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SCSL-2003-11-PD-013
(416-543)

THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

Before: Judge Thompson, Presiding Judge
Judge Boutet
Judge Itoe

Registrar: Robin Vincent

Date filed: 23 June 2003

IN THE MATTER OF THE DETENTION OF A SUSPECT PURSUANT TO RULE 40 *BIS*

MOININA FOFANA

Case No. SCSL-2003-11-PD

REPLY – URGENT APPLICATION FOR RELEASE FROM PROVISIONAL DETENTION

Office of the Prosecutor

Mr. Luc Cote, Chief of Prosecutions
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Defence Office

John R.W.D. Jones, Acting Chief of Defence Office and Legal Advisor
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Sam Scratch, Defence Intern

I. INTRODUCTION

1. The Defence Office files, on behalf of Moinana Fofana (the "**Suspect**"), this Reply to the "Prosecution Response to Application for Release from Provisional Detention" filed on 19 June 2003 (the "**Prosecution Response**").

II. GENERAL

2. While the Prosecution Response raises several issues which are analysed in detail below, in general terms the Defence Office reply is premised upon what it submits are the foundations of the mandate of the Special Court for Sierra Leone (the "**Court**"), namely the need to address impunity and entrench the rule of law in Sierra Leone and a deep respect for international human rights norms, in particular the rights to liberty and to an effective remedy. The Defence Office submits that this Trial Chamber should consider that the atrocities which are the subject-matter of the Court's jurisdiction were committed in the context of a society where, as Amnesty International has observed, "the justice system has collapsed and institutions for the administration of justice . . . are barely functional"[1] – i.e. where the rule of law does not exist. One aspect of the rule of law is that the rights and duties of all concerned individuals must be respected equally in the course of adjudication. Impunity leading to the collapse of the rule of law cannot be countered by further impunity in the course of seeking to punish those deemed most responsible for such collapse. Rights, even of suspects and accused, must therefore be given as broad and as robust a content as justice permits in order to fit within a mandate based on international human rights law.

3. As Judge Wald said in her dissenting opinion to the ICTY Appeals Chamber's decision dated 22 February 2001in *Vujin's case*:

> "*the rule of law .. . requires that courts acknowledge the statutes and rules that bind them in the exercise of their powers* [...]. *Courts must lead the way in following the law if there is to be a rule of law.*" (emphasis added)

4. The Defence Office submits that the Prosecution's approach to the issues raised in the Defence's "Application for Release from Provisional Detention" is remarkably formalistic. This approach advocates a narrow definition of an individual's right to liberty

[1] Amnesty International "Sierra Leone: Ending impunity – an opportunity not to be missed" AFR 51/60/00 26 July 2000 at p.4 – Annex 1 to this reply.

and denies him or her an effective remedy for its violation despite a plain reading of the Statute and Rules permitting a robust interpretation of both rights. If the Statute and Rules were to be interpreted in the manner advocated by the Prosecution, pre-trial proceedings concerning individual liberty before this Court would become a mere formality devoid of content. The approach advocated by the Prosecution risks transforming this Court's consideration of the curtailment of individual liberty into proceedings that are "*full of sound and fury, signifying nothing*".[2]

III. PRELIMINARY ISSUES

A. THE NATURE OF THE APPLICATION

5. The Release Application clearly stated that it was brought before the Trial Chamber pursuant to Rule 40 *bis* (K).[3] As the Prosecution has noted, only Judge Boutet's name was listed on the coversheet of the Release Application. This was a typographical error, which the Defence Office regrets.

B. OUT-OF-TIME FILING BY THE PROSECUTION

6. According to the Court's Records Unit, the Prosecution was served with the Release Application on 12 June 2003. The Prosecution Response was not filed with the Records Unit until after 5 p.m. on 19 June 2003 and is marked as received on 20 June 2003 in accordance with Article 12.1 of the Practice Direction on Filing Documents of this Court. According to Rule 7(C) of the Rules of Procedure and Evidence (the "**Rules**") of the Court, the Prosecution Response should have been filed within 7 days of being served with the Release Application, that is by the close of business on 19 June 2003. The Prosecution Response has, therefore, been served out-of-time and the Trial Chamber is entitled to reject the Prosecution Response on that basis.

7. In the event that, notwithstanding this irregularity, the Trial Chamber decides to consider the Prosecution Response on the merits, the Defence Office herewith replies to the points raised.

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2 William Shakespeare, *Macbeth*, Act V, Scene V.

3 See paragraph 1 of the Release Application: "*The Defence Office applies to the Trial Chamber pursuant to Rule 40 bis (K)* [...]".

IV. THE EXTENT TO WHICH THE STATUTE CONSTRAINS THE JUDICIARY'S RULE-MAKING POWERS[4]

8. The Defence Office's contention that Rule 40*bis* is *ultra vires* the Statute of the Special Court rests on the simple and uncontentious premise that the parties to the Agreement creating the Special Court envisioned its judges as judges and not legislators or their international equivalent. Thus the creators of the Court expected that matters of procedure and evidence were best regulated by the judges before whom cases were tried – i.e. they envisioned the Court's judges having a broad power to regulate proceedings before them. It follows that the creators of the Court did not expect that the judiciary would regulate matters beyond the evidentiary and procedural. All of the Prosecution's examples (at paragraph 14 of the Prosecution Response) of matters explicitly addressed by the Court's rules but not its Statute concern evidentiary or procedural matters. These examples prove this Court has a broad inherent power to control its own process. They do not prove it has an even broader legislative capacity. The powers that this Court purports to have granted itself concerning the arrest of suspects are in a different category from powers over contempt, perjury, the number of judges who may consider a matter, *amicus curiae* or motions for directed verdicts of acquittal.

9. Powers of arrest and detention, while admittedly a different category, are more akin to powers to define offences than a judge's power to control proceedings before him or her. Both of the former categories engage fundamental individual rights, and do not merely govern how such rights should be adjudicated. Just as judges of this Court have no power to create new offences within the Court's jurisdiction (although the Statute is silent on that matter), they have no power to dictate the conditions under which individuals will be deprived of their liberty. The fact that this Court's legislators may have neglected to address the terms under which individuals may be deprived of their liberty does not mean this power has been delegated.

10. With respect to the Prosecution's reliance (at paragraph 13 of the Prosecution Response) on the ICTR judgments in *Barayagwiza*, the Defence Office submits the Prosecution seeks to extend the Trial Chamber's judgment[5] in that case beyond its limits. The Trial

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4 Paragraphs 8-16 of the Prosecution Response.

5 Contrary to the Prosecution's assertion at paragraph 13 of the Prosecution Response, the Appeals Chamber never considered the validity of Rule 40 *bis* in its judgments (initial appeal and reconsideration) in

Chamber in *Barayagwiza* ruled that Rule 40*bis* of that Tribunal's Rules was consistent with Articles 17 to 20 of the ICTR's Statute which, in contrast to this Court's Statute, address the arrest of individuals. At its highest, the Trial Chamber's judgment supports the proposition that where an international criminal tribunal's statute envisions the arrest of individuals *and* contains an equivalent to the ICTR's Article 14 granting the Tribunal the power to adopt rules "*for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters*", then, in that context, arrest is part of "the pre-trial phase of proceedings". Where the statute does not explicitly contemplate the deprivation of individual liberty before trial – i.e. where it does not mention arrest – it cannot be considered part of the pre-trial phase of proceedings and therefore the proper subject of the judiciary's rule-making powers. Put another way, a Court may regulate the procedures by which arrest is effected but cannot grant itself the power to do so in the first instance.

11. Of course, this Court must have the power to issue arrest warrants against *indictees*, otherwise it would not be able to carry out its mandate. The same cannot, however, be said of the power to arrest mere *suspects*.

12. The Prosecution also submits that Article 14 of the Statute incorporates Rule 40 *bis* by reference. For the reasons set out in paragraph 9 above, the Defence Office contends that one cannot incorporate by reference a power as fundamental as the right to liberty engaged by a tribunal's arrest powers.

13. Finally, the Defence Office submits that the omission of suspects before the ICTY and ICTR to raise the *ultra vires* issue raised in the Release Application is irrelevant. To state the obvious, this Court cannot derive guidance from those tribunals on issues they have not considered.

Barayagwiza. As a result, the Appeals Chamber never "assumed" the Rule's validity. See the Appeals Chamber's summary of the issues before it at paragraph 2 of the *Barayagwiza Appeal* – Annex 14 of the response and the more detailed review of the appellant's position at paragraphs 14-18 of the same judgment. In fact, like others who have appeared before the ICTY and ICTR, the appellant in *Barayagwiza* failed to challenge the rule's legality.

V. RESPECTING RIGHTS UNDER RULE 40*bis*(J)[6]

14. The Prosecution's interpretation of Rule 40*bis*(J) suggests that the hearing held pursuant to this rule is nothing more than a mere formality by which the Court ensures that certain texts are or have been read to the Suspect in a language he understands, without any scope for addressing the fundamental right to liberty of which the Suspect has been deprived. This Court's foundation in the international human rights movement requires it to respect the rule formulated in Article 8 of the Universal Declaration of Human Rights:

> *"Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law".*

The spirit of this provision applies *mutatis mutandis* to the current international law context.[7]

15. In advocating a restrictive interpretation of Rule 40 *bis* (J), the Prosecution seeks to create a dichotomy between this sub-rule's requirement that the presiding Judge "ensure [a suspect's] rights are respected" and Rule 40*bis*(K)'s requirement that a suspect "*may submit to the Trial Chamber all applications relative to the propriety of provisional detention or* [his] *release*" (emphasis added), where no such dichotomy exists. Paragraph (K)'s language is permissive. It gives a Suspect the *option* of applying to the Trial Chamber for release. Nothing in its language *requires* that such applications be brought before the Trial Chamber alone. Had that been the framers' intent, paragraph (K) would read, "*during detention, the Prosecutor, the suspect or his counsel shall submit to the Trial Chamber all applications relative to the propriety of provisional detention or to the suspect's release*".

16. The Prosecution's reliance (at paragraph 17 of the Prosecution Response) on Rule 40(C) and (D)(i) in support of its interpretation of Rule 40*bis*(J) and (K) is also misguided. It fails to take into account that Rule 40 contains no equivalent to Rule 40 *bis* (J). A suspect detained pursuant to Rule 40 is not brought before a Judge who is required to ensure his rights are respected. His only option is an application to the Trial Chamber. The plain language of Rule 40*bis*, on the other hand, indicates that a suspect detained under its provisions has two opportunities to assert his rights.

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6 Paragraphs 17-19 of the Prosecution Response.

7 This position is supported by the passage from *Prosecutor v. Delalic et al. (Celebici), Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delic* – Annex 24 of the Response – quoted in paragraph 16 below.

17. The interpretation of Rule 40*bis* advocated by the Prosecution violates the principle that in interpreting a statute or set of rules, the judiciary should make every effort to avoid absurd results. The Defence Office submits, as it did in its Release Application (paragraph 12) and at the hearing on 4 June 2003, that an interpretation of paragraph (J) which would permit a judge to ignore a claim that an individual's liberty (or other) rights have been violated is absurd. A simple reading of the plain language of Rule 40 *bis* is that it provides the Suspect with an expeditious forum to assert those rights.

18. Finally, the Prosecution's assertion, at paragraph 17 of the Prosecution Response, that "*it is a matter of general practice that allegations of unlawful arrest or detention are decided by a Trial Chamber and not a single Judge*" is unsupported by any authority.

19. In the *Brđanin Habeas Corpus Decision* cited by the Prosecution, the ICTY Trial Chamber, having determined that the common law writ of *habeas corpus* was not available in proceedings before the ICTY, went on to consider the accused's application as a Rule 73 motion challenging the lawfulness of the his detention. The Chamber noted that,

> "[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 . . . if the application amounts to a challenge to jurisdiction, or Rule 73 if it does not*" (emphasis added).

This decision supports the proposition, therefore, that accused (not suspects) before the ICTY whose cases have been assigned to a Trial Chamber should challenge the legality of their arrest before their assigned Trial Chamber. The judgment says nothing about Rule 40 *bis*.

20. With respect to the *Delić Application for Leave to Appeal (Provisional Release)* upon which the Prosecution relies in its footnote 23, the Prosecution has taken the quotation from the judgment on which it relies out of context. *Delić* dealt with whether an accused could seek leave to appeal the denial of bail by a Trial Chamber under Rule 72 of the ICTY's Rules.[8] In his application for leave to appeal, Delić asserted that the Trial Chamber which refused him bail had violated his right to liberty and deprived him of an effective remedy for that violation. The section from which the Prosecution quotes reads in full:

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[8] The ICTY subsequently amended its Rule 65 to give an accused the right to appeal where leave was granted by the Appeals Chamber. See ICTY Rule 65(D).

> *"The right to liberty is without question a fundamental human right. The Applicant has cited a number of international human rights instruments in this connection, but the proposition is axiomatic. The right also entails the right to an effective remedy for deprivation or violation of that right.*
>
> *The mistake with the Applicant makes, however, is to consider that the Trial Chamber, by denying the motion for provisional release, has violated the Applicant's right to liberty and that the Applicant is therefore entitled to an effective judicial remedy for that violation. The correct analysis is that the Trial Chamber is the effective judicial remedy for any alleged violation of the right to liberty. By applying to the Trial Chamber, the Applicant exercises his right to challenge the lawfulness of his detention and deprivation of liberty. The word "effective" does not mean the Application has to succeed; this would be nonsense. It is enough that the competent judicial authority reviews the position in accordance with the appropriate norms and human rights standards, which the Trial Chamber has done quite properly"* (emphasis in the original)

Far from supporting the Prosecution's contention that a Trial Chamber alone must consider challenges to the lawfulness of arrest, *Delić* supports the Defence Office's interpretation of Rule 40*bis*(J) advanced in paragraph 14 above.

VI. ARBITRARY DETENTION[9]

21. The Prosecution Response on this point appears to assert that an order under Rule 40 *bis* does not deprive a suspect of his liberty. Rather, it simply brings him within the jurisdiction of the Special Court after arrest by authorities unconnected with the Court.

22. In taking this position - that a Rule 40*bis* order does not deprive a suspect of his liberty - the Prosecution relies exclusively on one of its requirements, namely sub-Rule (B)(i) which requires that a State have either arrested the suspect or received a request to do so under Rule 40. The Prosecution ignores the fact that paragraph (B) contains two other requirements for the issuance of a transfer and detention order: The judge must be satisfied "there is reason to believe that the suspect may have committed a crime or crimes" within the Court's jurisdiction; and, most importantly, the judge must consider provisional detention to be necessary "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". Without evidence in support of the Prosecution's contention that these requirements have been met, a judge cannot issue an order for the transfer and detention of a suspect. Mr. Gbekie's declaration that the Prosecution had asked Sierra Leonean authorities to arrest the suspect failed to satisfy all of 40*bis*(B)'s requirements.

