SCSL-2003-11-PT
(1112- 1155)

THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, President
Judge Emmanuel Ayoola
Judge George Gelaga King
Judge Renate Winter
Fifth Judge to be determined

Registrar: Mr. Robin Vincent

Date: 31 October 2003

THE PROSECUTOR

v.

SAM HINGA NORMAN

CASE NO. SCSL-2003-08-PT

MOININA FOFANA intervening

REPLY TO THE PROSECUTION RESPONSE TO THE MOTION ON BEHALF OF MOININA FOFANA FOR LEAVE TO INTERVENE AS AN INTERESTED PARTY IN THE PRELIMINARY MOTION FILED BY MR. NORMAN BASED ON A LACK OF JURISDICTION: JUDICIAL INDEPENDENCE

&

SUBSTANTIVE SUBMISSIONS

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Mr. Luc Côté, Chief of Prosecutions

Counsel for Mr. Norman

Defence Office:
Mr. Sylvain Roy, Acting Chief

For Mr. Fofana, intervening:
Mr. Michiel Pestman
Mr. Victor Koppe
Mr. Arrow John Bockarie
Prof. André Nollkaemper
Dr. Liesbeth Zegveld

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1. Wang Tieya and B. Bing Jia, 'Is Defective Composition a Matter of Lack of Jurisdiction within the Meaning of Rule 72?', in: R. May et.al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald,* The Hague: Kluwer, 2001, pp. 45-53.

2. P. Reuter, *Introduction to the Law of Treaties,* London: Kegan Paul International, 1995, pp. 95-99.

3. G. McIntyre, "Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY," in: G. Boas and W.A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY,* Leiden: Martinus Nijhoff, 2003, pp.193-238.

4. A. Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights," *European Journal of Human Rights* (14) 2003, pp. 529-568.

ANNEX 1

Wang Tieya and B. Bing Jia, 'Is Defective Composition a Matter of Lack of Jurisdiction within the Meaning of Rule 72?', in: R. May et.al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, The Hague: Kluwer, 2001, pp. 45-53

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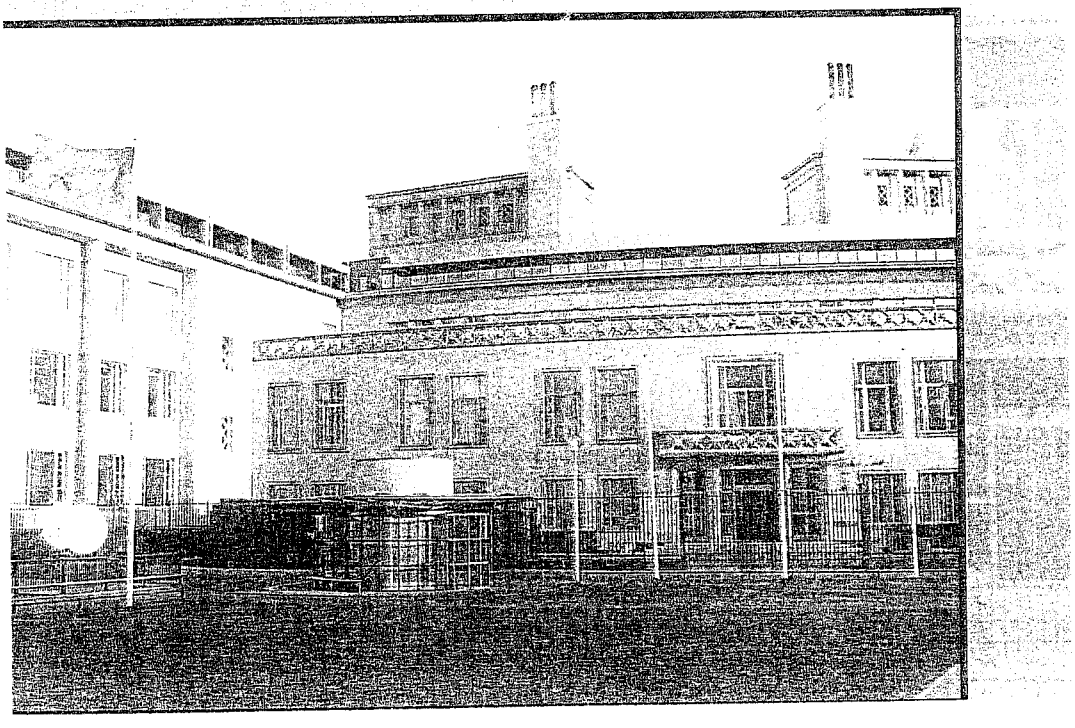

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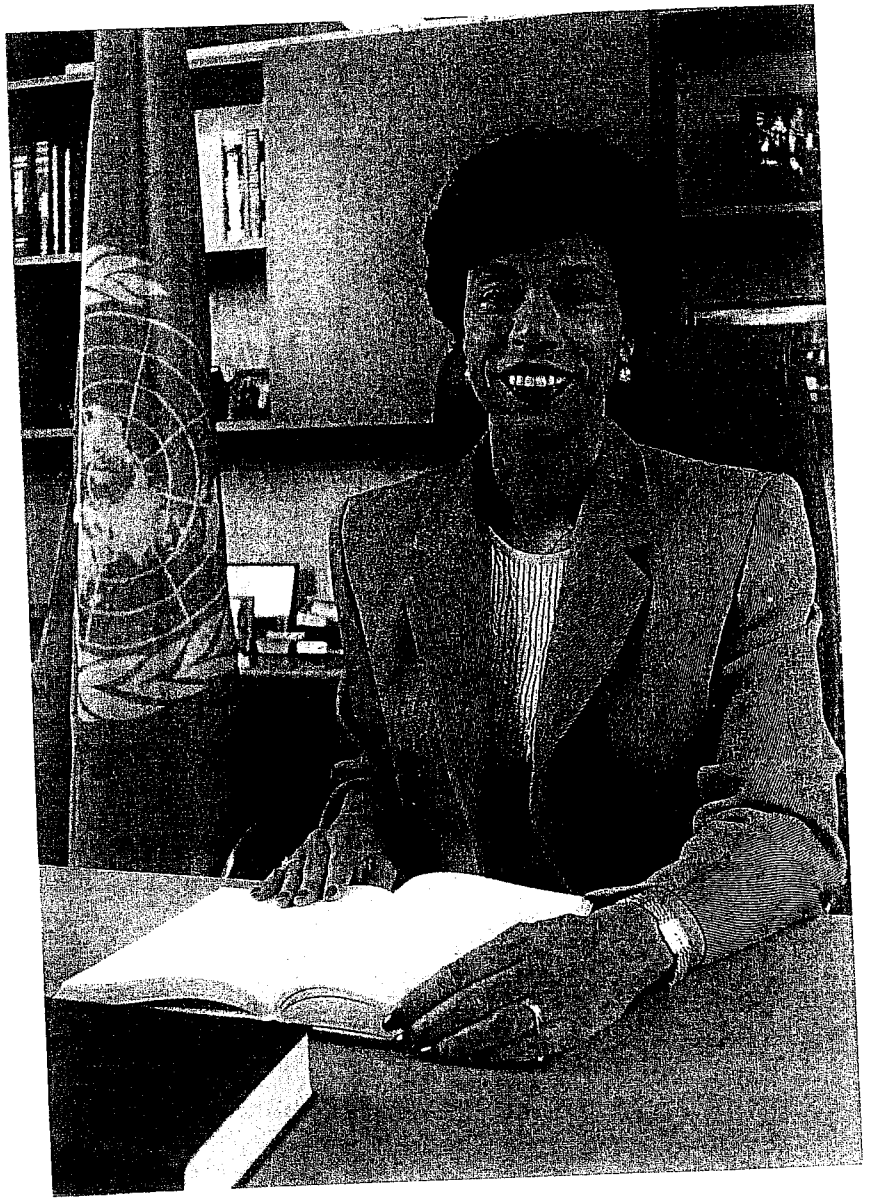

Judge Gabrielle Kirk McDonald
Former President of the ICTY

WANG TIEYA* AND BING BING JIA**

5. Is Defective Composition a Matter of Lack of Jurisdiction within the Meaning of Rule 72?

This paper is proposed to deal with a question which has engaged the attention of the Appeals Chamber of the ICTR on numerous occasions.[1] The question itself, embodied in the topic, is practical in origin, as it does not correspond to any of the articles of the Statute or of the Rules of Procedure and Evidence of the ICTR.[2] It therefore calls for some consideration as to why and how it arises in the ICTR practice. Interpretation of the Rules in connection with an unprecedented question of practice is an exercise that always fascinates the authors in their practice that involves ICTR appeals.

The question is not unique to the practice of the ICTR.[3] However, for one reason or another, it arises surprisingly frequently in that practice. It begins with the terms of Rule 72, paragraph (A) of which provides that preliminary motions may be filed by either party "within sixty days following disclosure by the Prosecution to the Defence of all the material envisaged by Rule 66(A)(i), and in any case before the hearing on the merits".[4] Rule 72(B)(i) provides that preliminary motions may contain objections based on lack of jurisdiction. Rule 72(D) provides that "[D]ecisions on preliminary motions are without interlocutory appeal, save in the case of dismissal of an objection

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[1]The views expressed in this paper do not in any way reflect the position of the ICTY or ICTR or the United Nations. They are personal thoughts of the authors.

[2]In the following pages, the designations "Statute" and "Rules" will be used.

[3]See para. 10, below. However, it has not arisen in the ICTY practice.

[4]Rule 66(A)(i) provides that "The Prosecution shall disclose to the Defence: i) Within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecution from the accused...".

