses, therefore, to terminate and nullify the proceedings before it as a consequence of acts of State over which it has no knowledge or control.

FOR THESE REASONS,

THE TRIBUNAL

DIRECTS the Prosecutor, to amend the following parts of the indictment and implement the necessary changes:-

(i) specify the time-frames indicated in paragraphs 9 through 16 of the statement of facts and in the six Counts; to

(ii) identify on the one hand the acts or sequence of acts for which the accused himself is held individually responsible for having committed direct and public incitement to and complicity in genocide, and on the other hand, the acts or sequence of acts of his subordinates for which he is held responsible as their superior; and to

(iii) identify some or all of the persons with whom the accused is alleged to have conspired to commit genocide in Count 1;

INVITES her to make the amendment within 30 days from the date of this Decision.

DISMISSES the Defence Counsel's motion on all other points.

Arusha, 28 November 1997

William H. Sekule, Presiding Judge

Yakov Ostrovsky, Judge

Tafazzal H. Khan, Judge

Seal of the Tribunal

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