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9 Paragraphs 20-24 of the Prosecution Response.

23. If the Prosecution's position were correct, Rule 40 *bis* would provide no scope for judicial scrutiny or intervention; in that case, however, the Rule would then have provided for the Prosecution alone to have the authority to effect a transfer pursuant to Rule 40 *bis*. The fact that judicial intervention is required means that that intervention must be *effective*, which in turns means that it must be more than a mere "rubber-stamp"; the Judge can only exercise his discretion if there is evidence, whether by affidavit or otherwise, or at the very minimum, *argument* as to why it is necessary to effect the arrest. In this case, this was entirely absent.

24. The Prosecution's reliance on Rule 40*bis*(B)(i) also ignores: 1) the relationship between Sierra Leonean authorities and the OTP and 2) the particular facts of this Suspect's arrest which emerges from Mr. Gbekie's declaration. By virtue of Article 15(2) of the Statute, Article 17 of the Agreement and Rule 8(A) of the Rules, Sierra Leonean authorities are obligated to assist the Prosecutor in the investigation and apprehension of suspects. They are thus agents of the Court, particularly where their actions, such as the apprehension of suspects, are inspired by a request from an organ of the Court. In the present case, Mr. Gbekie's declaration states that the Prosecution requested the suspect's arrest. There is no material before the Court indicating that Sierra Leonean authorities had any interest in arresting him except in the discharge of their duties to the Court. The Prosecution was an active participant in the deprivation of the suspect's liberty.

25. Finally, the Prosecution contends (at paragraph 24 of the Prosecution Response) that the legality of the Rule 40*bis* order cannot be determined by reference to matters that were not before the designated Judge at the time the order was made. The Defence Office repeats and emphasizes the duty that the Prosecution owes a suspect and the presiding Judge on an *ex parte* motion such as a Rule 40*bis* application. The information to which the Defence Office refers in its original motion was available to the Prosecution at the time it requested the suspect's arrest and detention. The Prosecution had a duty to bring this information to the issuing Judge's attention.

26. Should the Trial Chamber deem it necessary for the Defence to furnish evidence of the matters set out in the Release Application, the Defence Office files the declaration of Ibrahim Yillah[10] in reply to paragraphs 25 and 26 of the Prosecution Response. The

[10] Annex 2 to this reply.

Defence Office chose, faced with limited time, resources and barriers to contacting the Suspect's family upcountry, to communicate information concerning the Suspect's circumstances on the basis of instructions from him. In addition, Rule 92 *bis* permits proof of facts other than by oral testimony or, by implication in the case of written motions, its written equivalent.[11] Moreover, it is important to note the Prosecution's inability to confirm or deny the information presented by the Defence Office. This lack of information at this time raises the question: what information did the Prosecutor or Mr. Gbekie possess in late May that led the OTP to believe the suspect's detention was necessary?

VII. THE TRIAL CHAMBER'S JURISDICTION TO GRANT RELIEF[12]

27. This Court has a broad inherent jurisdiction to control its own proceedings. The Prosecution's position at paragraphs 8 to 16 of its response appears to support this contention. This broad power coupled with the Court's basis in the international human rights movement give it the power to determine if an individual detained under the Court's authority has had his rights violated and to make a declaration of that fact in addition to granting any other suitable remedy.

VIII. AN INDICTMENT IS NO BAR TO JUDGMENT IN THIS MATTER

28. In paragraph 28 of its response, the Prosecution announces its intention to indict the Suspect. The Defence Office submits that this information is irrelevant to the Release Application and is certainly no bar to the declaratory relief requested.

29. The issues raised in this Application are important ones which require judicial consideration at this early stage or proceedings and, indeed, of the Court's existence. Judgment in the present case will provide guidance to the Prosecution and Defence as to the parameters of Rules 40 and 40*bis*. The meaning to be attributed to Rule 40*bis*(J) is of paramount importance. Judicial interpretation of the provision will clarify the remedies available to an individual whose rights have been violated in the course of arrest. The

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11 Of course Rule 92*bis*(C)'s notice requirement does not conform to the time limits set by Rule 7 for responses and replies to motions. Given Rule 89(C), which states the Trial Chamber "*may admit any relevant evidence*", the spirit of the two provisions combine to allow for uncontroversial evidence to be simply stated for the Court by Counsel either in person or in writing.

12 Paragraph 7 of the Prosecution Response.

meaning which this Chamber attributes to the provision will also send out a signal as to this Court's commitments to the international human rights norms which form part of the basis of its attempt to address impunity and entrench the rule of law in Sierra Leone.

30. Furthermore, the issues raised by the Suspect are of fundamental importance to him. He has been detained for 26 days without any factual basis having been offered for that detention. His detention has also gravely affected his family and their ability to sustain themselves and their home life. The Suspect's application also raises issues of fundamental importance to the community at large. The Suspect submits that the Court would be perceived as lacking were it to refuse to address such important issues in a considered judgment.

31. Finally, the determination of whether or not the Suspect has been arbitrarily detained is far from an academic issue, even if he is indicted. This determination, best made at this stage of proceedings, may effect his trial, any right he may have to compensation[13] and, should the Prosecution prove his guilt beyond a reasonable doubt, any sentence handed down by this Court.[14]

Dated at Freetown this 23rd day of June 2003

DEFENCE OFFICE

John R.W.D. Jones, Acting Chief of Defence Office
Claire Carlton-Hanciles, Defence Associate
Ibrahim Yillah, Defence Associate
Haddijatu Kah-Jallow, Defence Associate
Sam Scratch, Defence Intern

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13 Article 9(5) of the ICCPR provides: "*Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation*". Article 5(5) of the ECHR contains similar provisions. It is thus arguable the suspect has a claim should his current detention be determined to have been unlawful. The ICTR Appeals Chamber in its reconsideration of its original judgment in *Barayagwiza* (Annex 3 to this reply at paragraph 75) decided that that accused was entitled to compensation for unlawful detention if he was acquitted at trial. See S. Beresford, "Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted or Convicted by the *Ad Hoc* Tribunals", (2002) 96 *American Journal of International Law*, 628 at p.636-37 – Annex 4 to this reply.

14 The ICTR Appeals Chamber in its reconsideration in *Barayagwiza* also decided that the accused was entitled to a reduction in his sentence if convicted at trial as compensation for his unlawful detention – see Annex 2 at paragraph 75.

INDEX OF ANNEXES

Annex 1: Amnesty International "Sierra Leone: Ending impunity – an opportunity not to be missed" AFR 51/60/00 26 July 2000

Annex 2: Declaration of Ibrahim Yillah

Annex 3: *Jean Bosco Barayagwiza v. The Prosecutor – Decision (Prosecutor's Request for Review or Reconsideration)* Case No. ICTR-97-19-AR72, 30 March 2000

Annex 4: S. Beresford, "Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by *Ad Hoc* Tribunals" (2002) 96 *American Journal of International Law* 628.

ANNEX 1

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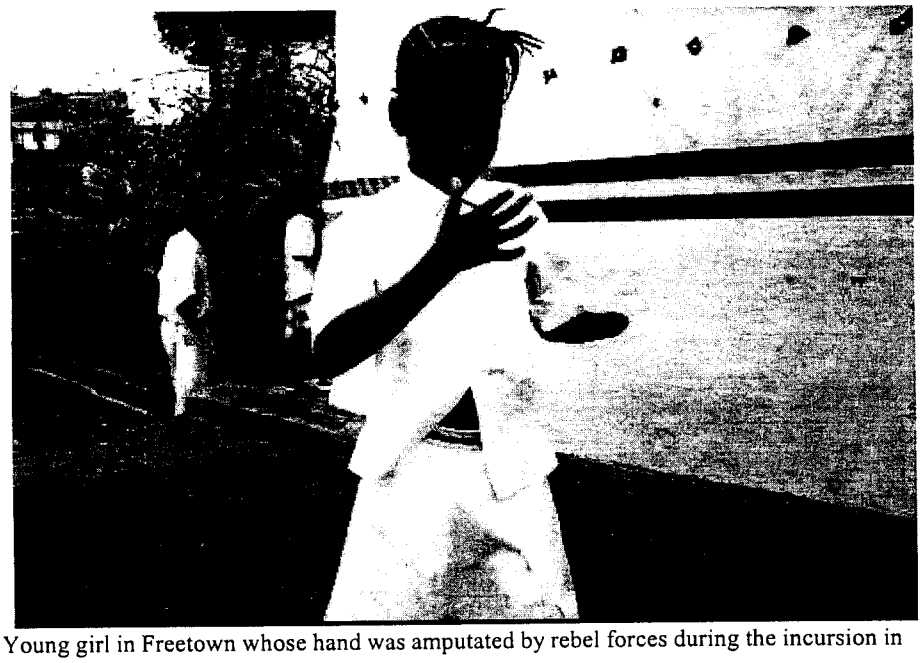
SIERRA LEONE

Ending impunity - an opportunity not to be missed

The crisis precipitated in May 2000 by the capture of United Nations (UN) peace-keeping forces by rebel forces in Sierra Leone, the subsequent resumption of hostilities and the arrest and detention of leading members of the armed opposition Revolutionary United Front (RUF) have forced a reconsideration of the peace agreement signed between the government of Sierra Leone and the RUF on 7 July 1999 in Lomé, Togo. The international community, in particular the UN, must seize this opportunity to deal effectively with impunity for the horrendous human rights abuses, committed by all parties to the internal armed conflict, which have occurred in Sierra Leone.

The UN Security Council is now debating a process and mechanism to bring those alleged to be responsible for human rights abuses to justice, following a request by the Sierra Leone government to the UN for assistance and guidance in establishing a special court or tribunal. Amnesty International is making a series of recommendations for achieving justice for the victims of human rights abuses in Sierra Leone, for ensuring that those who are brought to justice receive a fair trial in accordance with international standards, and for contributing towards the longer-term strengthening of the Sierra Leone judicial system to enable it to assume responsibility for bringing to justice perpetrators of human rights abuses.



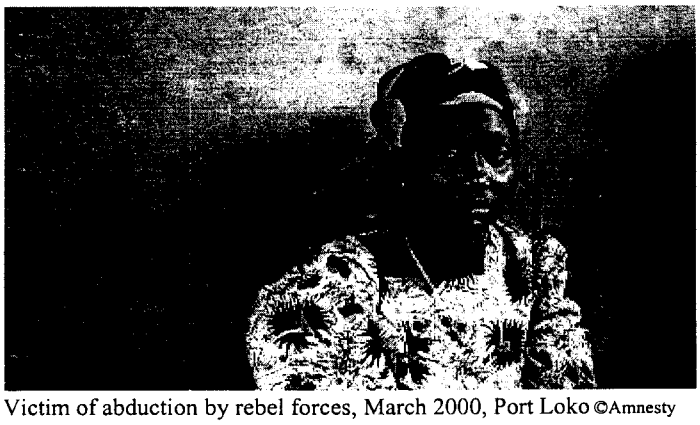
Young girl in Freetown whose hand was amputated by rebel forces during the incursion in January 1999 ©Stuart Freedman

Context

The need to end impunity in Sierra Leone for perpetrators of human rights abuses is paramount and urgent if Sierra Leone is to enjoy peace and an environment where the fundamental human rights of all Sierra Leoneans are respected and protected. The continuation of human rights abuses against civilians after the peace agreement was signed and the increase in abuses since the resumption of hostilities in May 2000 underline this urgency. It is the responsibility of the international community as a whole to respond decisively to end impunity in a process which is credible, effective and meets international standards of fair trial, in which justice is done and seen to be done.

The Lomé peace agreement entrenched the impunity enjoyed by perpetrators of human rights abuses throughout Sierra Leone's eight-year conflict. By including an amnesty for all activities undertaken in pursuit of the conflict, the peace agreement granted impunity for some of the worst human rights abuses, including crimes against humanity and war crimes. The UN at the time added a disclaimer to the agreement that the amnesty would not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. No substance was, however, subsequently given to this disclaimer by the international community.

The peace to be forged by the agreement was undermined from the start because it failed to address the issue of establishing accountability for human rights abuses and bringing those responsible to justice. It was a peace agreement which failed to provide justice for the victims of human rights abuses. It also appeared to give a signal that human rights abuses would be condoned and that their perpetrators would not be held accountable. Since July 1999 human rights abuses against civilians, including deliberate and arbitrary killings, mutilations, rape and abductions have continued. Although the amnesty in the peace agreement does not apply to abuses committed after 7 July 1999, no steps have been taken to end impunity for these abuses.



Victim of abduction by rebel forces, March 2000, Port Loko ©Amnesty International

The responsibility for bringing to justice perpetrators of human rights abuses in Sierra Leone lies primarily with the government of Sierra Leone. Serious obstacles, however, face the Sierra

Leone judicial system and these must be taken into account when considering what is the most effective and fair judicial process for bringing perpetrators of human rights abuses to justice.

An appropriate judicial mechanism with the necessary special legal expertise to try those alleged to be responsible for the widespread and grave violations of international human rights and humanitarian law committed during the last nine years must be established by the international community. The need to provide justice to the people of Sierra Leone as well as the fairness and effectiveness of the process must remain prime considerations.

The judicial process must exclude imposition of the death penalty, which remains on the statute book in Sierra Leone. Amnesty International is unconditionally opposed to the death penalty on the grounds that it is a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading punishment as set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which was ratified by Sierra Leone in 1996. The scale of human rights abuses committed in Sierra Leone has been horrendous and an argument used in favour of the death penalty is that it is justified retribution for particularly atrocious crimes. The use of the death penalty, however, perpetuates a cycle of violence, bitterness and revenge, instead of promoting reconciliation and respect for human rights.

Amnesty International believes that it is important that any judicial mechanism established to try those alleged to be responsible for human rights abuses, including crimes against humanity and war crimes, serves a dual purpose: firstly, to bring the perpetrators to justice in trials which meet international fair trial standards; and secondly, to contribute to the long-term goal of strengthening Sierra Leone's national capacity to try perpetrators of human rights abuses in its own courts.

Ideally, therefore, any judicial mechanism created should be rooted in the Sierra Leone legal and judicial system and ensure, as far as possible, the active involvement of and close cooperation with Sierra Leonean judicial, prosecution and police officials. Expertise to try crimes under international law is essential because trials for such crimes involve special requirements for the gathering and presentation of evidence to prove the specific elements of these crimes, which may include evidence regarding the scale and systematic nature of the crimes committed and individual responsibility based on chain of command.

For reasons described below, however, Amnesty International believes that the Sierra Leone judicial system is, at this stage, not in a position to try those alleged to be responsible for human rights abuses in trials which meet minimum international standards, without considerable international expert assistance.