R. May et al., Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald, 45–53.

based on lack of jurisdiction, where an appeal will lie as of right". The generality of the terms of Rule 72(B) incites certain not unfounded inquiries into the meaning and scope of the word "jurisdiction". Does it encompass a variety of situations where powers of the organs of the ICTR are called into question? Does it refer only to the powers of the Chambers in respect of cases before them? Can it mean that, since challenges to jurisdiction are brought before Trial Chambers and the Appeals Chamber, the Chambers have final say in this question even in relation to the powers of the Prosecution or the Registry? Be that as it may, Rule 72(B)(i) is the only general ground on which an interlocutory decision by a Trial Chamber can be appealed to the Appeals Chamber.[5] This restriction in the Rules may well be the reason behind the multiple attempts by, notably, the Defence to refer various decisions of the Trial Chambers to the Appeals Chamber on the ground of Rule 72(B)(i).[6] The composition of a Trial Chamber has been used in support of such attempts.[7]

As an example, the interlocutory appeal, *Kanyabashi v. Prosecutor*,[8] is recalled to place the topic in context; yet, this is not intended to be an insider's guide to something which we once worked on in our official capacity. The appeal arose from a decision of Trial Chamber I, dated 24 September 1998, allowing two motions of the Prosecution to amend the indictment and to join the trial of Mr. Kanyabashi with that of some other accused. The appeal was lodged by the Appellant on the ground that Trial Chamber I lacked jurisdiction to hear the two motions, because his initial appearance was made before Trial Chamber II which had the exclusive jurisdiction over his case, the re-composition of Trial Chamber I violated Article 13 of the Statute and rendered the Chamber incompetent,[9] the re-composition violated his right to be tried by independent and impartial judges, and the change in the composition of the Chamber was not justified by exceptional circumstances and was dictated by factors that affected the

[5]Relief may be sought under Rule 73, which, however, does not include a right of interlocutory appeal. Rule 65 allows appeals from a decision relating to provisional release to be filed subject to leave granted by a bench of three appellate judges of the Appeals Chamber.

[6]Cf. Rule 72(C) of the ICTY Rules, which provides for the parties to apply for leave to appeal Trial Chambers' decisions over preliminary motions unrelated to objection on the basis of lack of jurisdiction. There have consequently been far fewer applications based on lack of jurisdiction in interlocutory appeals before the ICTY.

[7]Cf. *Nsengiyumva v. Prosecutor, Decision on Appeal against Oral Decision of Trial Chamber II of 28 September 1998*, Case No. ICTR-96-12-A, 3 June 1999; *Ngirumpatse v. Prosecutor, Decision*, Case No. ICTR-98-44-A, 28 April 2000; *Kajelijeli v. Prosecutor, Decision*, Case No. ICTR-98-44-A, 28 April 2000; and *Karemera v. Prosecutor, Decision*, Case No. ICTR-98-44-A, 22 May 2000.

[8]*Joseph Kanyabashi v. The Prosecutor, Decision*, Case No. ICTR-96-15-A, 3 June 1999.

[9]The reference to Article 13 is limited to Article 13(2), which provides that "After consultation with the Judges of the International Tribunal for Rwanda, the President shall assign the Judges to the Trial Chambers. A Judge shall serve only in the Chamber to which he or she was assigned".

impartiality of the judges. The second ground raised the issue that is subject to discussion in this paper.[10]

The Joint and Separate Opinion of Judge Gabrielle McDonald and Judge Lal Chand Vohrah held that the re-composition of a Trial Chamber by the President was an administrative decision that did not offend the Statute of the ICTR or the Rules.[11] The Joint Separate and Concurring Opinion of Judge Wang Tieya and Judge Rafael Nieto-Navia held that the matter of composition was in no way concerned with the jurisdiction of a Trial Chamber, and that the relevant rules regarding composition were concerned with judicial administration.[12] However, Judge Mohamed Shahabuddeen dissented, stating that "[W]hen there is an error in the composition of the bench, the court is not properly constituted. And where the court is not properly constituted, it cannot exercise its jurisdiction ... I think it is also possible to extract some support from the jurisprudence of the International Court of Justice for the proposition that an error in the composition of a judicial, or quasi-judicial, body goes to jurisdiction."[13] The learned Judge refers to a passage from an English case wherein it was stated that a "court may lack '*jurisdiction*' to hear and determine a particular action or application because (i) of the *composition* of the court (for example, the bias of the judge)."[14]

The starting point for this paper would be the meaning given to the word "jurisdiction". *Black's Law Dictionary* defines the word as signifying "a court's power to decide a case or issue a decree".[15] It goes without saying that, in national legal systems, such power normally comes from statutes, and no court may take on a case clearly outside its statutory jurisdiction. The ICTR is in an essentially similar position. Its jurisdiction is set forth in the Statute, and it cannot extend its jurisdiction beyond the reach of the Statute. Following numerous challenges to jurisdiction allegedly made pursuant to Rule 72(B)(i), the latest revision of the rule at the 7th plenary session of the ICTR in February 2000, defines the range of challenges to jurisdiction with reference to the personal, territorial, temporal, and subject-matter jurisdiction laid down in Articles 1 through 8 of the Statute of the ICTR, thus narrowing the scope of Rule 72(B)(i) jurisdictional motions to the substantive jurisdiction of the ICTR. However, the question this paper is exploring does not disappear.

It is necessary to state that the *constitution* of the Chambers is decided by Article 10 of the ICTR Statute, which provides for three Trial Chambers and

[10]This second ground does not correspond to the second ground of appeal in the case.

[11]See supra, footnote 8, *Joint and Separate Opinion of Judge McDonald and Judge Vohrah*, para. 46.

[12]See supra, footnote 8, *Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia*, para. 19.

[13]See supra, footnote 8, *Dissenting Opinion of Judge Shahabuddeen*, p.7.

[14]Judge Shahabuddeen cites *Oscroft v. Benabo* [1967] 2 All ER 548 at 557, C.A. per Lord Diplock.

[15]1999.

Appeals Chamber; whereas Article 11 regulates the *composition* of the Chambers, stipulating for three judges to sit in each of the Trial Chambers and five in the Appeals Chamber. These articles deal with matters which are distinct from those under Articles 1 to 8 of the Statute.

Another point, which is more important due to its general nature, is the distinction between the possession of jurisdiction and the exercise of that jurisdiction. It may be that jurisdiction cannot be exercised by a court even though it is formally in its possession. The relevance of this point is that, it is arguable that a jurisdictional challenge in terms of Rule 72 does not have to be confined to the issue of whether a Chamber or the Tribunal possesses jurisdiction, as it may also be based on the fact that the Chamber has lost competence to exercise that jurisdiction. We submit, however, that the terms of Rule 72(B) are probably more restrictive than they appear to be, as "lack of jurisdiction" is hardly equivalent to "lack of competence to exercise jurisdiction". If a court is for certain reasons unable to exercise jurisdiction over a case, this presupposes that it had that jurisdiction. It may even be argued that such jurisdiction, once lawfully conferred on an ICTR Chamber, cannot be lost under the Statute. A lawful conferment would be by way of presidential assignment of a case to a Trial Chamber, this being shown when an accused is brought before a Trial Chamber for initial appearance under Rule 62. This view seems to be specifically apt to describe the practice of the ad hoc ICTR and ICTY, but not what is current in public international law.

Public international law appears to consider in different terms the difference between jurisdiction and competence.[16] A leading authority states generally that:

> There is the question of the general class of case in respect of which a given tribunal has jurisdiction – the tribunal's jurisdictional field, whether *ratione materiae, personae* or *temporis*; and there is the question of its competence to hear and determine a particular individual case – e.g. the case may not fall, *ratione materiae*, within the tribunal's general field; or even if it does, may be excluded on grounds arising *ratione personae* or *ratione temporis*. A tribunal may have jurisdiction in the "field" sense, yet lack competence as regards the particular case: basic jurisdiction does not necessarily entail competence in the particular case.[17]

[16]This is said with the caution that there is in this body of law the independent subject of jurisdiction which is concerned with the *right* of a State to exercise certain of its powers: see F. A. Mann, "The Doctrine of Jurisdiction in International Law", 111 *Recueil des cours* (1964), at p. 9.

[17]G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951–4: Questions of Jurisdiction, Competence and Procedure", 34 *British Yearbook of International Law* (1958), at pp. 8–9.

He remarks later:

> In short, the jurisdiction of any tribunal can be faulted under any of these heads [i.e. *ratione materiae, personae, or temporis* – added by the authors] by showing either that the tribunal does not possess jurisdiction in the particular material, personal or temporal field to which the case relates, or that, the tribunal being possessed of a certain field of jurisdiction, material, personal and temporal, the particular case falls in some essential respect outside that field.[18]

He refers also to the question of the propriety of exercising jurisdiction, but does not seem to construe the meaning of propriety as covering the cases where the composition of a certain tribunal is questioned by parties before it.[19] It is felt that the question a criminal tribunal may encounter does not necessarily arise before a tribunal is set up and operated on the basis of consensual jurisdiction, such as the International Court of Justice. Composition would be a matter resolved first of all to the satisfaction of the States that initially set up the tribunal, and then of the States that bring their cases before it: this is, in fact, the case in respect not only of arbitral tribunals, but of permanent institutions like the International Court.[20]

In international criminal law, jurisdiction, in the sense of one over a "field" – to use the term of the quoted authority referred to in the preceding paragraph, is, and should be, as pre-determined as in a national system. It is determined by way of agreement reached among entities that are not subject to the jurisdiction – States. That jurisdiction encompasses only natural persons who cannot influence the existence and conferment of that jurisdiction. The administering of international criminal law may therefore be more closely reflective of the practice in domestic law than in public international law, opening the way for international criminal tribunals to borrow from general principles of law recognised in national practice. Similar questions may arise in international criminal law and municipal law. Disqualification of judges, or composition of a bench, is one such example.

In terms of municipal law, the English case quoted by Judge Shahabuddeen in *Kanyabashi* is obviously supportive of the position that disqualification affects jurisdiction. In other English cases where jurisdiction is a matter for contention, if in the course of deliberation and drafting of the judgement a court took into account a factor that was not within its power to consider, its decision would be a nullity, as it had no jurisdiction to do so,

[18]Id., p. 9.

[19]Id., pp. 21–22 and pp. 143–47. See also, H. Thirlway, "The Law and Practice of the International Court of Justice 1960–1989, Part Nine", 69 *British Yearbook of International Law* (1998), p. 1 at 34–57.

[20]Art. 26 (2) of the Statute for the International Court provides that the Court may "at any time" form a chamber for dealing with a particular case, with the number of judges to sit in the chamber determined by the Court "with the approval of the parties". Under Art. 26(3), cases shall be heard and determined by the chambers formed pursuant to Art. 26 "if the parties so request".

on terms of the ICTR Statute, it lacked jurisdiction to do so.[21] Lord Reid stated thus:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have made a decision which it had no power to make.[22]

In the same breath, he also included the cases where a tribunal misconstrued the provisions giving it its powers so that it failed to deal with the matter remitted to it but dealt with matters not remitted to it and where the tribunal failed to consider matters which it was required to consider. Concurring, his colleague Lord Pearce pointed out that lack of jurisdiction might arise in various forms, such as where a court made decisions which it had no power to make, departure by the court from the rules of natural justice, wrong questions asked of itself, or consideration of matters which it was not asked to consider. Any of such will lead to a legal error that a supervisory court should intervene to correct.[23]

The preceding paragraph merely shows that, in certain English cases, the consequence of *a court* stepping outside its jurisdiction is the nullity of its decision made in such circumstances which leads to the intervention by a supervisory court to correct the error that led the lower court to make that decision. It is plain that the action of a court taken outside its jurisdiction will be an act done in lack of jurisdiction. The point is that a party in the case can raise this matter to a superior court for remedy, but that this happens only *after* the error of the lower court was committed.

However, Rule 72 provides for preliminary motions, which are by nature confined to the pre-trial stage. There is no question of acting outside jurisdiction, if the trial is yet to commence, unless concerns are raised in respect of the possession of jurisdiction by the Tribunal including the Trial Chambers to deal with the case (it is noteworthy that none of the ICTR interlocutory appeals seem to have raised such concerns as regard the possession of jurisdiction of the Tribunal). On this account, the ICTR is like

[21] E.g., *Anisminic, Ltd. v. the Foreign Compensation Commission and Another*, [1969] 1 All ER 208, HL (Lord Morris and Lord Pearson dissenting); *Pearlman v. Keepers and Governors of Harrow School*, [1979] 1 All ER 365, C.A. (Civil Division, Lane LJ dissenting).

[22] *Anisminic, Ltd. v. the Foreign Compensation Commission and Another*, [1969] 1 All ER 208 at p. 213.

[23] Id., para. 233.

the International Court, its jurisdiction over a whole case having to be determined prior to the opening of the trial or the commencement of the merits stage. Once a decision is made by a Trial Chamber, without knowing that a legal error has been committed that compromises the fairness of the trial, there is the remedy of lodging an appeal. Errors of this type do not undermine the possession of jurisdiction by the Trial Chamber. They concern the way of exercise of that jurisdiction. They do not fall under Rule 72.

It is of course arguable that the composition of a Chamber, as distinct from the constitution of the Chamber, may have impact upon the competence of the Chamber to *exercise* jurisdiction over a certain case. If the composition of the Chamber, in terms of which judges are assigned to it by the President of the ICTR,[24] is somehow defective, but the Chamber nevertheless proceeds with motions in a pending case, there is a realistic chance of bias and violations of the rights of the accused to a fair trial. However, this consequence does not make the issue of disqualification of judges or, conversely, of composition of the Chambers, jurisdictional, in the sense that jurisdiction would be lost over a pending case. It can only be said that, defective composition will affect the impartiality of the composing judges to try the case, and their continuation with the trial in spite of the partiality concern will give rise to appeal. In terms of the whole case, therefore, the interests of the accused would not be undermined irreparably. It may be, however, arguable that, as defective composition will entail that some judges cannot sit on a case, it affects the exercise of jurisdiction by the relevant Chamber, and that therefore, this matter can be deemed jurisdictional. The problem with this latter view is that it may be useful only if the Rules are silent over the issue of the impartiality of judges.[25] However, the Rules are not silent in this regard.

Rule 15(A) provides, inter alia, that "[A] Judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case." Rule 15(B) states that "[A]ny party may apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber from a trial or appeal upon the above grounds. After the Presiding Judge has conferred with the Judge in question, the Bureau, if necessary, shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge."

On the basis of Rule 15(A), it would be difficult to maintain that the composition of a Chamber is lawful if one of the members of the Chamber were found to be associated with the case in a way that is anticipated by Rule

[24] The power of the ICTR President to assign judges applies only to Trial Chambers, as the Appeals Chamber is filled with the appellate judges from the ICTY Appeals Chamber: see Article 12(2) of the ICTR Statute.

[25] The issue of disqualification of judges is not discussed in this paper. But see the contribution by Morrison in this collection of essays.

(A). There is the sense that the act of composition of the Chamber may well be flawless, but that the result of the act, reflected in the membership of the Chamber, is not beyond reproach. The Defence could feel unsettled by the knowledge that a judge who had been vocally advocating a particular cause before taking up the office with the Chamber will sit on the bench assigned to deal with its case that focuses on that very cause. It could be forgiven for questioning the impartiality of the Chamber in this composition, with suitable submissions.

There is, however, a distinction between the competence to exercise jurisdiction and the possession of jurisdiction. If the ICTR has jurisdiction over the case, the Trial Chambers will have delegated jurisdiction to handle the case. Can that jurisdiction be lost due to factors that will disqualify one of the judges? The answer is negative. The relevant Trial Chamber is an institution of itself, insomuch as it can exist, in theory, without judges. Of course it always comes to life only with judges. But whatever judges are assigned, they are assigned under the presumption that the Trial Chamber is duly seized of the case and has jurisdiction over the whole case. The change in the membership of the Chamber cannot therefore affect its jurisdiction. Where impartiality of one or several members of the Chamber is called into question, resort should first be had to Rule 15, rather than Rule 72. A judge may decline to exercise the jurisdiction of the Trial Chamber for reasons of propriety, but he cannot divest the Chamber of its jurisdiction by continually sitting in it.

In connection with what is said in the previous paragraph, it is conceded that a particular Trial Chamber may sometimes lack jurisdiction. This is a situation which has also occurred in *Kanyabashi*. In the case, Trial Chamber I was requested by the Prosecution to consider two motions from it, one of which was concerned with the amendment of the indictment. Under Rule 50, such a motion shall be considered by the Chamber before which the accused made his initial appearance. The appropriate Chamber in this case would be Trial Chamber II. The majority of the Appeals Chamber held that Trial Chamber I lacked jurisdiction over the amendment motion.[26] It ordered the motion to be returned to Trial Chamber II for decision. This shows that jurisdiction goes along with a Chamber, rather than the constituent judges of that Chamber.

The presumption is not helpful that any challenge to jurisdiction could be submitted on the premise that the exercise of jurisdiction would be affected if a Trial Chamber carried on its proceedings in a given case. This seems a confusion of the two issues of possession and exercise of jurisdiction. The competence of a Trial Chamber to correctly exercise jurisdiction may be affected by procedural errors in composing the bench of the Chamber, but

[26] *Joseph Kanyabashi v. The Prosecutor, Joint and Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. ICTR-96-15-A, 3 June 1999 at para. 28; and *Joint Separate and Concurrent Opinion of Judge Wang and Judge Nieto-Navia*, 3 June 1999 at para. 9.

not the ab initio power of the Chamber to adjudicate this case. Rule 72 (B) (i) concerns "lack of jurisdiction" only.

It is recognised that the paper has so far relied on an interpretation of Rule 72(B)(i) that appears to be strict. After all, the provision refers only to "objections based on lack of jurisdiction". It seems that, as long as an objection is claimed to be based on the ground of lack of jurisdiction, an interlocutory appeal will lie as of right pursuant to Rule 72(D). We consider, however, that whether an objection can be regarded as a challenge to jurisdiction depends on whether the cause of the objection is genuinely linked with jurisdiction. There has to be an objection, but there must also be a case regarding jurisdiction, which the objection manifests. It is stretching reason to argue that matters like assignment of counsel by the Registrar or failure to provide translation of court documents in time can also give rise to a contention over jurisdiction, if only a party claims this to be the case. A right of appeal cannot be lightly given under the Rules, because the interests that right protect cannot be trivial.

In short, the matter of the composition of Chambers is not a matter that falls under Rule 72(B)(i), but only under Rule 15. It may affect the competence of a Chamber to exercise its jurisdiction over a case, but has no bearing on the possession or lack of jurisdiction of the Chamber that is regulated by the Statute and the Rules. It cannot therefore lead to a claim of lack of jurisdiction. Not completely paralleling the existing pattern in public international law, the matter also assumes less urgency for criminal tribunals than for tribunals settling disputes among States, because there is always the remedy of post-trial appeal available to parties before a criminal tribunal to correct legal errors even regarding jurisdiction or composition. To this extent, the ICTR procedure likens to municipal law procedure; whereas the former differs significantly from the latter in allowing jurisdiction to be challenged prior to trial.

ANNEX 2

P. Reuter, *Introduction to the Law of Treaties*, London: Kegan Paul International, 1995, pp. 95-99

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To make the text more readable, references and some additional material have been included separately, at the end of each chapter. Each paragraph ending with an asterisk (*) is completed by a corresponding paragraph of notes bearing the same number.

CHAPTER THREE

THE EFFECTS OF TREATIES

136 The effect of a treaty is essentially to create legal rules, to generate rights and obligations. Any treaty 'is binding upon the parties to it and must be performed by them in good faith' (1969 and 1986 Conventions, article 26).