Capacity of the Sierra Leone judicial system

Collapse of the judicial system

The protracted conflict in Sierra Leone, which began in 1991, has had a serious negative impact on the legal system as a whole. The justice system has collapsed and institutions for the administration of justice, both civil and criminal, are barely functional. Sierra Leone's national judicial institutions currently lack the necessary personnel with the appropriate training in international criminal law, financial support, equipment and the necessary legal tools to conduct trials of those accused of crimes under both national and international law. Sierra Leone national law does not currently extend to crimes under international law, including crimes against humanity and war crimes.

Magistrates, high court judges, judges of the Court of Appeal and Supreme Court are forced to operate from the run-down and overcrowded law courts building in the centre of Freetown. Judges and magistrates have no library to use in verifying the law, consulting jurisprudence and preparing judgements. There are no recording facilities for the proceedings in court and hardly any secretarial services for judges and magistrates. The administration of justice outside Freetown has been almost non-existent. Courts outside Freetown, other than magistrates courts in the provincial towns of Bo and Kenema, have ceased to function. Court rooms have been burned or destroyed. The remuneration and conditions of service of judges are seriously deficient and private legal practitioners who would otherwise have wished to serve on the bench can hardly consider, under the existing climate, taking up judicial appointments.

The Sierra Leone Bar Association is acutely aware of and concerned about this situation. In a resolution passed on 6 July 2000 at the conclusion of its 19th annual conference held in Freetown, concern was expressed about "the inability of judicial personnel to effectively discharge their duties, circumscribed by lack of access to legal materials and resources" and that "a significant number of judges have retired and the poor conditions of service have failed to attract suitable members of the Bar to the bench". It also noted that "the employment of judges by means of renewable contracts after retirement is incompatible with judicial independence and is likely to compromise the quality of judicial performance".

Independence and impartiality

Furthermore, in a situation where political instability and insecurity continue to prevail, and where any trials of those accused of human rights abuses will be both politically sensitive and complex, the Sierra Leone judiciary is potentially vulnerable to outside influence and pressure. This may prevent the perpetrators of crimes against humanity and war crimes from being brought to justice in trials which guarantee the independence and impartiality required by international standards of fairness.

Amnesty International is also concerned about the potential conflict of roles arising from the merging of the positions of Minister of Justice and Attorney General. This arrangement could compromise the relative independence of the prosecution authorities and the political responsibility for justice and the administration of law.

Continuing hostilities and insecurity

Continuing serious security concerns also have implications for the conduct of trials which conform to international standards of fairness. Issues such as the protection of witnesses and victims, judicial and legal personnel, confidentiality of information, as well as detention and court facilities which would ensure the safety of defendants, all require careful consideration in creating the most appropriate judicial mechanism.

The national army and police force

The conflict has had a devastating impact on the capacity of the national army and police force to carry out their responsibilities for law enforcement.

Following the military coup in May 1997 which brought the Armed Forces Revolutionary Council (AFRC) to power, the Sierra Leone Army was effectively dismantled. Training of the new Sierra Leone Army, assisted by the United Kingdom, is now being undertaken.

During the rebel incursion into Freetown in January 1999, around 200 police officers were killed and police stations were deliberately demolished by rebel forces. The effective functioning of the justice system cannot take place without an effective and professional police force. The Commonwealth Police Development Task Force, operating in Sierra Leone since 1998, has developed programs aimed at re-establishing and training the national police force. These programs are, however, far from complete and need further and sustained support from the international community.

The Central Police Station in Freetown, destroyed by rebel forces in January 1999

Inadequate detention facilities

Conditions in all places of detention throughout Sierra Leone, both in Freetown and in the provinces, give serious cause for concern. This includes the Central Prison, Pademba Road, in Freetown, where members of the RUF are currently detained, and, in particular, police stations. Detainees awaiting trial are held in harsh and squalid conditions which fail to meet international standards for the treatment of prisoners and often amount to cruel, inhuman and degrading treatment. The lack of basic infrastructure and an acute economic crisis, further aggravated by the rebel incursion into the capital in January 1999, have resulted in little or no resources being made available for prisoners and detainees. Detainees held in police custody face particular deprivation since no food is provided by the authorities.

An Amnesty International delegation in March 2000 visited police cells in the building used temporarily to replace Freetown's Central Police Station, which was destroyed in January 1999, as well as cells in the law courts building, and noted the deplorable conditions in which detainees were held.

Building used as a temporary police station in Freetown, March 2000 ©Amnesty International

Amnesty International's recommendations

A judicial process under the auspices of the United Nations

In June 2000 the government of President Ahmad Tejan Kabbah wrote a letter to the UN Secretary-General requesting assistance and guidance from the UN to establish a special court to bring to justice leading members of the RUF for offences including human rights abuses.

In its resolution of 6 July 2000, the Sierra Leone Bar Association welcomed the proposed establishment of a judicial mechanism to try the perpetrators of violations of international human rights and humanitarian law. It repeated its criticism of the amnesty provision contained in the peace agreement and of subsequent legislation to enforce this provision, and, furthermore, called for the immediate repeal of the amnesty provision. It urged the government to ensure that amnesty or pardon only be granted after a process of truth and reconciliation. Noting that all parties to the conflict had violated both national and international law, the Bar Association called on the government to ensure that prosecutions should not be restricted to one faction or group.

In order to respond effectively to the request of the Sierra Leone authorities for assistance, the UN must ensure that fair trials in accordance with international law and standards take place. Given the very limited capacity of the Sierra Leone judicial system, the UN should establish, together with the Sierra Leone authorities, a judicial process of an international character under the auspices of the UN.

This judicial process should take the form of a tribunal composed of both international and Sierra Leone judicial officials. The political sensitivity of such a judicial process poses a challenge to the capacity of any legal system, let alone one that is emerging from a protracted period of internal armed conflict. Amnesty International therefore recommends, as an essential guarantee for independence and impartiality, that a majority of international judges, prosecutors and investigators participate in all stages of the judicial process.

The judicial mechanism under the auspices of the UN could be established either through a resolution of the UN Security Council or the UN General Assembly. Clear agreement must be reached between the UN and the government of Sierra Leone on respective responsibilities and the necessary guarantees for the independence and proper functioning of the tribunal. As a judicial mechanism established under the auspices of the UN, it should receive full and sustained financial support from the UN under the regular budget or under a voluntary trust fund. It should also benefit from the cooperation of UN member states in criminal matters and the provision of expertise and other assistance including specialized legal and judicial personnel and investigators.

Alternatively, if such a tribunal cannot be established, the UN Security Council should establish an international criminal tribunal to bring to justice the perpetrators of crimes under international law, as it has done for Rwanda and the former Yugoslavia.

A credible, effective and fair judicial process

At a minimum, any judicial process under the auspices of the UN to try those alleged to have committed grave violations of international human rights and humanitarian law in Sierra Leone during the conflict and since the signing of the peace agreement should encompass the essential elements outlined below.

- No single individual or party to the conflict should be singled out for prosecution to the exclusion of others. Trials should focus on those most responsible for the gravest abuses of human rights committed since the conflict began in 1991, whether they are members of the RUF, the AFRC, the Sierra Leone Army, or the Civil Defence Forces. Amnesty International opposes the creation of any tribunal or court which would have the sole aim of bringing to justice one named individual or group of individuals. Given that any judicial mechanism established would not be able to try all perpetrators of

serious human rights abuses, any process for deciding which alleged perpetrators to prosecute would have to be transparent, impartial and independent of government or other influence. Any process that is not objective and impartial will impede the process of national reconciliation.

- There should be a non-selective, balanced and independent prosecution policy to ensure that the perpetrators are identified for prosecution regardless of their current political position and allegiance. At this stage, such a policy will be difficult to achieve unless international prosecutors are appointed to work together with national prosecutors in order to ensure the necessary expertise in bringing charges under international law and also that a prosecution policy is pursued impartially without political influence being exerted. An international prosecutor should take the lead in taking policy decisions since he or she would be free from local political pressures and can develop an independent policy in the best interests of justice. National prosecutors should actively participate in the process, their role in decision making gradually increasing over time. International police investigators should be appointed to conduct investigations with and to provide training to the national police force.

- The judicial mechanism should have jurisdiction to try international crimes, including crimes against humanity and war crimes, as well as grave crimes under national law committed during the conflict and since the signing of the peace agreement. Sierra Leone national law does not currently extend to crimes against humanity and war crimes but the government has already announced its intention to ratify the Statute of the International Criminal Court which would require it to incorporate these international crimes into national legislation. The UN should promptly provide the necessary technical legal assistance to draft the statute for the judicial mechanism to be established, using relevant legal models.

- The judicial mechanism should have the jurisdiction to try all the above crimes committed since 1991 when the conflict began.

- The interpretation by the UN that the amnesty provided in the peace agreement does not apply to "international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law" should be integrated into the statute of the judicial mechanism and be immediately and rigorously applied.

- The death penalty must be excluded as a punishment, especially since it can be imposed under national law. The Statute of the International Criminal Court and the statutes of the international criminal tribunals for Rwanda and the former Yugoslavia have excluded the use of the death penalty for all crimes, including the most serious.

- Qualified judges should be appointed of high moral standing, known integrity and independence. They should include a substantive number of Sierra Leonean judges, although there may be few available in the immediate post-conflict situation. Recognizing the considerable pressures to which sitting Sierra Leonean judges might be subjected, international judges with the requisite expertise in international law should be appointed. International judges should constitute the majority on the bench, sitting alongside Sierra Leonean judges. Since Sierra Leone shares similarities in its judicial system with many other Commonwealth countries, judges from Commonwealth countries would be particularly well qualified for these tasks.

- International defence lawyers should be allowed to participate in trials in the event that no national lawyers are able or willing to defend those accused or if the number of Sierra Leonean lawyers is not sufficient to cope with the demands of defending the accused. Facilities for the provision of access by all defendants to defence lawyers should be established promptly, since the pre-trial stage is of crucial importance in guaranteeing the right to an adequate defence and therefore a fair trial.

- Appeal chambers should have a similar predominance of international judges, and could be drawn mainly from Commonwealth countries. Alternatively, the joint Appeals Chamber of the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the former Yugoslavia could also be charged with hearing appeals for Sierra Leone. Such an arrangement would ensure that appeals benefit from the unique and accumulated experience of the joint Appeals Chamber; it may, however, not be practicable given its already heavy workload.

- Expertise should be provided on gender-based crimes and in addressing the particular problems facing the prosecution of crimes of violence against women, including protection of victims of and witnesses to these crimes. Similarly, particular expertise in dealing with violence against children, as well as juvenile perpetrators and witnesses, should be provided at all stages of the process.

- Expert training for all judicial personnel, including judges, lawyers and prosecutors, in international criminal law and procedure and international standards should be provided by the UN or member states able to provide such expertise. This training should include a component on women's and children's rights.

- There should be international supervision of detention, preferably by the UN. Such supervision would be intended to ensure that detention facilities comply with international standards, including the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form

of Detention or Imprisonment. Where existing facilities do not meet these standards, the UN and the international community should be required to establish them.

- Adequate security should be provided for judicial personnel participating in trials, preferably by the UN.

- A professional witness protection and support program which includes expertise in dealing with children and with women who have suffered sexual violence should be established with support from the international community and with expert advice from the international criminal tribunals for Rwanda and the former Yugoslavia.

- Trials should preferably take place in Sierra Leone since this would be the best means to ensure that justice is seen to be done, that the facts are laid before the Sierra Leone people, and that the trials contribute towards the process of reconciliation. If this proves impossible on security grounds, trials should take place in a nearby country with the necessary legal infrastructure, including a body of defence lawyers able to undertake the defence in these legally complex cases.

An international commission of inquiry

Any judicial process to be established in Sierra Leone with the assistance of the international community, or an international criminal tribunal, would only be able to prosecute the major perpetrators of human rights abuses. In order to end impunity, however, there is a need to also ensure that all human rights abuses are investigated.

In addition to a judicial process under the auspices of the UN, Amnesty International therefore continues to urge the establishment without further delay of an international commission of inquiry to investigate human rights abuses during Sierra Leone's conflict, as recommended by the UN High Commissioner for Human Rights shortly after the signing of the peace agreement. There has appeared to be little political will on the part of the international community to pursue the High Commissioner's recommendation.

Such an international commission of inquiry should ensure thorough fact-finding and lead to appropriate accountability for all perpetrators of human rights abuses. It should include experienced investigators of crimes under international law who would be able to gather evidence which could be used by any judicial mechanism established by the UN. The commission of inquiry's impartial findings should constitute the basis for any future prosecution policy.

While including the amnesty, the peace agreement also provided for the establishment of a Truth and Reconciliation Commission as a means by which accountability for human rights abuses committed during the conflict would be established. The amnesty, however, limited the

capacity of the Truth and Reconciliation Commission to establish accountability. Although the High Commissioner subsequently set up a study on the possible relationship between an international commission of inquiry and the Truth and Reconciliation Commission provided by the peace agreement, the outcome of that study has not yet been made public.

The Truth and Reconciliation Commission may have a role in establishing the facts about human rights abuses committed during the conflict, but more is needed to bring true justice and reconciliation and an end to impunity. In addition, the establishment of a Truth and Reconciliation Commission was envisaged for a post-conflict situation; the failure of parties to the conflict to adhere to the peace agreement and continuing hostilities and insecurity raise questions about its viability in the current climate.

Strengthening the national judicial system

The Sierra Leone judicial system, including the prosecution services and the national courts, has to be strengthened to enable it to deal with the many crimes which it will be expected to investigate and adjudicate. Any judicial mechanism established with international assistance would only be able to deal with a limited number of cases and would involve those most responsible for serious human rights abuses. By and large, the Sierra Leone judiciary will still need to deal with other perpetrators of human rights abuses during the conflict and since the signing of the peace agreement. Unless the national judiciary is strengthened through the provision of training, resources and logistical support, it will not be able to adequately undertake this responsibility. While the courts in Freetown may currently be functioning, albeit with difficulty, rural communities in most parts of the country are left without a functioning judicial system, resulting in impunity prevailing not only for crimes linked to the continuing conflict but also for other crimes.

While the establishment of a judicial mechanism to deal with those most responsible for human rights abuses should be a priority for the international community, it is also important to consider ways in which the UN and foreign governments could assist the Sierra Leone authorities in dealing in the long term with the investigation and prosecution of crimes committed during the conflict and since the signing of the peace agreement. While the establishment of a judicial mechanism in Sierra Leone under the auspices of the UN would bring additional resources for the national judiciary, it is important to ensure that the quality of justice dispensed to those most responsible for human rights abuses, including crimes under international law, is not significantly different to that offered to others who may be accused before national courts for committing the same crimes.