For its effects to be determined, the treaty must first be viewed in isolation, irrespective of any other legal rules which may be applicable in a given situation (without prejudice to problems of interpretation; see below, No. 145) first with regard to parties (Section I) and then to non-parties (Section II), whereupon it will be considered in relation to other rules which may have to combine with it, giving rise to some specific issues (Section III).(*)

I Effects with regard to the parties

137 It has been noted (see above, No. 50) that a treaty, by its very nature, closely links a juristic act and a rule laid down by means of that act. The effects of the treaty relate to the authors of the act: from their will do they proceed and they are nothing apart from that will. That very generally is the basic principle. It makes it possible to formulate from the outset a problem arising even before the treaty is being performed, namely how to determine the intention of the parties. This is the issue of treaty interpretation, which is the subject of Sub-Section 1. Apart from interpretation, several aspects regarding the scope and extent of the undertaking concern the 'application' of a treaty. The application of treaties in the municipal order has already been dealt with (see above, No. 44); their application in space and time remains to be considered in Sub-Section 2.(*)

1. Interpretation

138 States or international organizations which are parties to a treaty have to apply the treaty and therefore to interpret it. In the case of States, the organs having concluded the treaty are the most qualified to do so, but their courts also have to interpret an increasing number of treaties. If the parties to a treaty agree on a common interpretation either by a formal treaty or otherwise, this interpretation acquires an authentic character and prevails over any other. But other entities beside the parties also interpret the treaty, for instance an arbitral tribunal or an international organization which, although not a party, has to apply a treaty or control its application, in particular when the treaty concerned is its constituent charter.(*)

139 The fact that different entities are called upon to interpret the treaty does not in principle affect the manner in which interpretation must be performed. What does change from one situation to another is the extent of the interpreter's powers, and also the effects of his interpretation. While the right of the governments parties to interpret a treaty is unchallenged, the same cannot be said of municipal courts whose powers, laid down by their national Constitution, vary considerably from State to State and occasionally from court to court within the same country. In international organizations, it is generally accepted that each organ, within its functions, is called upon to interpret the treaties which concern it although the interpretations of some, especially judicial, organs may in some cases be binding on the other organs as well.

140 We shall not go into the constitutional issues of which some aspects have already been mentioned (see above, No. 44) but will simply present the basic rules of treaty interpretation. Interpretation is governed by legal rules, for disputes concerning treaty interpretation are the very type of legal disputes which can be settled by judicial means (Article 36 of the Statutes of the Permanent Court of International Justice and of the International Court of Justice). These rules are necessarily applicable by all entities called upon to interpret a treaty. There has, however, been much discussion about the method of interpretation, the most difficult issue being the distinction between what can be

the subject of specific *rules* of interpretation and what in a concrete case should be left to the interpreter's *art*.

141 Yet there is one fundamental observation which makes such a distinction possible. The purpose of interpretation is to ascertain the intention of the parties from a text. The problem is quite different in the case of agreements not recorded in an instrument, whether verbal or implicit, where the existence and the content of a spontaneous will emerge simultaneously, without any recourse to a formal document specially designed for that purpose. If, on the contrary, there is such a document, the intention has become a text by means of a very specific operation. Interpretation is the reverse operation, going backwards from the text to the initial intention. Drafting methods and rules of interpretation are therefore two aspects of the same problem viewed from two opposite angles: both deal with an intention embodied in a text.(*)

142 The primacy of the text, especially in international law, is the cardinal rule for any interpretation. It may be that in other legal systems, where the legislative and judicial processes are fully regulated by the authority of the State and not by the free consent of the parties, the courts are deemed competent to make a text say what it does not say or even the opposite of what it says. But such interpretations, which are sometimes described as teleological, are indissociable from the fact that recourse to the courts is mandatory, that the court is obliged to hand down a decision, and that it is moreover controlled by an effective legislature whose action may if necessary check its bolder undertakings. When an international judge or arbitrator departs from a text, it is because he is satisfied that another text or practice, i.e. another source of law, should prevail.(*)

143 In the interpretation of international law, because of the submission to the *expression* of the parties' intention, it is essential to identify exactly how and when that intention was expressed and to give precedence to its most immediate manifestation. In this respect the draft provisions drawn up by the International Law Commission, and barely modified by the Vienna Conferences, are one of the most remarkable achievements of the 1969 Convention (articles 31 and 32).(*)

144 According to article 31 of the 1969 and 1986 Conventions,

interpretation must be based simultaneously on the 'context' (paragraph 2) and on other elements (paragraph 3) which appear to carry less weight. The 'context' covers the text itself (including the preamble and annexes) and any agreement relating to the treaty which has been reached between all the parties in connection with its conclusion, as well as 'any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'. The other elements to be 'taken into account' are 'any subsequent agreement between the parties' regarding interpretation or application of the treaty, 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' and 'any relevant rules of international law applicable in the relations between the parties'.

These carefully and subtly graduated elements constitute, primarily and simultaneously, the basic guidelines of interpretation. As for the terms used in these agreements, they are to be interpreted in good faith following their ordinary meaning and in the light of the object and purpose of the treaty. The ordinary meaning of the terms may only be departed from if the parties' intention to do so can be established.(*)

145 It is from these elements, since they primarily incorporate the parties' intention, that the meaning of the treaty should normally be derived. Recourse to supplementary means of interpretation (article 32) – including preparatory work or deductions to reconstitute the parties' intention especially by reference to the circumstances of the conclusion of the treaty – is only admissible at a later stage, either to confirm the results of the interpretation or to avoid reaching ambiguous or manifestly absurd or unreasonable results on the sole basis of the primary elements.

146 When articles 31 and 32 were considered, one point which gave rise to serious discussion was whether preparatory work should only play a secondary role. This solution was favoured for two reasons. As a matter of law, all the factors listed in article 31 constitute an authentic expression of the parties' intentions, whereas the intentions recorded in the preparatory work are not final. As a matter of fact, recourse to preparatory work means treading uncertain ground: its content is not precisely defined

nor rigorously certified, and it reveals the shortcomings or possible blunders of the negotiators as well as their reluctance to confront the true difficulties. Moreover, preparatory work is not always published, and even when it is there could be some misgivings about invoking it against States, ever more numerous on account of the modern methods of accession, which did not take part in the negotiations.(*)

147 Nevertheless, the International Law Commission's commentary shows how important preparatory work is in practice and the judicial decisions it mentions reveal that it does help to clarify points which would otherwise have remained obscure. In the end, the provisions of both Conventions are very moderate and it would be inappropriate to challenge them on doctrinal grounds alone. There may be slight variations in the positions of the authors, and while these nuances may be linked to doctrinal preference, they do not really coincide with any of the world's main legal systems. The transition from an intention to its written expression has given rise to identical problems and to similar solutions all over the world.

148 It would be equally rash to try to make a difference between principles of interpretation depending upon whether the treaties considered are bilateral or multilateral, law-making or contractual; the principles may apply differently according to the characteristics of the treaties concerned, but they necessarily remain the same. What international case-law does show is both far more modest and more interesting, i.e. that the courts examine groups of treaties covering similar subjects at a given time (see above, No. 81). Indeed, with regard to both vocabulary (especially technical terms) and some usual provisions (e.g. the most-favoured-nation clause), drafting practice reveals that drafters often look to existing treaties (especially in a bilateral context): hence it becomes possible to identify groups or types of treaties. The scope of clauses which recur from treaty to treaty or the meaning of a particular expression may thus be clarified in some complex cases, although here too considerable caution is required.(*)

2. Application

A. Territorial application

149 The territorial scope of the rules laid down by a treaty has to be identified: in what territory or extraterritorial location are the situations and facts governed by such rules supposed to arise? Each treaty must define its territorial scope, otherwise it may be difficult to ascertain the parties' intention, especially for areas whose status has not yet been clearly defined as in the case of certain maritime or polar areas or of outer space. When a treaty refers to the territory of a State, in order to determine the scope of application of its rules, it must be regarded as covering the whole of the State's territory (article 29 of the 1969 and 1986 Conventions). Such a presumption cannot extend to international organizations since they do not have a 'territory'.

150 In the past, it was often the policy of colonial powers to exclude colonial territories from the application of their treaties by means of a final clause usually referred to as the 'colonial clause'. This practice has raised conflicting opinions from the legislative point of view. It is less relevant now that most colonies have become independent; but many States still practise a high degree of decentralization and usually exclude islands or remote areas from the application of certain treaty rules, especially for economic matters. No better example could be given than the provisions of the treaties of the European Communities involving the rules applicable to territories enjoying special relations with member States. Apart from the federal solutions which will be dealt with below, there are a number of highly specific situations which may derogate from the rule that a treaty, unless otherwise stipulated, applies to the whole of a State's territory.(*)

B. Temporal application

151 The conditions under which a treaty enters into force have already been discussed (see above, No. 10) and the next chapter (see below, Nos. 230 ff.) will consider the different situations in which the application of a treaty is suspended or terminated. The question is how to identify the temporal application of the treaty, or in other words how to connect the facts and situations

ANNEX 3

G. McIntyre, "Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY", in: G. Boas and W.A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden: Martinus Nijhoff, 2003, pp. 193-238

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Gideon Boas & William A. Schabas, editors

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Foreword

When the history of the ICTY comes to be written, its contribution to the jurisprudence of international criminal law will be seen as among its significant achievements. Like the builders of old, the pioneers of the Tribunal found a quarry and turned it into the makings of a temple. However, at the time of writing, the foundations are just being built. There has been important work in many disparate fields. Much has been done to define the substantive law, for instance, the elements of the crimes and the types of responsibility. A code of procedure and evidence has been established and there have been important decisions on such matters as hearsay and written evidence. The notion of fair trial rights has been developed with decisions such as those on the right of the accused to examine witnesses and equality of arms. A system for the protection of victims and witnesses has been set up, a development which may be said to be unique and from which it is to be hoped others can learn.

But, there is no point in building a temple if nobody sees it or uses it. While sterling work has been done in some quarters to collect, publish and publicise the decisions of the Tribunal, and a certain amount of academic commentary has been engendered, the fact remains that too many decisions go unheeded. If they are given by Trial Chambers, and in some cases by the Appeals Chamber, they may go into the files and not be properly reported. The fate of oral decisions is even more summary. There is thus, as yet, no comprehensive collection of these decisions and no easily accessible way to get at them.

It is, therefore, particularly welcome that this analysis of developments in the case law of the Tribunal is being published now. It is written by authors with much experience of the work of the Tribunal and can, therefore, be relied upon to shed light on its practice. Analysis of the decisions will help to publicise them. Discussion and criticism of the case law will contribute to its development. In the end, those who worked in the Tribunal will be able to say, as the great architect said of his masterpiece: '*si monumentum requiris, circumspice*' – if you want a monument, look around.

Richard May
Judge of the International Criminal Tribunal for the former Yugoslavia

Boas & Schabas, eds, International Criminal Law Developments in the Case Law of the ICTY, *vii-viii.*

GABRIELLE MCINTYRE*

Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY

In the first case brought before the International Criminal Tribunal for the former Yugoslavia (ICTY), it premised its legality as a functioning legal institution upon its full adherence to the rule of law. It interpreted the rule of law at international law as obliging it to adhere fully to international human rights principles. In a decision rendered shortly thereafter the Tribunal held that it was not bound by universal human rights principles as interpreted by other human rights bodies. The Tribunal reasoned that because of its unique structure as an international tribunal and because of the nature of the subject matter with which it dealt, those universal human rights principles were not applicable to it in the same way in which they were applicable to municipal jurisdictions. It suggested that it was more akin to a military tribunal and as such it would adopt a contextual approach to the interpretation of universal human rights principles.[1]

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1. By characterising itself as more akin to a military tribunal the Tribunal brings itself into immediate conflict with concerns of the human rights regime. See "General Comment 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14)", UN Doc. CCPR/C/21/Add.3, where the Human Rights Committee expressed its concern at the administration of justice by military or special courts and observed, at para. 4:

> Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14 [of the International Covenant on Civil and Political Rights (ICCPR)].

Boas & Schabas, eds, International Criminal Law Developments in the Case Law of the ICTY, *193–238.*

By adopting such an approach to the application of universally established human rights principles, the Tribunal has left itself open to the criticism that it is an operational contradiction: existing to uphold principles of international humanitarian law but in the process permitting departure from certain principles of international human rights law.[2] The contradiction becomes more marked when it is considered that the idea of an international community exists in large part because of the recognition of the proper treatment of humans enshrined in human rights laws and conventions. Human rights by their very nature do away with the distinction traditionally drawn between the internal and international legal orders. The interference in the rights of States that claim the human rights of their citizens are a matter of internal concern has been the fulcrum around which the concept of an international community has developed. By justifying departure from universal principles recognised by the international community, it is arguable that the Tribunal establishes a hierarchy of law to which those universal norms can be subverted. It also fragments the idea of an international community by distinguishing the internal legal order of States from the international legal order – a distinction that human rights law had hitherto denied.

However, more importantly from the perspective of the Tribunal, by adopting a contextual approach the Tribunal raises questions about its legality as a functioning legal institution. After examining the framework the Tribunal set itself, this chapter will consider the operation of the Tribunal as a judicial body. It will be argued that although the departures of the Tribunal from universal human rights principles as interpreted by other human rights bodies is difficult to reconcile with the jurisdictional obligation of the Tribunal to respect fully the rights of an accused in its criminal trial processes, this is only because those universal principles had, at the time of the conception of the Tribunal, no other meaning than that derived from their application in the municipal criminal trial process. The Tribunal is the first truly international forum to apply universal human rights principles to international criminal proceedings. Accordingly, if it accepted that human rights are principles that can only have meaning in context[3] the Tribunal is entitled, by reference to the human rights regime, to develop its own set of human rights standards in light of its context as an international criminal court dealing with crimes committed in times of war. The real issue of concern then is not whether the Tribunal adheres to existing interpretations of universal human rights principles, but whether the standards it is setting are proper international standards so that it could be said the Tribunal does conform to the rule of law.

2. This pattern of judicial activity seems to reflect the enforcement of humanitarian law, a core component of international criminal law. In times of armed conflict (or other state emergencies) international human rights law permits derogation from certain human rights norms.

3. This assumption is contentious and its detailed consideration is beyond the scope of this chapter.

The potential scope of this inquiry is relevant to all aspects of the procedural and substantive operation of the Tribunal and it is not possible to comprehensively cover the topic within this chapter. What will be considered in the following is a sample of procedural rights that are of crucial significance to an accused facing criminal trial proceedings. The human rights selected are those that have been most commonly raised by accused in challenging the legality of the proceedings of the Tribunal. The examination of these rights is also by no means comprehensive. The chapter merely touches upon some of the more obvious issues in relation to them.

Established by Law

The Tribunal considers itself established by law.[4] In its first case, the accused argued that the Tribunal had not been "established by law" as required by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).[5] He claimed that to be duly established by law the Tribunal should have been created by treaty, the consensual act of nations, or by an amendment to the Charter of the United Nations, not by resolution of the Security Council. The *Tadić* Trial Chamber refused to entertain the challenge on the basis that it was not competent to do so under Rule 72 of the Rules of the Tribunal, characterising the submission as "not truly a matter of jurisdiction but rather the lawfulness of its creation".[6]

The Appeals Chamber rejected this "narrow characterisation" of jurisdiction and found that while a conception of jurisdiction limited to issues of *ratione temporis*, *loci*, *personae* and *materiae* may be applicable to municipal systems, it was not appropriate in international law. It justified this finding on the ground that the international legal system lacks a centralised structure akin to that found in municipal systems.[7] Without such a structure, every tribunal within international law constitutes a "self-contained system". As such, a plea based on the constitutional validity of the Tribunal went to the "very essence of jurisdiction as a power to exercise the judicial function within any ambit".[8] From this standpoint the Appeals Chamber held that as a judicial body, it

4. In the human rights jurisprudence, for a judicial body to be established at law means that not only the establishment but also the organisation and the functioning of the tribunal in question must have a legal basis. *Piersack* v. *Belgium*, Series A, Vol. 53, p.23

5. *Prosecutor* v. *Tadić*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Case IT-94-1-AR72, 2 October 1995.

6. *Prosecutor* v. *Tadić*, Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, Case No. IT-94-1-PT, 10 August 1995, para. 4.

7. *Prosecutor* v. *Tadić*, *supra* note 5, para.11.

8. *Ibid.*, para.12.

shared with other judicial bodies the power to determine its own *compétence de la compétence* and, rejecting arguments that the exercise of Chapter VII power by the Security Council was non-justiciable, proceeded to examine the argument of the accused that it had not been "established by law".[9]

The Appeals Chamber held that the establishment of the Tribunal by the Security Council was a valid exercise of power pursuant to Article 39 of the Charter of the United Nations, constituting a measure within Article 41, and found that the requirement that the Tribunal be established at law, to comply with Article 14(1) of the ICCPR in the context of international law, meant that it must be established in accordance with the rule of law.[10] For it to have been established according to the rule of law it must conform to "proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments".[11]

The Appeals Chamber was satisfied that the Statute and Rules of the Tribunal, being based upon the internationally recognised standards of Article 14 of the ICCPR, supported a conclusion that it had been established in accordance with the rule of law.[12] In reaching this conclusion the Appeals Chamber made clear that it conceived the rule of law at international law to be firmly established in universal human rights principles, and that its operational legitimacy as a judicial body derived from its adherence to that rule of law.[13]

More recently, Slobodan Milošević brought a "Preliminary Protective Motion" in which he raised a number of arguments challenging the legitimacy of the Tribunal, including the argument made by *Tadić* that the Tribunal had not been "established by law" as required by Article 14(1) of the ICCPR.[14] The *amici curiae* appointed to assist the Trial Chamber in the proceedings[15] urged the Tribunal to reconsider the arguments made in *Tadić*, arguing that there was no doctrine of precedent in international law that prevented the Trial Chamber from doing so.[16] While the Trial Chamber rejected this claim, based

9. *Ibid.*, paras. 13-25. Most considerations of the *Tadić* Jurisdiction Decision, *supra* note 5, have focused on the determination made by the Appeals Chamber that the Security Council was empowered to establish the Tribunal.
10. *Ibid.*, paras. 28-40.
11. *Ibid.*, para. 45.
12. *Ibid.*, paras. 46-47.
13. *Ibid.*, paras. 45-47.
14. *Prosecutor* v. *Milošević*, Preliminary Protective Motion, Case No. IT-99-37-PT, 9 August 2001. The arguments of the accused were set out in an untitled supporting document filed on 30 August 2001.
15. *Prosecutor* v. *Milošević*, Order Inviting Designation of Amicus Curiae, Case No. IT-99-37-PT, 30 August 2001.
16. Motion Hearing, 29 October 2001, Transcript pp. 33-34.

on the decision of the Appeals Chamber in *Aleksovski* that "a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on the Trial Chambers",[17] it nevertheless decided that it was able to reconsider the argument.[18] The Trial Chamber found, as the *Tadić* Appeals Chamber before it, that the creation of the Tribunal was within the powers conferred on the Security Council and that the Tribunal was established according to law because of its "obligation to guarantee fully the rights of the accused".[19]