The imperative of restoring confidence in the rule of law and the justice system is one of the cornerstones for establishing a culture of protection of human rights. To do this, the serious problems facing the national judiciary, which have been identified above, need to be

addressed as a matter of urgency and the international community should provide substantial assistance for this purpose. This would include: improvement in the remuneration and conditions of service of the judiciary in order to encourage competent and experienced private legal practitioners to take up judicial appointments; the provision of appropriate administrative and information technology support systems in order to facilitate efficient management of cases; the provision of basic law libraries with national statutes, collection of decisions of the higher courts, regional and international human rights instruments and treaties ratified by Sierra Leone, and basic legal text books; and extensive refurbishment and equipping of court buildings.

Capacity building through professional training for law enforcement personnel is critical for the re-establishment of the justice system. Training of judges and magistrates is recognized as a priority within the Commonwealth. Any assistance offered to the national judiciary should include the transfer of judges and other legal personnel, especially from countries of the Commonwealth, to ensure that the courts and other judicial institutions function effectively. Judicial training for Sierra Leone should include, among other issues, training in international human rights and humanitarian law. Some of the assistance would have to ensure also that police officials expected to investigate crimes have training in human rights as well as the resources and facilities needed to undertake their tasks.

In its resolution of 6 July 2000, the Sierra Leone Bar Association called on the government of Sierra Leone to give higher priority to making adequate provision for the smooth running of the judiciary as a whole, providing better conditions of service for judges which would be comparable to those of other member states of the Commonwealth in West Africa, embarking on continuing legal education and training of judges, magistrates and other court personnel, and to appointing judges to the Superior Court of Judicature.

Conclusion

In July 1999 the UN and the international community failed to deal effectively with impunity for human rights abuses in Sierra Leone. They now have another opportunity which must not be missed. Unless serious and concerted measures are taken to assist the Sierra Leone authorities, impunity will continue to prevail.

The Sierra Leone judicial system is currently unable to ensure trials that would conform to international standards of fairness. In order to achieve justice for the victims of human rights abuses and to ensure that those who are brought to justice have a fair trial in accordance with international standards, the UN should not take half measures in the establishment of a judicial mechanism. At the same time, the judicial mechanism established under the auspices of the UN should contribute to the longer-term strengthening of Sierra Leone's national capacity to try perpetrators of human rights abuses in its own courts.

ANNEX 2

DECLARATION

I, IBRAHIM SORIE YILLAH, a Barrister at Law and Solicitor of the High Court of Sierra Leone presently attached to the Defence Office of the Special Court for Sierra Leone affirmatively state as follows:

1. I work as a Public Defence Associate in the Defence Office of the Special Court for Sierra Leone.

2. My duties include inter alia: "providing initial legal advice and representation to suspects and accused persons held pursuant to the authority of the Special Court for Sierra Leone".

3. I also serve as a Defence Investigator when the need arises as the Defence Office is understaffed and does not presently have investigators as staff members of the Defence Office.

4. On the instructions of the suspect, Moinina Fofana and the Acting Principal Defender, I interviewed a Mr. Eric Jumu, Regional Co-ordinator National Commission for Social Action (NACSA) for the Southern Province of the Republic of Sierra Leone co-ordinating amongst other things rehabilitation and reconstruction of the Southern Province of Sierra Leone. Further that his duties also include resettling and re-integrating ex-combatants in the Southern Province of the Republic of Sierra Leone, where he dealt officially with ex-combatants with the assistance of, among others, the suspect, Moinina Fofana.

5. I was informed by Eric Jumu that his duties as a Regional Co-ordinator includes engaging ex-combatants in skills training and other trauma-related counselling programmes and also integrating ex-combatants already skilled into profit-making projects.

6. I was also informed by Eric Jumu that he has been engaged in re-habilitation work since 1996 and in the process met the suspect, Moinina Fofana whom he has also now come to know in a personal capacity. He informed me that he knows for a fact that Moinina Fofana has four wives and eighteen children most of whom he has personally met.

7. He further informs me that at an official level, Moinina Fofana is presently Chiefdom Speaker in Gbap, Bonthe District. His duties as Chiefdom Speaker include the

following: assisting the Paramount Chief in the administration of the Chiefdom and acts in the office of Paramount Chief in the absence of the latter.

8. He further informs me that he knows for a fact that in his capacity as Chiefdom Speaker, he is a member of the Chiefdom's council of elders which said body is charged with the administration of law and order in Gbap Chiefdom. He also informed that he knows for a fact that in his capacity before his arrest and detention, members of his Chiefdom and a large number of ex-combatants who reside in Gbap area are also dependent upon Mr. Fofana and the projects he runs for their survival and livelihood.

9. Eric Jumu also informs me that he knows for a fact that Moinina Fofana was up to the time of his arrest and detention involved in a fishing project at Gbap Chiefdom which said programme attracts partnership from several developmental non-governmental organisations including World Vision, Adventist Rural Development Agency and NacSa.

10. He informs me that the projects include bringing together ex-combatants and other youths of Gbap Chiefdom and training them in the art of constructing traditional fishing canoes and also fishing.

11. He further informs me that he knows for a fact the project referred to in paragraph 9 above, was initiated by Mr. Fofana who approached NACSA (Jumu's Office) and requested support for the implementation of the Gbap Fishing Project since March of last year.

12. Eric Jumu also stated that he knows that since the approval and funding of the said project Mr. Fofana has been the key implementer of same. Further that Mr. Fofana has been the focal person through whom NACSA and other funding partners mentioned in paragraph 9 above have co-ordinated and supported the work of this project.

13. Mr. Eric Jumu also stated that he knows that from reports received in the past from this project that Mr. Fofana has been not only the catalyst but also the sole figure around whom the project revolves. He stated the importance of such projects for post-war Sierra Leone cannot be gainsaid as there are from reports reaching his desk over five hundred persons engaged in same and who including Mr. Fofana have been gaining their livelihood and survival in the past year from.

14. Eric Jumu also stated that Mr. Fofana's absence will impact considerably on the Gbap Fishing Project as he knows that his office, NacSa and other development partners would be reluctant to continue supporting such a project in the absence of Mr. Fofana who has been the sole manager and implementer of the Gbap Fishing Project.

15. I was also informed by Eric Jumu that he knows from his encounters with Mr. Fofana that he is highly regarded and held in high esteem by his people. Further that Mr. Fofana is regarded not only as a leader but as a very hard-working and dedicated man to his community upon whom his community can turn to in times of need.

16. I paid visit to Mr. Fofana in the Special Court Detention Facility in Bonthe on the day his initial hearing as a suspect was held by Judge Boutet.

17. Amongst other things Mr. Fofana expressed deep concern about the situation of his family (immediate and extended) that he says presently occupy a rented house at 136 New Jerehun Road, Bo Town. Mr.Fofana also stated that the rent on the house was due on the 1st April, 2003 and he wonders what would be the fate of his family in his absence as he was the sole bread-winner.

18. I was also informed by Mr.Fofana that up to the time of his arrest he never contemplated his arrest nor did he think about his possible naming as a suspect on alleged commission of war crimes and crimes against humanity by the Prosecutor of the Special Court for Sierra Leone.

19. The Defence Office had originally intended to file a declaration from Eric Jumu on behalf of the suspect. Mr. Jumu was scheduled to attend the Defence Office on Friday 20 June 2003 but was unable to do so because of urgent family business in Bo (so he informed me).

20. For all the reasons set out above, I believe his arrest will severely impact not only on his immediate and extended family but also on the community in Gbap Chiefdom who up to the time of his arrest was engaged in fishing and reconstruction under the control, guidance and supervision of Mr.Fofana.

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

Dated this 23rd day of June 2003

Ibrahim Sorie Yillah
Public Defence Associate
Defence Office
Special Court for Sierra Leone

Witness Sam Scratch

ANNEX 3

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

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

UNITED NATIONS
NATIONS UNIES

IN THE APPEALS CHAMBER

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

Registrar: Mr Agwu U OKALI

Order of: 31 March 2000

Jean Bosco BARAYAGWIZA
v
THE PROSECUTOR

Case No: ICTR-97-19-AR72

DECISION

(PROSECUTOR'S REQUEST FOR REVIEW OR RECONSIDERATION)

Counsel for Jean Bosco Barayagwiza

Ms Carmelle Marchessault
Mr David Danielson

Counsel for the Prosecutor

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

I. INTRODUCTION

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

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

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

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

II. PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[14] Filed on 21 December 1999

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

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

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

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III. APPLICABLE PROVISIONS

A. The Statute

Article 25: Review Proceedings

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

B. The Rules

Rule 120: Request for Review

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

Rule 121: Preliminary Examination

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

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IV. SUBMISSIONS OF THE PARTIES

A. The Prosecution Case

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

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

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

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

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

[20] *Ibid.*, at § 48.

[21] *Ibid.*, at § 46.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Defence Case

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

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

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

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

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

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

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

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

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

V. THE MOTION BEFORE THE CHAMBER

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

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

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

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[49] Transcript, pages 26-28.

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

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

A. REVIEW

1. General considerations

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

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

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

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

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

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

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

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

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

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

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

Further, the Appeals Chamber stated that-

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

[56] Article 25, Rules 120 and 121.

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

[58] *Ibid.*, at 30.

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

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

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

2. Admissibility

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

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

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

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

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

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

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

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

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

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

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

3. Merits

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

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

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

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

(a) First period (15.4.1996 – 21.2.1997)

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

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

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

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

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

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

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

(b) Second period (21.2.1997 – 19.11.1997)

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

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

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

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

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

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

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

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

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

(c) Third period (19.11.1997 – 23.2.1998)

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

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

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

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

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

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

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

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

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

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

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

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

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

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[75] Decision, §101.

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

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

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

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

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

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

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

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

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

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

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

4. Conclusion

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

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

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

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

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

B. RECONSIDERATION

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

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VI. CONCLUSION

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

VII. DISPOSITION

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

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

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

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

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

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

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

Judge Shahabuddeen appends a Separate Opinion to this Decision.

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

_____s/._____ _____s/._____ _____s/._____

Claude Jorda, Presiding | Lal Chand Vohrah | Mohamed Shahabuddeen

_____s/._____ _____s/._____

Rafael Nieto-Navia | Fausto Pocar

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

[Seal of the Tribunal]

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DECLARATION OF JUDGE LAL CHAND VOHRAH

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

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

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

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

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

S/.

Lal Chand Vohrah

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

[Seal of the Tribunal]

DECLARATION OF JUDGE RAFAEL NIETO-NAVIA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

. . .

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

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

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

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

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

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

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

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

23. The International Court of Justice has held:

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

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

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

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

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

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

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

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

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

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

[32] *Supra* note 20, § 76.

[33] § 72.

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

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

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

. . .

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

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

s/.
Rafael Nieto-Navia

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

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

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

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

(i) The limits of the present hearing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[8] Transcript, Appeals Chamber, 22 February 2000, p. 13.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(v) Whether there are new facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[59] Cited sometimes in legal discourse, as in *Serbian Loans*, P.C.I.J., Ser. A, No. 20-21, p. 56, dissenting opinion of Judge de Bustamante.

[60] Earlier cases suggested that this sort of evidence should be processed through the clemency machinery; but the position was changed by s. 23(2) of the Criminal Appeal Act 1968 (UK).

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

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

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

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

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

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

(vi) The effect of the new facts

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

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

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

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

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

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

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

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

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

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

(vii) Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

s/.

Mohamed Shahabuddeen

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

ANNEX 4

REDRESSING THE WRONGS OF THE INTERNATIONAL JUSTICE SYSTEM: COMPENSATION FOR PERSONS ERRONEOUSLY DETAINED, PROSECUTED, OR CONVICTED BY THE AD HOC TRIBUNALS

Although the best means of vindicating innocent accused is acquittal, in many criminal jurisdictions innocent persons who have been prosecuted or convicted of an offense may be compensated for the deprivation of liberty and economic losses they have suffered as a direct result of the proceedings against them. Awards of compensation may also be made to persons who have been the victims of unlawful arrest or detention. This remedy—which is also codified in various international human rights treaties—is not included within the constituent instruments of the International Criminal Tribunal for the Former Yugoslavia[1] and the International Criminal Tribunal for Rwanda[2] (the ad hoc Tribunals).

Since it is axiomatic that the ad hoc Tribunals fully respect internationally recognized standards on the rights of suspects and accused,[3] the lack of any provision authorizing awards of

decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

Id.

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[1] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 [hereinafter ICTY].

[2] International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994 [hereinafter ICTR].

[3] On the ICTY's recognition of the human rights of suspects and accused, see generally M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 955–72 (1996); 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 224–28 (1995); Stuart Beresford, *The International Criminal Tribunal for the Former Yugoslavia and the Right to Legal Aid and Assistance*, INT'L J. HUM. RTS., Winter 1998, at 49; Antonio Cassese, *The International Criminal Tribunal for the Former Yugoslavia and Human Rights*, EUR. HUM. RTS. L. REV., NO. 4, 1997, at 329; Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 INT'L LEGAL PERSP. 111 (1998); Hafida Lahiouel, *The Right of the Accused to an Expeditious Trial*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 197 (Richard May et al. eds., 2001) [hereinafter ESSAYS ON ICTY PROCEDURE AND EVIDENCE]; Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT'L L. 569 (2000); Patricia Wald & Jenny Martinez, *Procedural Rights*

compensation to persons who were wrongly prosecuted or convicted, as well as those who were unlawfully arrested or detained, raises serious concerns. Even though only a handful of trials have been completed thus far, a steadily increasing number of individuals have been deprived of their personal liberty only to be acquitted or have the proceedings against them subsequently terminated. In one of the most serious cases, an individual spent almost one thousand days in custody, most of them in isolation from other detainees, before being acquitted.[4]

On September 19, 2000, the ICTY president, Judge Claude Jorda, submitted, on behalf of the judges of the court, a letter to the United Nations Secretary-General asking the Security Council to consider amending the ICTY Statute to enable the Tribunal to award compensation to persons who have been wrongly prosecuted or convicted by it, as well as unlawfully arrested or detained under its authority.[5] Seven days later, his counterpart in the ICTR, Judge Navanethem Pillay, sent a virtually identical letter to the Secretary-General.[6]

This paper discusses the various policy arguments that can be made for and against awarding compensation to a wrongly detained, prosecuted, or convicted person and explains why tortious remedies normally available to persons tried for an offense they did not commit may not be available to persons prosecuted by the ad hoc Tribunals. Next, the relevant provisions of the international human rights instruments are examined, as are the most prominent features of compensation schemes in certain domestic jurisdictions. The paper then considers the juridical basis for the establishment of a compensation scheme, together with alternative regimes that were available to the presidents of the ad hoc Tribunals. In this connection, although sound arguments can be raised in favor of the eligibility criteria proposed by the two organizations, various shortcomings can be detected in the proposed approach, especially with respect to wrongly prosecuted persons. The paper concludes by assessing how claims for compensation should be processed in the event that the ad hoc Tribunals are granted the competence to make such awards.

I. THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

Effect on Suspects and Accused

It has been observed that "[t]he very essence of our society is freedom and all its existential, social, economic, and political implications."[7] This principle is enshrined in Article 3 of the Universal Declaration of Human Rights—which provides that "everyone has the right to life, liberty and security of person"—and is therefore also applicable at the international

EVIDENCE, *supra*, at 231; Michaïl Wladimiroff, *Rights of Suspects and Accused*, *in* 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 419 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000).

On the ICTR's recognition of the human rights of suspects and accused, see generally JOHN R. W. D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 518–22 (2d ed. 2000); 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 512–18 (1998); Cristian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381 (2001).

[4] On February 20, 2001, the appeals chamber confirmed the decision of the trial chamber acquitting Zejnil Delalić—who had been held in custody between March 26, 1996, and November 16, 1998—of the eleven counts of grave breaches of the Geneva Conventions on the Protection of Victims of War and violation of the laws and customs of war that he was charged with because of his alleged command over the Čelebići prison camp, located in central Bosnia-Herzegovina, in 1992. Prosecutor v. Delalić, Appeals Judgment, Case No. IT–96–21–A (Feb. 20, 2001), 40 ILM 630 (2001). ICTY decisions are available online at the Tribunal's Web site, <http://www.un.org/icty>.

[5] Letter Dated 19 September 2000 from the President of the International Criminal Tribunal for the Former Yugoslavia Addressed to the Secretary-General, annexed to Letter Dated 26 September 2000 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2000/904, *available at* <http://www.un.org/Docs/sc/letters/2000> [hereinafter ICTY President's Letter].

[6] Letter Dated 26 September 2000 from the President of the International Criminal Tribunal for Rwanda Addressed to the Secretary-General, annexed to Letter Dated 28 September 2000 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2000/925, *available at* <http://www.un.org/Docs/sc/letters/2000> [hereinafter ICTR President's Letter].

[7] C. RONALD HUFF, ARYE RATTNER, & EDWARD SAGARIN, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 146 (1996).

level. Deprivation of this right by arrest or imprisonment can be justified only in exceptional circumstances: in particular, when individuals have engaged in conduct so harmful to the interests of others, or the international community as a whole, as to necessitate the application of international criminal law.[8]

Like their domestic counterparts, the processes of the international criminal justice system are invasive.[9] World leaders and the media at large generally label persons suspected of committing violations of international criminal law as "war criminals," subjecting them to the defamatory effects of public accusation before affording them an opportunity to profess their innocence. Once detained, they are searched and often forced to spend several days in custody prior to being brought before a trial chamber to enter a plea. Despite the presumption of innocence, accused persons seldom gain provisional releases, and in those few cases where they do, the places where they may travel and reside, as well as the persons with whom they may associate, are severely restricted.[10] Those who are denied bail must often spend considerable periods of time in custody before the commencement of their trial. Over and above the effect on their career prospects and earning potential, accused persons, unless they are entitled to legal aid, must also bear the substantial financial burden of defending themselves before an international tribunal situated at a considerable distance from their families and friends.[11] In this connection, accused persons who enter a plea of not guilty and undergo trial face counsel fees (as well as other expenditures for investigators, researchers, and expert witnesses) estimated as running to hundreds of thousands of dollars.[12]

Harsher consequences face those who are convicted and subsequently imprisoned. Aside from being deprived of their liberty in an unfamiliar location far removed from their country of origin—often where they do not speak the language or understand local customs—and being subjected to the hardships and indignities of prison life, convicted persons are confronted with several secondary consequences. In addition to the cost to their livelihood and future employment prospects, they may lose their home and other personal property, as well as suffer the breakup of spousal and other personal relationships and stigmatization.[13]

Given the severity of these repercussions, the international criminal justice system requires the highest standard of proof before an accused can be convicted and imprisoned. Unfortunately, this system is as fallible as that operating at the domestic level and these consequences are therefore likely to be suffered by persons who are unlawfully arrested or detained, or are innocent of the offense for which they were prosecuted or convicted.[14]

[8] *See* NEW ZEALAND LAW COMMISSION, COMPENSATING THE WRONGLY CONVICTED, para. 1 (Parliamentary Paper E 31AJ, 1998), *available at* <http://www.lawcom.govt.nz> [hereinafter NZ LAW COMM'N].

[9] *See id.*, para. 2.

[10] For instance, in its decision to release Milan Simić provisionally, ICTY Trial Chamber II stated that during the period of release the accused shall, inter alia, remain within the confines of the municipality of Bosanski Šamac; surrender his passport to the International Police Task Force (IPTF) or the Office of the Prosecutor; meet once a day with the local police; consent to checks by the IPTF with the local police about his presence and occasional, unannounced visits by the IPTF; avoid all contact with any other co-accused in the case; avoid all contact whatsoever and all interference with any persons who might testify at his trial; and refrain from discussing his case with anyone other than his counsel. Prosecutor v. Simić, Application for Provisional Release, Case No. IT-95-9-PT (May 29, 2000).

[11] *See* John J. Johnston, Reasonover v. Washington: *Toward a Just Treatment of the Wrongly Convicted in Missouri*, 68 UMKC L. REV. 411, 411–12 (2000); *see also* Keith S. Rosenn, *Compensating the Innocent Accused*, 37 OHIO ST. L.J. 705, 711 (1976) (noting that "[t]he cost of properly defending a criminal prosecution can be staggering, impoverishing all but the very rich or the already indigent").

[12] It should be noted, however, that in the case of the ICTY, all but four accused have pleaded indigence and their counsel's legal fees have been paid for by the court "at rates reputed to be often much more generous than those prevailing in their home countries." Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J. L. & POL'Y 87, 103 (2001).

[13] *See* NZ LAW COMM'N, *supra* note 8, para. 3; Johnston, *supra* note 11, at 412.

[14] *See* Peter Ashman, *Compensation for Wrongful Imprisonment*, NEW L.J., May 23, 1986, at 497, 497.

Concern for Individual Liberty

One of the most fundamental principles of human rights, as stated above, is "the protection of individual liberty, especially from the undue exercise of state power."[15] This principle is also applicable at the international level and the concern for personal liberty is reflected in the Statutes of the ICTY[16] and the ICTR[17] and their Rules of Procedure and Evidence.[18] These instruments limit the extent to which persons may be deprived of their liberty before they are brought to trial and set out rules aimed at preventing the innocent from being convicted and imprisoned by protecting the integrity of the trial itself.[19]

The Rules permit the prosecutor to arrest and provisionally detain a suspect if a reliable and consistent body of material demonstrates that the suspect may have committed a crime over which the ad hoc Tribunals have jurisdiction.[20] But such measures may be authorized only if necessary to prevent the escape of the suspect, injury to or intimidation of a victim or witness, or the destruction of evidence; or if otherwise necessary for the conduct of the investigation.[21]

For an indictment to be confirmed, the prosecutor must satisfy the confirming judge that prima facie evidence indicates that the accused committed the alleged acts.[22] Upon confirmation of the indictment, the Tribunals arrange for transmittal of an arrest warrant to the appropriate states.[23] An accused shall be held in detention following his transfer to The Hague (in the case of the ICTY) or Arusha (in the case of the ICTR), and only in exceptional circumstances—namely, where an accused satisfies the trial chamber that he will appear for trial and, if released, will not pose a danger to any victim, witness, or other person—will the Tribunals order the release of the accused.[24]

The Statutes of the ad hoc Tribunals specify that the penalties they impose shall be limited to imprisonment.[25] On account of the seriousness of a guilty verdict, the courts have adopted various safeguards to ensure that an accused will not be wrongly judged: the most important being the presumption of innocence[26] and the requisite burden of proof that the prosecutor must satisfy to obtain a conviction.[27] Other safeguards against wrongful conviction are found in the rules of evidence, which exclude, for example, information obtained by methods that cast substantial doubt on its reliability.[28]

[15] NZ LAW COMM'N, *supra* note 8, para. 8.

[16] Statute of the International Criminal Tribunal for the Former Yugoslavia, *in* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) [hereinafter S-G Report], UN Doc. S/25704 (1993), *reprinted in* 32 ILM 1159 (1993), *available at* ICTY Web site, *supra* note 4 [hereinafter ICTY Statute].

[17] Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), *reprinted in* 33 ILM 1602 (1994), *available at* <http://www.ictr.org> [hereinafter ICTR Statute].

[18] International Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, *as amended*, UN Doc. IT/32/Rev.22 (Dec.13, 2001), *available at* ICTY Web site, *supra* note 4 [hereinafter ICTY Rules]; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, *as amended*, UN Doc. ITR/3/Rev.11 (May 31, 2001), *available at* <http://www.ictr.org> [hereinafter ICTR Rules].

[19] NZ LAW COMM'N, *supra* note 8, para. 9.

[20] ICTY Rules, *supra* note 18, Rules 40, 40 *bis*; ICTR Rules, *supra* note 18, Rules 40, 40 *bis*.

[21] ICTY Rules, *supra* note 18, Rule 40 *bis* B(iii); ICTR Rules, *supra* note 18, Rule 40 *bis* B(iii).

[22] ICTY Statute, *supra* note 16, Art. 19; ICTR Statute, *supra* note 17, Art.18.

[23] Arrest warrants shall be issued to the national authorities of a state in whose territory or under whose jurisdiction the accused resides, *see* ICTY Rules, *supra* note 18, Rule 55; ICTR Rules, *supra* note 18, Rule 55.

[24] ICTY Rules, *supra* note 18, Rule 65; ICTR Rules, *supra* note 18, Rule 65. For a discussion of the hurdles that accused persons need to overcome in order to be granted provisional release, see Wald & Martinez, *supra* note 3.

[25] ICTY Statute, *supra* note 16, Art. 24; ICTR Statute, *supra* note 17, Art. 23.

[26] ICTY Statute, *supra* note 16, Art. 21(3); ICTR Statute, *supra* note 17, Art. 20(3).

[27] Although the Statutes of the ad hoc Tribunals do not specify the requisite burden of proof that must be satisfied to obtain a conviction, their Rules state that "[a] finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt." ICTY Rules, *supra* note 18, Rule 87(A); ICTR Rules, *supra* note 18, Rule 87(A).

[28] The Rules of the ad hoc Tribunals provide that "[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." ICTY Rules, *supra* note 18, Rule 95; ICTR Rules, *supra* note 18, Rule 95.

The integrity of the proceedings is further safeguarded by the rights afforded to an accused under the Statutes of the ad hoc Tribunals. In addition to a fair and public hearing, subject to rules relating to the protection of victims and witnesses,[29] an accused is entitled to the following minimum guarantees:

> (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) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) to be tried without undue delay;
>
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the [ad hoc Tribunals];
>
> (g) not to be compelled to testify against himself or to confess guilt.[30]

Although the pronouncement of the verdict signifies the end of the trial proceedings, a convicted person has the right to lodge an appeal against either the judgment or the sentencing decision, or both.[31] However, the Statutes limit the jurisdiction of the appeals chamber to set aside the verdict. Decisions may be appealed only on the grounds of either an error on a question of law invalidating the decision, or an error of fact that has occasioned a miscarriage of justice.[32]

Consequences for Wrongly Detained, Prosecuted, or Convicted Persons

If an accused is unlawfully arrested or detained under the authority of the ad hoc Tribunals, or if he is acquitted or has his conviction reversed by the appeals chamber or quashed on review, the accused has an arguable claim for compensation for any deprivation of liberty and economic losses suffered as a result of the proceedings against him. An accused person who has protested his innocence throughout the proceedings will feel aggrieved; the intensity of those feelings will correspond to the length of time he was held in detention and the extent of his financial loss.[33] More important, an accused person who is truly innocent will feel "more intensely aggrieved" than one who escapes conviction by virtue of a procedural irregularity.[34]

In domestic jurisdictions, a person who has been wrongly detained, prosecuted, or convicted may be entitled to either reimbursement of his legal and related fees or an award of compensation, or both. In addition, if the person is a victim of malicious prosecution, false imprisonment, or misfeasance in public office, he may be able to file a claim in tort against the

[29] ICTY Statute, *supra* note 16, Art. 21(2); ICTR Statute, *supra* note 17, Art. 20(2).
[30] ICTY Statute, *supra* note 16, Art. 21(4); ICTR Statute, *supra* note 17, Art. 20(4).
[31] ICTY Statute, *supra* note 16, Art. 25; ICTR Statute, *supra* note 17, Art. 24.
[32] ICTY Statute, *supra* note 16, Art. 25; ICTR Statute, *supra* note 17, Art. 24.
[33] Carolyn Shelbourn, *Compensation for Detention*, 1978 CRIM. L. REV. 22, 22.
[34] *Id.*

authorities or individuals concerned.[35] The person may also be empowered to bring an action under the constitution of the state in which he resides alleging a violation of one or more of his constitutional rights, or to lodge a claim under appropriate international human rights instruments arguing violation of the rights protected by these instruments by the state concerned.

Even though the veil of immunity enjoyed by the ad hoc Tribunals and their officials may be lifted in certain circumstances,[36] the tortious remedies listed above will benefit a wrongly detained, prosecuted, or convicted person only if the prosecutor or her staff have engaged in misconduct or, at the very least, knowingly breached the powers of her office. Few cases in which an innocent accused is prosecuted will be attributable to such causes. Most will arise out of honest human error such as incorrect identification of the accused.[37] These cases may be properly brought by the prosecutor and correctly decided by the chambers on the evidence then available, but later shown, in light of fresh evidence, to have been mistakenly brought or decided. In these circumstances, the loss suffered by the accused may equal that sustained by a victim of prosecutorial misconduct or a malevolent witness—but no civil remedy would be available.

II. The Moral and Legal Obligation to Compensate

Arguments in Favor of Compensation

Why, then, should the ad hoc Tribunals compensate persons who have been erroneously detained, prosecuted, or convicted? The first justification of compensation is underpinned by the general principle that the international community has a moral obligation to compensate an individual for losses incurred as a result of the application of its coercive powers.[38]

[35] To succeed in an action for malicious prosecution, a plaintiff would have to prove that the defendant prosecuted him; that the prosecution ended in the plaintiff's favor; that the defendant lacked reasonable and probable cause for bringing the prosecution; that the defendant acted maliciously; and that the plaintiff suffered damage as a result of the prosecution. Such claims are seldom brought and very rarely succeed, primarily on account of the mental elements that must be proved to establish that the police or other prosecuting authorities acted maliciously.

This description also applies when a plaintiff seeks to bring an action for misfeasance in public office. This tort refers to malicious acts or omissions by a public officer in the exercise or purported exercise of his office, which are in breach of a duty owed to the plaintiff and cause loss to the plaintiff. Malice in this context includes spite, ill will, or any other improper motive, as well as knowledge that a particular action was invalid and likely to harm the plaintiff or individuals in the plaintiff's position.

The tort of false imprisonment provides a remedy where the plaintiff has been detained or imprisoned by the authorities without lawful justification. For instance, a claim may be brought against the police for false imprisonment if they detain a person for questioning without making an arrest. However, the police are only liable for false imprisonment during the period before that person is brought before a court: thereafter, any liability will rest in malicious prosecution or misfeasance in public office. The tort of false imprisonment will not assist a person seeking compensation for being remanded in custody, convicted, and subsequently imprisoned. THE LAW OF TORTS IN NEW ZEALAND 980–84 (Stephen Todd et al. eds., 2d ed. 1997).

[36] Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, Art. V, §20, 21 UST 1418, 1 UNTS 15; Agreement Concerning the Headquarters 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, May 27, 1994, Neth.-UN, Art. XV(5), UN Doc. S/1994/848; Agreement Concerning the Headquarters of the International Criminal Tribunal for Rwanda, Aug. 31, 1995, Tanz.-UN, Art. XV(5), UN Doc. A/51/399–S/1996/778, app., *available at* <http://www.ictr.org>.

[37] In addition to eyewitness misidentification—which is estimated to be the cause of over half of all wrongful convictions uncovered—commentators have identified the following factors leading to such injustices: perjury by witnesses, negligence by criminal justice officials, pure error, coerced confessions, frame-up, identification by police due to prior criminal record, and forensic errors. HUFF, RATTNER, & SAGARIN, *supra* note 7, at 53–82.

[38] In this connection, one should recall that the United Nations has the authority to settle claims of a private law character, for instance, when property is appropriated during its operations. Daphna Shraga, *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage*, 94 AJIL 406, 411 (2000). Shraga notes that pursuant to a policy decision mandated by the UN General Assembly,

> compensation for personal injury, illness, or death [attributable to the activities of members of a peacekeeping force in the performance of their official duties] was limited to economic loss (i.e., medical expenses, loss of earnings, and financial support) measured by local standards of compensation not to exceed a ceiling

Whenever the criminal justice system by which the ad hoc Tribunals operate is set in motion, errors are bound to ensue. The pretrial and trial procedures they adopted closely follow adversarial legal systems, as opposed to the inquisitorial legal system. Under the adversarial system, the prosecutor investigates the offenses and prepares the indictments.[39] Although a judge must confirm an indictment, the Statute does not permit the judge to investigate the offense independently. At trial, notwithstanding the trial chamber's authority to introduce evidence on its own behalf,[40] the parties are primarily responsible for the presentation of evidence. An innocent accused who makes an unreliable confession or another prejudicial statement, or engages incompetent counsel, is therefore at risk of being wrongly convicted. While these features of the adversarial system may be based on sound reasons, they can sometimes work against an innocent person and when this occurs, the ad hoc Tribunals should be prepared to compensate wrongly prosecuted or convicted persons, as well as those who are unlawfully arrested or detained.[41]

Imposing strict or absolute liability on the international community for the wrongful incarceration of individuals should not be seen as assessing "fault" for the accidents inherent to the system; at least not in the purely legal sense of the term. The main purpose of this justification is "to shift the risks of 'accident' to the party better suited to handle them."[42] As Professor Borchard observed:

> We have recognized, in certain spheres of activity, that it is unfair to the individuals injured that they alone should bear the entire loss resulting from the accident, and therefore society distributes the loss among its members. Where the common interest is joined for a common end—maintaining the public peace by the prosecution of crime—each individual member being subject to the same danger (erroneous conviction), the loss when it occurs should be borne by the community as a whole and not by the injured individual alone.[43]

Compensation is further justified by the fact that if the international community is truly interested in individual liberty, it must also concern itself with the detrimental consequences of mistakes made by the ad hoc Tribunals.[44] The harm felt by a person deprived of his liberty will be magnified by subjecting him to an unjust prosecution or conviction or an unlawful arrest or detention,[45] even if this does not place him in a worse position than he was in before his detention.[46]

An associated justification relates to the ameliorative effect that compensation will have on the individual and the international community as a whole. Although the payment of compensation cannot undo the damage done, it can serve a restorative and therapeutic function by easing the level of stigmatization—thereby improving the social acceptance and

of U.S.$50,000. Noneconomic loss such as pain and suffering was excluded. Compensation for property loss or damage was limited by reference to relevant criteria: for nonconsensual use or damage to premises, an adequate compensable amount was determined on the basis of fair rental value or repair costs; and for personal property, it was set at reasonable costs of repair or replacement of the personal property damaged.

[39] ICTY Statute, *supra* note 16, Art.18; ICTR Statute, *supra* note 17, Art. 17.

[40] ICTY Rules, *supra* note 18, Rule 98; ICTR Rules, *supra* note 18, Rule 98.

[41] As one British report noted: "When [the adversarial] system works well, it is probably unrivalled at getting at the truth. When it works badly, the risk of wrongful conviction is probably greater than under the alternative inquisitorial system which operates in most of Continental Europe." GEORGE WALLER, MISCARRIAGES OF JUSTICE 23 (1989).

[42] Johnston, *supra* note 11, at 414.

[43] Edwin Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201, 208 (1941).

[44] *See* Johnston, *supra* note 11, at 411–12.

[45] H. Archibald Kaiser, *Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course*, 1989 WINDSOR Y.B. ACCESS TO JUSTICE 96, 101.

[46] One commentator has observed that "[e]ven if there has been an acquittal or a dismissal of all charges, the cloud of suspicion frequently remains, causing enormous hardship to the persons involved." Rosenn, *supra* note 11, at 724.

adjustment of a wrongly detained, prosecuted, or convicted person—and "contributing to a feeling of vindication."[47] Compensation will also empower a wrongly prosecuted or convicted person vis-à-vis the international community, especially as the mere existence of the formal accusation will cause many persons to presume guilt despite the acquittal or dismissal of the charges against the accused.[48]

Compensating wrongly prosecuted or convicted persons, as well as those unlawfully arrested or detained, is also warranted by the need to maintain the public's perception of the ad hoc Tribunals at a high level. Reluctance to compensate may emanate from concerns that confidence in the two judicial institutions will be undermined by evidence of malfunction. However, if the cost of such failure is disproportionately borne by individuals and not distributed across the international community, the implications of such malfunctioning will be hidden.[49] The acknowledgment of mistakes through the payment of compensation will enhance the credibility and, ultimately, the legitimacy of the Tribunals by demonstrating that they take their errors seriously.[50] Obliging them to compensate persons who have been wrongly detained, prosecuted, or convicted will give them an incentive to ensure that mistakes are kept to a minimum. The prosecutor will be encouraged to approach new investigations cautiously, avoid groundless proceedings, and increase the levels of propriety among her staff.[51] These collateral consequences will restore and enhance respect for the jurisdiction of the ad hoc Tribunals, especially among the peoples of the former Yugoslavia and Rwanda.

Arguments Against Compensation

Of course, several persuasive reasons militate against awarding compensation, particularly with regard to persons who were wrongly prosecuted or convicted. The first recognizes that the procedural safeguards employed by the ad hoc Tribunals, such as the burden of proof and evidentiary rules that exclude relevant but dubiously obtained information, should guarantee that an accused person will generally not be convicted unless the prosecutor's case is very strong. Their presence also indicates that acquittal cannot necessarily be equated with innocence.[52] To award compensation to all persons who are acquitted would result in compensating certain guilty persons. Although awarding compensation to the innocent may be morally justified, an effective way to separate the truly innocent from those found not guilty has yet to be discovered. "Any attempt to do so would undermine the not guilty verdict and the presumption of innocence."[53]

The second argument concerns the reliability of the criminal justice system operated by the ad hoc Tribunals. This system contains certain self-correcting mechanisms designed to ensure the detection of errors in the prosecution process or at trial,[54] and most of these mistakes in law or in fact should be rectified on appeal. However, if the conviction of an innocent accused is upheld, he may avail himself of the right of review where a new fact is discovered that was not known at the time of the proceedings and that could have been a decisive factor in reaching the decision.[55]

[47] Christine E. Sheehy, *Compensation for Wrongful Conviction in New Zealand*, AUCKLAND U. L. REV. 977, 984 (1999).

[48] Rosenn, *supra* note 11, at 716; *see also* Johnston, *supra* note 11, at 412.

[49] NZ LAW COMM'N, *supra* note 8, para. 32.

[50] Conversely, the absence of a mechanism by which wrongly detained, prosecuted, or convicted persons may claim compensation indicates the low priority the ad hoc Tribunals give to the plight of such persons. *See* Sheehy, *supra* note 47, at 986.

[51] Moreover, accused who might plead guilty with a view to receiving a reduced sentence or charge will instead be encouraged to insist on their innocence. *Id.*

[52] NZ LAW COMM'N, *supra* note 8, para. 33.

[53] *Id.*

[54] *Id.*, para. 34.

[55] ICTY Statute, *supra* note 16, Art. 26; ICTR Statute, *supra* note 17, Art. 25.

The effects that could result if compensation were awarded lie at the heart of the next argument against awarding compensation. The prospect of compensation may cause the prosecutor to be less vigorous in preparing an indictment in cases where there is not proof beyond a reasonable doubt, as opposed to merely prima facie evidence that the person committed the alleged crimes.[56] It would add an extraneous consideration to the decision to prosecute,[57] and could thus affect the confidence of the public and the international community in the ability of the ad hoc Tribunals to dispense justice. A right to compensation could also influence decisions on provisional release, and possibly decisions as to guilt as well. The courts operate under a criminal justice system that requires guilt to be proven beyond a reasonable doubt, and in the application of this basic principle they should not be influenced by fiscal considerations.[58]

The last argument against compensation relates to the recourse of other participants in the trial proceedings to compensatory schemes. Although the ad hoc Tribunals are authorized to order the restitution of property or the proceeds thereof,[59] no mechanism is in place that enables victims of the armed conflicts waged in the former Yugoslavia and Rwanda to claim compensation.[60] Objections may be raised, therefore, to the establishment of a compensation scheme for one group of participants, while others cannot be compensated for the losses and harm they suffered.[61]

Domestic and International Human Rights Systems

In addition to the moral justification for compensating erroneously detained, prosecuted, or convicted persons, the right to compensation gained approval through adoption in both domestic and international human rights law. Although a comparative study of national compensation schemes cannot be made in the confines of this paper, a few pertinent details concerning their eligibility criteria, which vary from one country to another, should be mentioned. Certain regimes entitle persons to receive compensation if they were held in preventive detention and then acquitted at trial, while others compensate only those persons who were detained following a conviction and subsequently pardoned.[62] Moreover, some systems require claimants to prove that they were innocent of the alleged crimes so as to receive compensation, whereas others incorporate an appraisal of the likelihood of innocence into the determination of the amount of compensation to be awarded.[63]

Under international human rights treaties, persons who may have been deprived of their liberty in circumstances or in a manner that involves a violation of their human rights are guaranteed the right to receive compensation. For instance, Article 9(5) of the International Covenant on Civil and Political Rights (ICCPR) provides: "Anyone who has been the victim

[56] *See* Sheehy, *supra* note 47, at 988–89.

[57] Kaiser, *supra* note 45, at 109.

[58] Sheehy, *supra* note 47, at 989.

[59] ICTY Rules, *supra* note 18, Rule 105; ICTR Rules, *supra* note 18, Rule 105.

[60] For a detailed discussion of the growing trend to award compensation to victims of armed conflicts and the lack of such a mechanism within the ad hoc Tribunals, see Susanne Malmström, *Restitution of Property and Compensation to Victims, in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE, *supra* note 3, at 373.

[61] *See* Sheehy, *supra* note 47, at 989.

[62] Shelbourn, *supra* note 33, at 25 (describing how certain countries—for instance, Belgium, Germany, and the Netherlands—compensate individuals who were detained in custody pending a trial at which they were acquitted, or against whom charges were withdrawn at or before trial, while others—such as the United States—provide compensation only to "those who have suffered detention following a conviction and have subsequently been pardoned").

[63] *See* Hans Gammeltoft-Hansen, *Compensation for Unjustified Imprisonment in Danish Law*, 18 SCANDINAVIAN STUD. L. 29, 32 (1974) (noting that "[i]n Denmark and Norway, compensation is excluded if there are still grounds for presuming the accused to be guilty of the crime charged").

of unlawful arrest or detention shall have an enforceable right to compensation."[64] An almost identical provision is found in the European Convention for the Protection of Human Rights and Fundamental Freedoms.[65] Although the American Convention on Human Rights does not contain a comparable compensation provision, Article 63 authorizes the Inter-American Court to rule that "fair compensation" be paid to an applicant whose rights or freedom under the Convention is shown to have been violated.[66]

These provisions prescribe the award of compensation for "unlawful" detentions, which includes detentions that are unlawful under a state's domestic law, even though they do not contravene the provisions pertaining to arbitrary detention in the human rights treaty in question. However, the United Nations Human Rights Committee, in *A v. Australia,* held that Article 9(5) also prescribes the payment of compensation when the detention is permissible under domestic law but contrary to the ICCPR.[67] Thus, as noted by Joseph, Schultz, and Castan, a sanction for "arbitrary yet lawful detentions" has been ascribed to this article despite the lack of any such reference in the provision.[68]

With respect to the right of wrongly convicted persons to receive compensation, the most relevant instrument at the international level is the ICCPR, which provides in Article 14(6):

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

This provision confers a right to compensation on victims of miscarriages of justice in the circumstances and subject to the conditions it specifies. To claim compensation, an applicant needs to demonstrate that his conviction was final and that he has undergone punishment. In *W. J. H. v. The Netherlands,*[69] the complainant had been convicted at first instance of various offenses, including forgery and fraud. However, he served no time, apart from two months of pretrial detention. The Supreme Court subsequently set aside his conviction and remanded the matter to the lower courts, which acquitted him on procedural grounds, as some of the evidence against him had been irregularly obtained.[70] He claimed, inter alia, a breach of Article 14(6) because he was not granted compensation for the initial "wrong" conviction. The Human Rights Committee disagreed, stating that since the final decision of the case had acquitted the applicant and he had not suffered any punishment as a result of the earlier conviction, his claim fell outside the scope of this article.[71]

This case demonstrates that "a miscarriage of justice may occur only after a matter is finally disposed of by all potential appeal courts," which distinguishes miscarriages of justice from

[64] International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 9(5), 999 UNTS 171 [hereinafter ICCPR].

[65] European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221. Article 5(5) of the Convention provides: "Everyone who has been the victim of arrest or detention in contravention of the provisions of [Article 5 of this Convention] shall have an enforceable right to compensation."