Neither the *Tadić* Appeals Chamber nor the *Milošević* Trial Chamber ventured to demonstrate how its "obligation to guarantee fully the rights of the accused" is accommodated by its criminal trial processes. In *Tadić* this is not surprising, given that at the time the decision was rendered there was no pre-existing body of Tribunal decisions upon which the Appeals Chamber could draw to show that this was indeed the effect of the provisions in the Statute and the Rules. However, the *Milošević* Trial Chamber, which did have a body of jurisprudence to draw upon, assumed it unnecessary to support its conclusion by establishing, with reference to the jurisprudence of the Tribunal, how in fact the Tribunal does "guarantee fully the rights of the accused". It relied solely upon the fact that the Statute and the Rules make provision for the protection of internationally recognised rights as *prima facie* evidence that those rights would be protected. However, it is an issue that did warrant further exploration if the Trial Chamber was, as it claimed, venturing to reconsider the challenge to its constitutionality for itself. This is particularly so given that departures from universally established human rights principles by the Tribunal must, according to the reasoning of the *Tadić* Appeals Chamber and that of the *Milošević* Trial Chamber, render the exercise of jurisdiction by the Tribunal illegal, or at least *ultra vires*.[20]

However, determining whether or not the Tribunal is acting within its jurisdictional confines by according full protection to universally recognised rights of an accused at all stages of its criminal proceedings would not

17. *Prosecutor* v. *Aleksovski*, Appeal Judgment, Case No. IT-95-14/1-A, 24 March 2000, para. 113.
18. *Prosecutor* v. *Milošević*, Decision on Preliminary Motions, Case No. IT-99-37-PT, 8 November 2001, para. 4. See also, *Prosecutor* v. *Krajišnik*, Decision on Motion Challenging Jurisdiction-With Reasons, Case No. IT-00-39-PT, 22 September 2000, in which the Accused also challenged the jurisdiction of the Tribunal on the basis of the same arguments made as *Tadić* and the Trial Chamber refused to reconsider the issues finding itself bound by the *Tadić* Jurisdiction Decision in accordance with *Prosecutor* v. *Aleksovski*, *supra* note 17, paras. 15-16, 27.
19. *Prosecutor* v. *Milošević*, *ibid.*, para. 7.
20. See *Prosecutor* v. *Krajišnik*, *supra* note 18, in which the accused alleged that the Tribunal was contrary to the fundamental principles of international law and that it violated rights guaranteed under the ICCPR. The Trial Chamber recited the findings in the *Tadić* Jurisdiction Decision, *supra* note 5, and held that the Tribunal met all the requirements of procedural fairness and accorded the accused the full guarantees of a fair trial as set out in Article 14 of the ICCPR.

have been a simple issue for the *Milosevic* Trial Chamber to demonstrate by reference to the jurisprudence of the Tribunal. It is complicated by the fact that Trial Chambers have been ambiguous about what those standards are and where, in international law, they are to be found. A perusal of the Report of the Secretary-General implies that the rights to be accorded to an accused are firmly established in international law and easily accessible to the Tribunal. In that Report the Secretary-General stated: "It is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognised standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights."[21] The reliance by the Secretary-General on Article 14 of the ICCPR suggests the intention that the Tribunal would accord an accused those rights as understood by other judicial bodies charged with the application of them, in particular the interpretation of the ICCPR by the United Nations Human Rights Committee (HRC) and of comparable principles set out by the European Court of Human Rights (ECtHR).

However, in the *Tadić* Protective Measures Decision,[22] which closely followed the *Tadić* Trial Decision on Jurisdiction, the Trial Chamber found that it was not bound by universally established human rights principles as interpreted by the HRC or the ECtHR. In essence, it concluded that it was not bound by interpretations given by any other judicial bodies at all.[23] It held that although the rights accorded to an accused in the Statute were based on Article 14 of the ICCPR, those rights could not be applied as they had been interpreted by the HRC, or as comparable principles had been interpreted by the ECtHR. This was because the Statute of the Tribunal also directed it to take into account the protection of victims and witnesses, and the fact that the Tribunal is operating in the midst of an armed conflict, is without a police force and is "adjudicating crimes which are considered so horrific as to warrant universal jurisdiction".[24] These factors caused the *Tadić* Trial Chamber to characterise the Tribunal as "more akin to a military tribunal which often has limited rights of due process and more lenient rules of evidence".[25]

21. See "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)", UN Doc. S/25704, para. 106.
22. *Prosecutor* v. *Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995.
23. *Ibid.*, paras. 28-30.
24. *Ibid.*, para. 28.
25. *Ibid.*, paras. 27–28:

    [T]he interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the European Convention on Human Rights is only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal, as these bodies interpret their provisions in the context of their legal framework, which do not contain the same considerations. In interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused's rights to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique framework [...] The fact that the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretation made by other judicial bodies is evident in the different circumstances in which the provisions apply. The interpretations of Article 6 of the European Convention on Human Rights by the European Court of Human Rights are meant to apply to ordinary criminal proceedings and, for Article 6(1) civil adjudications. By contrast the International Tribunal is adjudicating crimes which are considered as so horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence[...].

In reaching this conclusion, the Trial Chamber noted that although the Report of the Secretary-General emphasised the importance of according an accused protection of those rights established in Article 14 of the ICCPR, and mirrored in Article 21 of the Statute, the Report provided little guidance regarding the applicable sources of law in construing and applying the Statute and the Rules, and it did not indicate the relevance of the interpretation given to those provisions by other judicial bodies.[26]

It is clear, therefore, that the Tribunal has found that its unique structure within the international community, and the unique subject matter with which it deals, justifies its characterisation as a self-contained legal system unbridled by the human rights regimes to the extent that the rights to be accorded to an accused in its criminal trial processes are not to be automatically determined by pre-existing standards. As such, the standard the Tribunal set itself in the *Tadić* Jurisdiction Decision is essentially to be determined by the Trial Chambers on a case by case basis. This approach is inherently problematic for the reasoning underpinning the legality of the Tribunal and perpetuates criticism of it as a "self–validating" body.[27] While applying an international

26. *Prosecutor* v. *Tadić*, *supra* note 22, para. 19. By contrast to this decision, the Appeals Chamber in the International Criminal Tribunal for Rwanda (ICTR), in *Barayagwiza* v. *Prosecutor*, Decision, Case ICTR-97-19-AR72, 3 Nov 1999, para. 40, stated:

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

27. Motion Hearing, 29 October 2001, T 36-37; Mr Wladimiroff on behalf of the *amici curiae* urged the Tribunal to seek an advisory opinion from the International Court of Justice (ICJ) to avoid criticism that it was a self validating body, Transcript, pp. 48-49.

legal regime, the Tribunal itself is not part of an existing international legal regime but is free standing, a self-validating legal regime. This view is difficult to reconcile with the Secretary-General's instruction that "[i]t is axiomatic that the Tribunal must fully respect international standards regarding the rights of the accused at all stages of its proceedings".[28]

But the reasoning of the Tribunal in the *Tadić* Protective Measures Decision is not unpersuasive. Human rights principles relating to criminal trials have been developed by the international community to apply to the municipal criminal trial process. The situation within which the Tribunal operates is opposed to that which interprets the ICCPR and the ECHR. The Tribunal exercises its jurisdiction over individuals, while the human rights regime is concerned with the behaviour of States towards their nationals. The Tribunal is concerned with the most horrific crimes imaginable, the human rights regime is often concerned with much lesser abuses by the State. The Tribunal is a penal regime concerned with punishing individuals, while in the human rights regime the respondent is essentially a sovereign State, who is not subject to a penalty of imprisonment. Moreover, under the human rights regime, States parties are accorded a measure of flexibility in their adherence. Departures from established ideals are permissible where those departures can be justified by the particular circumstances of the State in question. As such, the ECtHR has developed its own form of contextual approach with yardstick concepts such as the "margin of appreciation" by which it defers to the specificities of the national jurisdiction.[29] The types of consideration relevant to these human rights bodies may not be appropriate for the Tribunal, which is free from particular municipal considerations and acting on behalf of the international community as a whole.

The reliance of the Tribunal upon context as governing the interpretation to be accorded to human rights is also not without precedent in the International Court of Justice (ICJ). In the *Nuclear Weapons* case, in response to an argument that the use of nuclear weapons would violate the "right to life" guarantee of Article 6 of the ICCPR, the ICJ reasoned that "whether a particular

28. Secretary-General's Report, para.106.

29. *Handyside* v. *United Kingdom*, Series A, Vol. 24, p. 22:

> The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.... The Convention leaves it to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.

Rasmussen v. *Denmark*, Series A, Vol. 87, p. 15:

> The Court has pointed out in several judgments that the Contracting States enjoy a certain "margin of appreciation" in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.... The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.

loss of life through the use of a certain weapon in warfare is to be considered an arbitrary deprivation of life could only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".[30] Essentially, as postulated by the Tribunal, both of these judicial bodies also recognise that human rights are not static concepts. They are understood by reference to the particular context in which they are applied.

If it is accepted that the rule of law at international law (defined by the *Tadić* Appeals Chamber as the obligation to adhere fully to universal human rights principles) can only be determined by reference to context, the Tribunal can avoid blanket criticism of its departure from other established judicial regimes. Nevertheless, it must be established that in the context of the Tribunal, there is a standard of protection that does meet "proper international standards". If so, the fact that the standard the Tribunal set itself in the *Tadić* Jurisdiction Decision was one of conformity to existing human rights principles, in accordance with the directive given by the Secretary-General, is rendered less problematic to the operational legality of the Tribunal. The Tribunal would adhere fully to universal human rights principles as understood within the context in which it is operating, an understanding that was not pre-existing at the time the *Tadić* Jurisdiction Decision was rendered.