[66] American Convention on Human Rights, Nov. 22, 1969, Art. 63, 1144 UNTS 123; *see* Helena Cook, *Preventive Detention—International Standards and the Protection of the Individual, in* PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE 1, 31 (Stanislaw Frankowski & Dinah Shelton eds., 1992).

[67] Communication No. 560/1993, A v. Australia, UN Doc. CCPR/C/59/D/560/1993 (1997). Decisions of the Human Rights Committee are available online at <http://www.unhchr.ch/tbs/doc.nsf>.

[68] SARAH JOSEPH, JENNY SCHULTZ, & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 241 (2000).

[69] Communication No. 408/1990, W. J. H. v. The Netherlands, UN Doc. CCPR/C/45/D/408/1990 (1992).

[70] *Id.*, paras. 2.1, 2.2.

acquittals on appeal.[72] Moreover, although the type of punishment encompassed by Article 14(6) is not limited to imprisonment, its scope does not include pretrial detention and the costs of defending oneself in criminal proceedings.[73]

In addition, the conviction must be formally reversed or the person convicted must be pardoned: "The mere disclosure of a miscarriage of justice is insufficient."[74] Although the granting of a pardon does not reverse the conviction—but rather remits the sentence on humanitarian grounds—the provision refers to this executive action to cover situations where a miscarriage of justice was acknowledged and the person concerned was released, but the conviction was not quashed.[75]

Persons whose convictions were reversed or who have been pardoned are entitled to receive compensation under the ICCPR only if a new or newly discovered fact shows conclusively that there was a miscarriage of justice. The grounds supporting the reversal must demonstrate conclusively that the new or newly discovered fact disclosed the miscarriage of justice. In *Muhonen v. Finland*,[76] the applicant was sentenced to eleven months' imprisonment for refusing to fulfill his military service. While he was serving this sentence, the Military Service Examining Board recognized that he was entitled to the status of conscientious objector on the basis of his ethical convictions, and he was pardoned soon afterward. The Committee denied him a right to compensation, as the pardon was not based on a miscarriage of justice but on "considerations of equity."[77]

If the reversal of the conviction is grounded on a newly discovered fact, the convicted person will not be awarded compensation when the untimely disclosure of that fact can be attributed to him. This restriction rules out claims by persons who let themselves be convicted so as to protect the real guilty parties. However, the burden of proof for establishing that the person concerned was at fault rests with the state.[78] Last, compensation can be awarded only if the person concerned has suffered punishment, a condition that means that this provision encompasses other types of punishment, in addition to imprisonment.[79]

When it was drafted, the right to compensation was the most controversial provision in the fair trial guarantees.[80] Despite three attempts to strike Article 14(6),[81] this right is now widely recognized by the international community. Although seven states have submitted reservations to this provision—for instance, on the basis that in their opinion the implementation of this right is incompatible with domestic law—Article 14(6) serves both as an important normative statement by the international community and as a reference point for national and international compensation schemes.

Initially, the right to compensation was not included in the European Convention, but it was incorporated into the Convention through the adoption of the Seventh Protocol, Article 3 of which reads:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be

[72] JOSEPH, SCHULTZ, & CASTAN, *supra* note 68, at 337.
[73] *Id.*
[74] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 270 (1993).
[75] *Id.*
[76] Communication No. 89/1981, Muhonen v. Finland, UN Doc. CCPR/C/24/D/89/1981 (1985).
[77] NOWAK, *supra* note 74, at 270; *see also Muhonen*, para. 11.2.
[78] NOWAK, *supra* note 74, at 271.
[79] *Id.*
[80] *Id.* at 269.
[81] *Id.*

> compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.[82]

Like Article 14(6) of the ICCPR—upon which Article 3 is based—this article does not accord an absolute right to compensation. "The person must have been convicted of a criminal offence by a final decision and suffered consequential punishment."[83] In this connection, a decision is considered final when it is *res judicata*. It becomes so, according to the *Explanatory Report* to the Seventh Protocol, when it "is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them."[84] The conviction must have been overturned or a pardon granted because new or newly discovered facts show conclusively that there has been a miscarriage of justice, by which is meant "some serious failure in the judicial process involving grave prejudice to the convicted person."[85] Finally, the European Convention extends no right to compensation if the nondisclosure of the unknown fact in time is wholly or partly attributable to the convicted person. To date, the European Court of Human Rights has not considered the right to compensation.

The right to compensation is also found in the American Convention on Human Rights, which provides in Article 10 that "[e]very person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice."[86] As with other international and regional human rights instruments, the requirement that a person be compensated "in accordance with the law" is not an obligation to pay compensation *simpliciter*—that is, to ensure that a person whose case falls within this provision is compensated, irrespective of how it is done. A state must enact legislation to deal with both the award and its quantum. *Ex gratia* payment of compensation would not satisfy this provision, as compensation is mandatory under the Convention, not a matter of grace.[87]

The increasing recognition that the right of wrongly convicted persons to receive compensation has become a general norm of international law was most recently demonstrated when the delegates at the Rome Conference on the Establishment of the International Criminal Court (ICC) included a provision to this effect in Article 85 of the Court's Statute, which was adopted on July 17, 1998.[88] Paragraph 2 of this article—incorporating the wording of Article 14(6) of the ICCPR—stipulates that compensation will be awarded for a miscarriage of justice when the conviction was reversed on the ground of a new or newly discovered fact whose nondisclosure in time is not wholly or partly attributable to the convicted person.[89]

This article—adopting verbatim the wording of Article 9(5) of the ICCPR—also provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforce-

[82] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Extending the List of Civil and Political Rights, Nov. 22, 1984, 24 ILM 435 (1985).

[83] D. J. HARRIS, M. O'BOYLE, & C. WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 568 (1995).

[84] COUNCIL OF EUROPE, EXPLANATORY REPORT OF PROTOCOL NO. 7 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, para. 22 (1983), *available at* <http://www.conventions.coe.int/Treaty/en/cadreprincipal.htm> [hereinafter EXPLANATORY REPORT] (quoting COUNCIL OF EUROPE, EXPLANATORY REPORT OF THE EUROPEAN CONVENTION ON THE INTERNATIONAL VALIDITY OF CRIMINAL JUDGMENTS 22 (1970)).

[85] EXPLANATORY REPORT, *supra* note 84, para. 23.

[86] American Convention on Human Rights, *supra* note 66, Art. 10.

[87] THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 255 (David J. Harris & Stephen Livingstone eds., 1998); *see also* STEPHANOS STAVROS, THE GUARANTEES OF ACCUSED PERSONS UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 300 (1993).

[88] Rome Statute of the International Criminal Court, July 17, 1998, Art. 85, UN Doc. A/CONF.183/9*, 37 ILM 999 (1998), *corrected through July 1999 by* UN Doc. PCNICC/1999/INF/3*, *at* <http://www.un.org/law/icc> [hereinafter Rome Statute].

[89] For commentary, see Gilbert Bitti, *Compensation to an Arrested or Convicted Person*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 623 (Roy S. Lee ed., 2001); Christopher Staker, *Article 85: Compensation to an Arrested or Convicted Person*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1041 (Otto Triffterer ed., 1999).

able right to compensation."[90] Furthermore, reflecting the growing consensus that the wrongly prosecuted also deserve compensation, the article provides that, in exceptional circumstances, compensation may be granted to a person released from detention following a decision of acquittal or a termination of the proceedings where the court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice.[91]

III. Letters of the Presidents of the Ad Hoc Tribunals

Proposed Scheme to Compensate Wrongly Detained, Prosecuted, or Convicted Persons

In their letters to the Secretary-General, the presidents of the ad hoc Tribunals cited the need to bring the two courts into compliance with human rights norms as the primary reason for requesting an amendment to their respective Statutes. As noted by President Jorda: "Since the International Tribunal for the Former Yugoslavia wishes, by definition, to abide fully by the internationally recognized norms relating to the rights of suspects and accused persons, the absence of any provision which would allow for awarding compensation in such situations is a cause for concern."[92] Presidents Pillay and Jorda considered that the issue of compensation arose in three situations—where an individual is unlawfully arrested or detained, where an individual is wrongly prosecuted, and where an individual is erroneously convicted—and set out various arguments in support of amending the Statutes to enable their organizations to compensate persons falling within each category.

Concerning the first of these situations, unlawful arrest or detention, the presidents observed that international human rights treaties—in particular, paragraph 5 of ICCPR Article 9—guarantee the right of compensation to persons who have been deprived of their liberty in circumstances involving a violation of their rights. Thus, if a person was arrested or detained under the authority of the ad hoc Tribunals in circumstances where the rights set forth in paragraphs 1 through 4 of ICCPR Article 9 were breached and if the conduct that gave rise to that violation was legally imputed to the Tribunals and thus to the United Nations, "the Organization would be under an international obligation to ensure that the victim of that violation was compensated."[93]

As to compensating wrongly prosecuted persons, the presidents noted that although the Rome Statute gave the court the power, in exceptional circumstances, to compensate persons who have been accused and subsequently acquitted because of the disclosure of a grave and manifest miscarriage of justice, no equivalent provision appeared in other instruments of international human rights law. In their view, one could not conclude that such a right had achieved the status of customary international law. Nonetheless, given "the particular circumstances in which the [ad hoc Tribunals operate], including the fact that the accused are detained for long periods pending trial,"[94] they concluded that it was in the best interests of both the Tribunals and the United Nations to award compensation in those circumstances.

In support of compensating wrongly convicted persons, the presidents referred to the fact that several international human rights treaties contained this right, including the ICCPR in Article 14(6) and the Rome Statute in Article 85(2). Since the ICTR and the ICTY were both subsidiary organs of the Security Council, their actions were imputable to the United Nations. Accordingly, because the United Nations considers itself bound by generally accepted norms of international human rights law, they reasoned that "the United Nations will be legally

[90] Rome Statute, *supra* note 88, Art. 85(1).
[91] *Id.*, Art. 85(3).
[92] ICTY President's Letter, *supra* note 5.
[93] ICTR President's Letter, *supra* note 6.
[94] ICTY President's Letter, *supra* note 5.

bound to compensate persons whose conviction by the [ad hoc Tribunals] is subsequently overturned."[95]

Alternative Approaches to the Proposed Compensation Scheme, in Both Form and Substance

Was the course of action proposed by the presidents of the ad hoc Tribunals strictly necessary? More important, could they have adopted a less stringent test as regards the eligibility criteria for the proposed compensation scheme? With respect to the first question, arguments can be made that the ad hoc Tribunals already have a judicial basis for awarding compensation. As stated above, in the execution of their mandate, the courts must fully respect internationally recognized standards concerning the rights of the accused. Although their Statutes do not grant accused persons the right to compensation, the specified fair trial guarantees are not exhaustive. The Tribunals have already extended the rights of the accused in their Rules, for instance by acknowledging the right to pretrial liberty in certain circumstances.

The authority to award compensation could also be derived from the inherent jurisdiction of the ad hoc Tribunals to adopt rules and regulations governing the consequential effects of their decisions. The Statutes entrust the courts with the task of promulgating rules necessary for the efficient and effective functioning of their three organs. Specifically, the Statutes provide: "The Judges of the [ad hoc Tribunals] shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses *and other appropriate matters.*"[96]

In addition to promulgating rules allowing them to prosecute the crimes of contempt and perjury, as well as to order the restitution of property, the ad hoc Tribunals have used the final phrase of the latter article to adopt rules enabling bodies designated by them to supervise sentences of imprisonment. Since the relevant provisions of their Statutes do not envisage the use of such bodies, the adoption of these rules and their acceptance by states that have indicated their willingness to sign enforcement-of-sentences agreements indicate that the courts have the competence to put rules and regulations into effect that govern the consequential effects of their decisions. It is suggested here not only that the ad hoc Tribunals should ensure the enforcement of sentences imposed, but also that any repercussions flowing from an acquittal, or the reversal of a conviction, should be suitably addressed.

Despite the apparent persuasiveness of this reasoning, the most striking argument against attributing the necessary competence to the ad hoc Tribunals is that their powers and functions are determined by the terms of their Statutes and these instruments—as currently drafted—do not contain any provisions giving the courts the authority to award compensation. Such authority is a significant power that raises legitimate budgetary considerations, as well as doubts whether the courts, as organs of the United Nations, may unilaterally create financial liability for the Organization as a whole. While their Statutes may be interpreted liberally in many respects, particularly so as to provide the ad hoc Tribunals with the power to carry out their mandates, they contain no language implying that the Security Council intended to allow them to make such awards. Moreover, should they unilaterally decide to award compensation, the courts may be seen by some members of the Security Council as overstepping their authority and violating their Statutes.

One may further question whether the authority to award compensation resides in the inherent jurisdiction enjoyed by the ad hoc Tribunals to regulate matters connected with the administration of justice. Such jurisdiction is inherent in the sense that it derives exclusively from the nature of the body exercising it. As elucidated by Lord Diplock, inherent jurisdiction covers "the doing by the court of acts which it needs must have power to do in order to

[95] *Id.*

[96] ICTY Statute, *supra* note 16, Art. 15; ICTR Statute, *supra* note 17, Art. 14.

maintain its character as a court of justice."[97] Although the doctrine of inherent jurisdiction may be used to punish persons found in contempt of court or who give perjurious testimony, this power should not be exercised to create new rules of substantive law.[98] The adoption of rules authorizing the Tribunals to order the restitution of property may go beyond the procedural law in the strict sense and impinge on the substantive law, but authority for it can be derived from the report of the Secretary-General, in which he stated regarding penalties: "In addition to imprisonment, property and proceeds acquired by criminal conduct should be confiscated and returned to their rightful owners."[99] Such authority was not given with respect to compensating wrongly detained, prosecuted, or convicted persons. This author therefore believes that the arguments claiming the existing competence of the ad hoc Tribunals are unpersuasive and the presidents were correct in apprising the Security Council of this matter with a view to achieving an appropriate amendment of their respective Statutes.

Turning to the second question, the author also believes that the presidents' decision to concentrate on the actual obligation, both legal and moral, to pay compensation and not the eligibility criteria of the compensatory scheme itself, clearly reflects the political sensitivity associated with using the international community's funds to compensate persons who have been labeled as "war criminals." Presumably to avoid lengthy substantive debates in the Security Council, the presidents proposed that essentially the same eligibility criteria as those agreed for the ICC be adopted. In this connection, it is generally accepted that all wrongly detained persons have an enforceable right to compensation. However, alternative approaches were open to the presidents with regard to the eligibility criteria pertaining to persons who were erroneously prosecuted or convicted.

The first and least restrictive option would have been to provide for compensation to all accused who were acquitted by the ad hoc Tribunals or had the charges against them dismissed. While its main advantage is its simplicity, this approach could have undermined the integrity of the courts. It does not distinguish between the truly innocent and those who have escaped liability on account of a procedural irregularity, or who have destroyed, or otherwise tampered with, the evidence against them. Moreover, knowledge that a compensation order could result from acquittal might influence the decision to prosecute, the nature of the charges, the entry of pleas, or the verdict of the chambers.[100]

The presidents of the ad hoc Tribunals could have taken a narrower approach and limited compensation to only those persons who could demonstrate their innocence beyond a reasonable doubt.[101] This option would have had the advantage of granting an automatic right of compensation to those accused who suffered the greatest miscarriages of justice, namely the innocent. Furthermore, it would have allowed such persons to be compensated for any losses suffered, regardless of whether they were acquitted at first instance or on appeal, or their conviction was quashed through the review process.

Nonetheless, despite its desirability for those who are innocent "in fact," this option, if adopted, would have been disastrous for the administration of justice. It could be viewed as giving rise to two classes of acquittal, real acquittal—where compensation is awarded—and artificial acquittal, with a presumption of guilt—where it is refused.[102] As one observer has written:

> A group of people is hereby brought into an intolerable situation where the criminal-court acquittal seems diminutive compared with the defamation which accompanies the presumption of guilt expressed in the decision to refuse compensation. . . .

[97] Bremer Vulkan Schiffbau und Maschinenfabrik v. S. India Shipping Corp., [1981] 1 All E.R. 289, 295 (H.L.).
[98] *See* Anthony Arnull, *Does the Court of Justice Have Inherent Jurisdiction?* 27 COMMON MKT. L. REV. 683, 701 (1990).
[99] S-G Report, *supra* note 16, para. 114.
[100] NZ LAW COMM'N, *supra* note 8, para. 103.
[101] *See* Rosenn, *supra* note 11, at 719–21.
[102] Shelbourn, *supra* note 33, at 26.

> . . . [F]ear of a stigmatizing rejection often causes the acquitted party completely to forgo submitting a compensation claim.[103]

Furthermore, claimants who are unable to adduce sufficient evidence to establish the necessary burden of proof on account of factors beyond their control—in particular, the death of a key witness—would not be compensated.

A variation of this option would have been to limit compensation to postappeal claimants who prove that they are innocent beyond a reasonable doubt. Under such a regime, accused persons who secure acquittal in the course of the trial or on appeal from the verdict would not be able to receive compensation. Various reasons support limiting compensation to accused who are pardoned or whose convictions are reversed outside the normal appeal process. As discussed above, the international criminal justice system contains several self-correcting mechanisms that ensure that mistakes in the prosecution process or at trial rarely occur. The majority of mistakes are remedied on appeal. The quashing of a conviction on appeal should therefore be considered a normal outcome flowing from the exercise of the accused's right to review. In addition, confining compensation—which should be paid only in exceptional cases—to postappeal claimants would lessen the number of people covered and hence the cost of any scheme adopted.[104]

These arguments are not by themselves conclusive. Individuals who are acquitted at trial or have their conviction reversed on appeal suffer the same pain and indignity as those who have their conviction quashed or are pardoned following the discovery of new facts. Moreover, concerns about the cost of the scheme that is adopted could be avoided by placing limits on the amount that may be awarded or applying fixed rates for each day of imprisonment: procedural simplicity would reduce administrative costs.

A less draconian approach would have been to grant postappeal claimants an automatic right to apply for compensation but to include an appraisal of the likelihood of innocence into the amount of the award. While this option would remove the strenuous burden of proving innocence beyond a reasonable doubt, the number of potential claimants would not significantly increase: the scheme would be confined to postappeal claimants only. Nevertheless, such an option can be faulted for uncertainty as to quantum—"the likelihood of innocence would be a major factor to be considered in determining the *level* of compensation," as opposed to being a precondition of eligibility. In this connection, "the integrity of an acquittal could be damaged if followed by a compensation award abated heavily because of probable guilt."[105]

The regime proposed by the presidents of the ad hoc Tribunals is not as restrictive as some of these options, but it is not as widespread as others, either. Recognizing the illogicality of providing redress for individuals who were unlawfully arrested and refusing compensation to those who were held for considerable periods of time in pretrial detention—such persons having suffered far more serious material and moral injury—they decided not to limit the compensatory scheme to postappellate applicants. Nonetheless, wrongly prosecuted persons will only be eligible to receive compensation if they can demonstrate conclusively that they were the victim of a grave and manifest miscarriage of justice: a burden that may prove insurmountable, except to applicants who were the victims of the most abhorrent cases of prosecutorial misconduct.

With respect to wrongly convicted persons, the presidents proposed that the Security Council adopt a reasonably expansive regime, one that excludes innocence as a precondition to eligibility. Nonetheless, compensation will be paid only on the showing of a new or newly discovered fact whose nondisclosure is not wholly or partly attributable to the applicant. While

[103] Gammeltoft-Hansen, *supra* note 63, at 56 (footnote omitted).
[104] NZ LAW COMM'N, *supra* note 8, para. 105.
[105] *Id.*, para. 107.

paying compensation is unobjectionable where the discovery of previously unknown facts led to the quashing of a conviction, it may be undesirable to deny compensation if the quashing is partially or fully attributable to other factors.[106] Moreover, to exclude compensation whenever the nondisclosure of a fact can be partly ascribed to the claimant is unfair. In almost all cases, an erroneous prosecution or conviction is arguably due in part to the conduct of the claimant who, while a suspect or an accused, could have done more to prevent the occurrence of a miscarriage of justice. For instance, claimants may be penalized for hiring incompetent counsel who failed to adduce exculpatory evidence or to conduct proper cross-examination of prosecution witnesses during the trial. In this regard, one commentator has noted: "If fairness and reasonableness are the bywords and full compensation the desired end, the state should err on the side of generosity. Meanness, vindictiveness, small-mindedness, or intellectual laziness should not allow the importance of the victim's conduct to be overblown."[107] Accordingly, while the ad hoc Tribunals should not be held liable for compensating fraudulent claimants or reckless participants in the trial process,[108] the naive, the youthful, and the powerless may be unfairly prejudiced by this requirement.[109]

IV. CONCLUSION

The languishing of the issue of compensation on the agenda of the Security Council for over a year with little, if any, public discussion demonstrates an apparent lack of enthusiasm among its members to address this matter. Although the author is not privy to the political considerations that underlie its decisions, the reluctance of the Security Council to do so—despite a polite reminder in March 2002 from the ICTY president[110]—may stem from the perceived desire of some its members to steadily reduce the mandate of the ad hoc Tribunals, as well as the unwillingness of others to provide additional funding to an institution of European concern.

In any case, the Security Council's inaction is unfortunate, especially as two individuals, Mirjan and Zoran Kupreškić, have recently demanded compensation from the ICTY for their wrongful arrest and conviction.[111] These former accused—who had been held in continuous custody since their voluntary surrender on October 6, 1997—were released on October 23, 2001, together with Vlatko Kupreškić, following the appeals chamber's decision to overturn the judgment of a lower court finding all three guilty of committing persecution as a crime against humanity for their alleged role in the massacre that took place in the village of Ahmići on the morning of April 16, 1993.[112] In their submission, the Kupreškić brothers maintain that they should receive compensation on account of both the mental and physical harm they suffered while in detention and the financial consequences (specifically, loss of earnings, reduced possibility of career advancement, and costs associated with travel by their family to The Hague) and loss of reputation resulting from that detention.[113] At the time of writing, these applications were still under consideration.[114]

[106] Kaiser, *supra* note 45, at 134.

[107] *Id.* at 136–37.

[108] In such cases, compensation should be excluded or, at a minimum, reduced. *See* Shelbourn, *supra* note 33, at 26.

[109] Kaiser, *supra* note 45, at 136.

[110] Letter Dated 12 March 2002 from the President of the International Tribunal for the Former Yugoslavia Addressed to the Secretary-General, annexed to Letter Dated 18 March 2002 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2002/304, *available at* <http://www.un.org/Docs/sc/letters/2002>.

[111] Prosecutor v. Kupreškić, Request by Zoran Kupreškić, Case No. IT-96-16-T (Dec. 21, 2001); Prosecutor v. Kupreškić, Request for Compensation for Mirjan Kupreškić, Case No. IT-96-16-T (Feb. 7, 2002).

[112] Prosecutor v. Kupreškić, Appeals Judgment, Case No. IT-96-16-A (Oct. 23, 2001), 41 ILM 313 (2002).

[113] *See* note 111 *supra*.

[114] Another accused, Zejnil Delalić, has indicated to the ICTY that he will also file a claim for compensation against the organization, *see* Prosecutor v. Delalić, Request for Personal Funds Used for Defence Expenses, Case

For whatever reasons, the Security Council has not heeded the warnings of the presidents of the ad hoc Tribunals and may thus have exposed the United Nations to large arbitration awards, as well as tarnished its reputation. The issue of compensation will not go away by simply ignoring the problem. Persons who have been wrongly prosecuted or convicted and those who have been unlawfully arrested or detained may lodge a claim against the United Nations, which would then be handled like any claim against the Organization. However, this process would not be satisfactory either for the complainant—who would be subjected to lengthy and expensive arbitration proceedings merely to enforce a right widely recognized by the international community—or for the United Nations—which would face the substantial legal costs of defending such a claim and the cost of any award.

The Security Council's position on this matter is even more disappointing, given that one of the cornerstones of the work of the ad hoc Tribunals is to fully respect internationally recognized standards regarding the rights of the accused. As discussed above, the right to receive compensation is laid down in various international human rights instruments and has been incorporated to varying degrees in the domestic legislation of several states. The acknowledgment of errors made during the prosecution of accused persons through the payment of compensation would not only ensure that these human rights standards are satisfied, but also increase the legitimacy of the two judicial institutions. It would be seen to symbolize the desire for the organizations to "square the account" between themselves and wrongly detained, prosecuted, or convicted persons.[115]

This is not to say that any and every acquittal or reversal of a conviction will give rise to an award. International human rights treaties limit the right of wrongly convicted persons to receive compensation to those cases where an accused can demonstrate that the reversal of his conviction arose from a new or newly discovered fact showing a miscarriage of justice and that the late discovery was not attributable to him. The circumstances in which compensation is payable to wrongly prosecuted persons are narrowed even further to only those cases where an accused has been acquitted or the proceedings against him have been terminated on account of "a grave and manifest" miscarriage of justice.

Should the ad hoc Tribunals be accorded the authority to award compensation to wrongly detained, prosecuted, or convicted persons, a defined, structured procedure—satisfying the basic requirements of legality and due process—needs to be established to handle such claims. Although the authority to define the exact components of such a scheme would lie with the judges, the author suggests that notice be taken of the provisions of the ICC Rules of Procedure and Evidence pertaining to compensation.[116] Since whether or not an individual seeking compensation falls within the ambit of Article 85 of the Rome Statute should be a judicial decision as opposed to an administrative one, these ICC provisions vest responsibility for deciding eligibility in a chamber composed of three judges, none of whom participated in an earlier judgment of the court pertaining to the claimant.[117] To ensure that the error implicit in the payment of compensation is vindicated as soon as possible, a claim—containing the grounds and the amount of compensation requested—must be submitted no more than six months after the decision upon which it is based.[118]

No. IT–96–21–T (May 18, 2001). Moreover, the other individual who was acquitted together with Mirjan and Zoran Kupreškić may also seek compensation from the organization.

[115] In this regard, the ad hoc Tribunals have already adopted procedures to reimburse, albeit to a limited degree, one group of participants in the trial process, namely witnesses, for the losses they incur. ICTY, Directive on Allowances for Witnesses and Expert Witnesses, UN Doc. IT/200 (Dec. 5, 2001).

[116] Finalized Draft Text of the Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1 (2000), *available at* <http://www.un.org/law/icc> [hereinafter ICC Rules].

[117] *Id.*, Rule 173(1).

[118] *Id.*, Rule 173(2). "The right to seek compensation is limited to the person who was actually arrested or convicted" and—even though spouses, children, parents, or any person alive at the time of the accused's death who has been given express written instructions from the accused is entitled to seek revision of a final judgment of conviction or sentence after his death—"this right cannot be exercised by others or passed on to others." Bitti, *supra* note 89, at 626.

The prosecutor shall be given an opportunity to respond to the request for compensation[119] and a hearing shall be held if the prosecutor or the claimant so requests.[120] The decision shall be taken by a majority vote,[121] and the chamber—when determining quantum in cases where the claimant alleges wrongful prosecution—shall take into consideration the consequences of the grave and manifest miscarriage of justice on the personal, family, social, and professional situation of the complainant.[122] Such consideration is not required in cases related to wrongful detention or conviction.

In view of the cogency of the arguments in favor of compensating wrongly detained, prosecuted, or convicted persons, the adoption of a corresponding scheme to determine eligibility and quantum would go a long way toward dampening some of the reservations that individual members of the Security Council may have in granting the ad hoc Tribunals the ability to award compensation. In any case, the international community should remember that although the courts have striven to ensure that all the processes they apply are based on the principles of justice, fair trial, and the protection of the fundamental rights of the accused, their achievements will mean nothing if they fail to take responsibility and make amends for the harm caused when an individual is wrongly deprived of his liberty. The fundamental principles of the international criminal justice system demand no less.

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CORRESPONDENCE

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TO THE CO-EDITORS IN CHIEF:

The International Court of Justice has, by impressive majorities, rendered a momentous judgment in the *LaGrand* case.[1] The finding that an indication of interim measures of protection has binding force in law will surely have profound implications for many aspects of the Court's future work.

At this stage, however, my concern is merely to offer some comments on one element of the Court's reasoning.

In addition to the broad considerations that guided the Court to its finding, the Court conducted a detailed analysis of the texts of Article 41 of its Statute, and of the *travaux préparatoires*. The Court held that its initial finding was not contradicted by the application of the textual analysis or these supplementary means of interpretation.

[119] ICC Rules, *supra* note 116, Rule 174(1). The right of the prosecutor to have standing in this process is based on the fact that "the decision on compensation may also very well be a decision on the Prosecutor's mistakes." Bitti, *supra* note 89, at 631.

[120] ICC Rules, *supra* note 116, Rule 174(2). During the hearing and throughout the entire proceedings, the person making a claim for compensation is entitled to legal assistance. Although the Rules do not specify whether persons lacking sufficient means to pay for legal assistance will be assigned a counsel free of charge, the ad hoc Tribunals are likely to follow customary international law on this point and agree to such a proposition. *See* Bitti, *supra* note 89, at 630–31.

[121] ICC Rules, *supra* note 116, Rule 174(3).

[122] *Id.*, Rule 175.

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[1] LaGrand (Ger. v. U.S.) (Int'l Ct. Justice June 27, 2001); *see* William J. Aceves, Case Report: LaGrand (Germany v. United States), *in* 96 AJIL 210 (2002).