This is more so because, although it has rejected the proposition that the interpretation of human rights principles as considered in other judicial regimes can be binding upon it, the Tribunal has not failed to consider universal human rights principles as developed by other bodies in determining its own concept of those rights in its criminal trial processes. In the decisions and judgments of the Tribunal, the rights of an accused as interpreted by the HRC, and as understood in the forum of the ECtHR, do have a significant role to play. In particular, the judgments of the ECtHR have become a yardstick from which the Tribunal will often reason its position. In some decisions, the Tribunal has justified its departure from interpretations of the human rights regime because the rights accorded to the accused in the municipal context are of insufficient status in the context in which it is operating. In other decisions, the Tribunal has sought to temper its failure to provide adequate protection for certain rights *vis à vis* the human rights regime by adopting the language and concepts developed specifically by that regime and attempting to apply those concepts within its own framework. This latter technique attempts to give the appearance of adherence to such standards in circumstances where the structure of the Tribunal clearly does not permit this. This approach undermines the legitimacy of the development by the Tribunal of its own set of human rights standards by highlighting the discomfort of the Tribunal in depart-

30. However, this reasoning may also be due to that fact that the prohibition is against an "arbitrary deprivation" and that determination cannot be made in the abstract but must be interpreted by reference to context. See *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, [1996] ICJ Reports 226, para.25.

ing from the established set of human rights principles as interpreted by the human rights regime. In a sense, the real criticism here is that the Tribunal has failed to fully embrace its own reasoning that its departures from established interpretations of human rights principles are justifiable. However, as will be seen, what also undermines the proposed contextual approach of the Tribunal is the reliance on established interpretations of human rights principles to justify restricting the rights of the accused when the circumstances would seem to warrant a positive increase in those rights.

Two internationally recognised rights will be considered here: the right to be informed at the time of arrest of the nature and cause of the charge alleged, and the right to provisional release. One problem will become apparent in attempting to identify the standard the Tribunal has set for the protection of these rights. There is no doctrine of precedent in international law and different Trial Chambers have different views about how these rights should be accommodated within the structure of the Tribunal. The *ratio decidendi* of Appeals Chamber decisions is binding upon Trial Chambers, and upon the Appeals Chamber itself, which will only depart from previous decisions where there are cogent reasons in the interests of justice for doing so.[31] However, the Appeals Chamber has issued few decisions laying down comprehensive principles as to how particular rights of an accused should be respected within its processes. In the following, the standards set by the Tribunal will by necessity be distilled from the range of positions adopted by different Trial Chambers.

Right to be Informed of the Case Alleged – Challenging the Lawfulness of Arrest

A fundamental universally recognised right of any person accused of a criminal offence is the right to be informed at the time of the arrest of the "nature and cause" of the charges against him or her. This right is enshrined in Article 21(4) of the Statute of the Tribunal, which mirrors Article 14(3)(a) of the ICCPR and Article 5(2) of the ECHR. The content of this right within national jurisdictions is uncontroversial. The HRC has stated that the requirements of Article 14(3)(a) are met "by stating the charge either orally or in writing, provided that the information includes both the law and the alleged facts on which it is based".[32] Similarly, the jurisprudence of the ECtHR interprets

31. *Prosecutor* v. *Aleksovski*, *supra* note 17, para. 113

32. "General Comment 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14)" UN Doc. CCPR/C/21/Add.3. The jurisprudence of the ECtHR supports the proposition that an accused will have been adequately informed of the nature and cause of the charge against him or her even in circumstances where there is a difference between the legal characterisation of the offence for which he or she is charged and that for which he or she is convicted: See *Prosecutor* v. *Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), IT-95-14-PT, 4 April 1997, para.16; *De Salvador Torres* v. *Spain*, Reports 1996-V, para. 33; *Gea Catalan* v. *Spain* (App. No. 19160/91), Judgment (Merits), 10 February 1995, paras. 28-29.

this right as imposing an obligation to inform an accused of the reasons for the arrest and of any charges made. The accused must "be told, in simple, non-technical language that he can understand, the essential reasons for his arrest, so as to be able, if he sees fit to apply to a court to challenge its lawfulness".[33] It is not necessary that this information be given in writing or that it be worded in a particular way.[34] In the human rights regime this requirement serves two functions. It puts the accused in a position to challenge detention pursuant to that arrest, and provides him or her with the information required in order to prepare a defence.[35]

In the municipal criminal trial process with which the HRC and ECtHR are primarily concerned, the transmission of this information to an accused is a relatively uncomplicated matter and is easily satisfied. Crimes alleged in municipal domestic systems are generally allegations of the commission of relatively precise acts. The standard required is also fairly low because an allegation of criminality within a domestic setting is generally an uncomplicated thing to communicate. The jurisprudence of the human rights regime suggests that this obligation will only be breached if at the time of the arrest the authorities fail to communicate any reasons for that arrest.[36]

33. *Fox, Campbell and Hartley* v. *United Kingdom*, Series A, Vol. 182, p. 9.

34. *Lamy* v. *France*, Series A, Vol. 151, p. 17.

35. The human rights regime also imposes the obligation that any process of arrest must be carried out in accordance with a procedure "prescribed by law". This means that the deprivation of liberty itself must be undertaken in conformity with the procedural rules and on grounds which are clearly established in the substantive law of the national law and that law must be "sufficiently accessible and precise" to the individual. The procedure adopted by the national authority must be fair and proper and must be executed by an appropriate authority and not be arbitrary. This last requirement is to be interpreted broadly. Cases of deprivation of liberty provided for by the law must not be manifestly unproportional, unjust or unpredictable, the specific manner in which the arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in the circumstances of the case: See Article 9(3) of the ICCPR: "Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law"; Article 5(1) of the European Convention on Human Rights: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law": *Amuur* v. *France*, Reports 1996-III, para. 50. *Kemmache* v. *France*, Series A, Vol. 296-C, pp. 86-87; *Winterwerp* v. *The Netherlands*, Series A, Vol. 33, pp. 17-18, 19-20; *S.W.* v. *United Kingdom*, Series A, No. 335-B, pp. 41-42; *Halford* v. *United Kingdom*, Reports 1997-III, p. 1017.

36. *Moriana Hernandes Valentini de Bassano* v. *Uruguay* (No. 5/1977), UN Doc. CCPR/C/OP/1, p. 40; *Leopolda Buffo Carballal* v. *Uruguay* (No. 33/1978), UN Doc. CCPR/C/OP/1, p. 63; *Alba Pietraroia* v. *Uruguay* (No. 44/1979), UN Doc. CCPR/

In the context of the Tribunal, the satisfaction of this obligation is not such a simple matter. An accused charged with serious violations of international humanitarian law is typically alleged to have been criminally involved in a multitude of offences, over a period of time, against numerous victims and often in a wide geographic area and with a number of other participants. Because of the complexity and number of crimes alleged it is not possible to inform an accused of the "nature and cause" of the charge with the same level of simplicity as in the municipal criminal context. Accordingly, the Tribunal has adopted a much more elaborate procedure to ensure the fulfilment of this obligation.

Before an accused can be arrested by the Tribunal, the Prosecutor must prepare "an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute"[37] and have that indictment confirmed by a judge of the Tribunal.[38] The confirming judge is required to examine each count of the indictment and supporting material to satisfy himself or herself that each count contains a *prima facie* case against the accused, "in the sense that it pleads a credible case which would (if not contradicted by the accused) be a sufficient basis to convict him on the charge".[39] Only then will a confirming judge authorise the arrest of an accused, signing a warrant of arrest to be issued to the relevant authorities.[40]

Once an arrest warrant is executed, the Prosecutor is required to serve the indictment upon the accused in a language he or she understands. Within thirty days of that service the Prosecutor must provide the accused with the supporting material upon which it relied to confirm the indictment.[41] Once this material has been served upon the accused, he or she is granted a period of

C/OP/1, p. 76; UN Doc. CCPR/C/OP/2, p. 161; *Glenford Campbell* v. *Jamaica* (No. 248/1987), U.N. Doc. CCPR/41/Add. 1, Vol. II, p. 383.

37. Article 18(4); Rule 47(B).

38. Article 19.

39. *Prosecutor* v. *Krnojelac*, Decision on Prosecutor's Response to Decision of 24 February 1999, Case No. IT-97-25-PT, 20 May 1999, para.11.

40. If an arrest warrant issued by a confirming judge is not executed within a reasonable time, and the judge who confirmed the indictment is satisfied that the Registrar and the prosecution have taken all reasonable steps to secure the arrest of the accused, the confirming judge may then order the Prosecutor to submit the indictment to the Trial Chamber of which he or she is a member. If so ordered, the Prosecutor is required to present the evidence upon which he or she relied before the confirming judge to the Trial Chamber in a public hearing. The Trial Chamber may also request the Prosecutor to call as a witness any person whose statement was submitted to the confirming judge. If the Trial Chamber is satisfied on the evidence presented that there are reasonable grounds for the allegations made against an accused it shall make that determination and this finding justifies the Trial Chamber issuing an international arrest warrant to all States to arrest an accused in order that he or she may stand trial before it. See Rule 61.

41. Rule 66(A)(i).

thirty days in which to challenge the indictment. Challenges to the form of an indictment are matters to be dealt with by the Trial Chamber assigned to the case. It is not the function of a Trial Chamber to consider whether an indictment is defective unless there is some complaint made by the accused.[42]

On its face it would appear that the procedure adopted by the Tribunal to informing an accused of the "nature and cause" of the charge is an inherently fair one. No person will be subject to arrest without a process of confirmation by a Judge. That process should ensure that the "nature and cause" of the case against an accused is clearly and concisely stated and supportable by sufficient evidence to establish a *prima facie* case warranting the accused standing trial.[43]

As stated above, in the human rights regime, the requirement that an accused be informed of the reasons for arrest at the time of the arrest is closely aligned to the right of the accused to challenge the lawfulness of arrest and detention. Once an accused is arrested, he or she has a right to be taken before

42. *Prosecutor* v. *Krnojelac*, *supra* note 39, para. 18.

43. Article 18(4) of the Statute, Rule 47(B) and 61. The approach of the Tribunal is also ostensibly consistent with the requirements of the human rights regime that an arrest be carried out in accordance with a procedure "prescribed by law". The procedure adopted by the Tribunal for the arrest of an accused person is a procedure prescribed by laws as set out in the Statute and Rules of the Tribunal and, as was established in the *Talić* case, this procedure reflects the Tribunal's adherence to Article 9(3) of the ICCPR and Article 5(1) of the ECHR. In the *Talić* case, the accused argued that his arrest had become unlawful because he had been detained pursuant to an order of the Trial Chamber which was founded on the original indictment. This indictment now having been amended, the absence of a new order for his detention meant that his detention was without judicial basis and therefore unlawful. In making this argument, Talić relied upon Article 9(3) of the ICCPR and in particular that "no one shall be deprived of his liberty except upon such grounds and in accordance with such procedures established by law". The Trial Chamber accepted the applicability of Article 9(3) of the ICCPR to the processes of the Tribunal but rejected the argument of the accused that there was "no basis in the Tribunal's 'procedures…established by law' for his present detention". In the context of the Tribunal the procedures established in law are that a judge who confirms an indictment may issue an arrest warrant. That indictment will be served upon the accused when arrested pursuant to the arrest warrant and the accused will then be transferred to the Tribunal. Once transferred he or she "shall be detained" and may not be released except by order of a Trial Chamber. On the basis of these procedures, established at law, "the only actions by the Tribunal which are necessary to justify the detention of the accused are the review and the confirmation of the indictment and the issue of the arrest warrant". This is made clear in Article 19(2) of the Tribunal's Statute. The order made for detention on remand at the initial appearance of the accused was made purely for administrative purposes and it was based upon procedures of the Tribunal established at law and not upon the existence of the original indictment. *Prosecutor* v. *Brđanin & Talić*, Decisions On Motions By Momir Talić (1) To Dismiss The Indictment, (2) For Release, And (3) For Leave to Reply To Response Of Prosecution To Motion For Release, Case No. IT-99-36-PT, 1 February 2000, paras. 11, 19, 21.

a judicial authority to have the lawfulness of that arrest reviewed.[44] A detaining authority is required to provide an individual with recourse to a judicial authority in all circumstances. If the reviewing authority determines that the arrest was unlawful, the individual whose rights have been infringed by that arrest has an enforceable right to compensation.[45] The right of the individual to review by a judicial authority of the grounds of arrest is separate from the issue of whether that initial detention was legally justified.[46] This right stems from the Anglo-American principle of *habeas corpus*.

There is no express provision in the Statute or the Rules conferring upon an accused a right to challenge the lawfulness of arrest *per se*. Once an accused has been arrested and transferred to the Tribunal, Article 20(3) of the Statute provides merely that

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

However, Rule 72 provides that an accused may do so by motion challenging the exercise of jurisdiction by the Tribunal. The scope of the jurisdiction of the Tribunal is stated in Article 1 of the Statute. It grants the Tribunal "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute".

Rule 72 sets out an exhaustive list of grounds upon which a motion will be considered to be a challenge to its exercise of jurisdiction:

> a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:
> (i) any of the persons indicated in Articles 1, 6, 7, and 9 of the Statute;
> (ii) any territories indicated in Articles 1,8 and 9 of the Statute;
> (iii) the period indicated in Articles 1,8 and 9 of the Statute;
> any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.

Pursuant to Rule 72, various grounds have been advanced to challenge the Tribunal's jurisdiction. Most have argued that the violations alleged do not breach customary international law, or are not serious violations, or that they

44. Article 5(4) of the ECHR provides that any person deprived of liberty by arrest or detention has the right to take proceedings by which the lawfulness of such deprivation of liberty will be reviewed expeditiously by a court and his release ordered if the latter decides that the detention is unlawful. See *Zamir* v. *United Kingdom*, (1985) D. & R. 42, p. 59.

45. Article 5(5) ECHR; Article 9(5) ICCPR.

46. *De Wilde, Ooms* v. *Versijp* v. *Belgium*, Series A, Vol. 12, at para.73; *Van Der Leer* v. *Netherlands*, Series A, Vol. 170-A; *Koendjbiharie* v. *Netherlands*, Series A, Vol. 185-B.

do not give rise to individual criminal responsibility under articles 7(1) or 7(3) of the Statute. Almost all of these have been dismissed and in no case has an indictment been set aside.[47]

One challenge that has yet to be fully considered is based on the alleged illegality of the arrest. The argument here is that the Tribunal should decline the exercise of jurisdiction if the presence of the accused before it is tainted with illegality because to do otherwise would sanction human rights abuses and impugn its integrity. This type of argument has been raised in three cases before the Tribunal, but the point has not been the subject of a reasoned decision.[48]

47. See for example: *Prosecutor* v. *Kvočka* et al., Decision On Preliminary Motions Filed by Mlado Radić and Mirošlav Kvočka Challenging Jurisdiction, Case No. IT-98-30-PT, 1 April 1999, where the accused alleged the Tribunal lacked jurisdiction because allegations of sexual assault were not "extremely serious" breaches of international humanitarian law as required for the exercise of jurisdiction under Article 1 of the Statute, and because common Article 3 to the Geneva Conventions was not within the scope of Article 3 of the Statute, did not constitute customary law and did not entail individual responsibility. See also, *Prosecutor* v. *Kordić & Čerkez*, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, Case No. IT-95-14/2-PT, 2 March 1999; *Prosecutor* v. *Krajišnik*, *supra* note 18, in which the accused alleged that the Tribunal was contrary to fundamental principles of international law and that it violated rights guaranteed under the ICCPR. The accused claimed that Article 7(3) which imposed superior criminal responsibility violated the principle of *nullem crimen sine lege* since criminal responsibility did not attach to superiors under customary international law at the time the crimes charged in the indictment against the accused were committed but only disciplinary action. He also claimed that Articles 2 and 3 of the Statute violated that principle because under customary international law those provisions only applied to international armed conflicts and the conflict in Bosnia and Herzegovina was internal. He further argued that the conflict did not commence until 1992 and some of the crimes alleged against him were said to have been committed in 1991 and that as the Tribunal's jurisdiction was limited to acts committed in an armed conflict it had no jurisdiction to entertain those charges. The Trial Chamber rejected all of these arguments. It held that superior criminal responsibility was customary in nature, that the characterisation of the conflict was a question of fact, but that in any event Article 3 offences at customary international law applied to both internal and international armed conflicts. It also held that when an armed conflict commenced was a question of fact to be determined at trial. With respect to the general claim that the Tribunal violated rights guaranteed under the ICCPR, the Trial Chamber recited the findings in the *Tadić* Jurisdiction Decision and held that the Tribunal met all the requirements of procedural fairness and accorded the accused the full guarantees of a fair trial as set out in Article 14 of the ICCPR.

48. See *Prosecutor* v. *Mrksić, Radić, Šljivančanin & Dokmanović*, Decision On The Motion Of Release By the Accused Slavko Dokmanović, Case No. IT-95-13A-PT, 22 October 1997; *Prosecutor* v. *Mrksić, Radić, Šljivančanin & Dokmanović*, Decision on Application for Leave to Appeal by the Accused Slavko Dokmanović, Case No. IT-95-13A, 11 November 1997 (leave to appeal refused).

The Tribunal has made it clear that Rule 72 does not encompass a right to challenge the legality of arrest on the ground that there is insufficient evidence to establish the allegations made in the indictment. It will not entertain a challenge to jurisdiction on the basis that there was insufficient evidence to have justified the initial confirmation of the indictment. In the human rights regime, a challenge to an arrest on this basis is akin to a challenge that that arrest as effected was illegal. Indeed, in any judicial system an assertion that there is no evidentiary basis for an arrest is an assertion that that arrest is illegal. However, this is not how the Tribunal has considered the matter.

In the *Brđanin* case the accused bought a motion to dismiss the indictment against him alleging that none of the material presented to the confirming judge in support of the indictment supported the allegations made.[49] The accused submitted two arguments. The first was that the procedure by which an indictment is confirmed is jurisdictional and that where this procedure is not properly followed the Tribunal will not have jurisdiction. The first ground was dismissed by the Trial Chamber because the accused had not shown that the procedure of confirmation had not been properly followed. In reaching this conclusion, the question whether a Trial Chamber would have the power to review the issue, had evidence of procedural irregularity been presented, was left open.[50] However, in making this finding the Trial Chamber rejected the argument that the procedural impropriety was the confirmation of the indictment without sufficient evidentiary basis to justify that confirmation.

The second argument was that there was insufficient material to support the indictment. The Trial Chamber held that this was irrelevant to the question of jurisdiction.[51] The jurisdiction of the Tribunal was founded upon the *indictment itself*. Provided that the indictment pleaded as material facts the fundamental elements of the jurisdiction of the Tribunal established in Article 1 of the Statute of the Tribunal, the indictment was within jurisdiction.[52] It based this interpretation upon the fact that the Statute made no reference to the supporting material, requiring only that the indictment itself disclose a *prima facie* case. The reference to the supporting material was found in the Rules only and the Rules could not alter what was in the Statute.[53] As such, it held that even if it was accepted for the purposes of argument that the supporting material did not establish the *prima facie* case pleaded in the indictment, the

49. *Prosecutor* v. *Brđanin*, Decision On Motion To Dismiss, Case No. IT-99-36-PT, 5 October 1999, para. 5.

50. *Ibid.*, para. 8.

51. *Ibid.*, para. 12.

52. *Ibid.*, para. 9. The indictment must plead as material facts the fundamental elements of its jurisdiction – its competence as to subject matter (*ratione materiae*), persons (*ratione personae*), territory (*ratione loci*) and time (*ratione temporis*) which are identified in Article 1 of the Statute of the Tribunal.

53. *Ibid.*, para.12. Under Article 15 of the Statute, the Rules of Procedure and Evidence are as determined by the judges of the Tribunal.

jurisdiction of the Tribunal still depended solely upon what was pleaded in the indictment.[54] As a corollary, whether there is in fact sufficient evidence to establish the material facts pleaded in the indictment will be a matter for the Trial Chamber to determine at the conclusion of the trial.[55]

A similar approach was taken to a motion for a writ of *habeas corpus* brought by Brđanin seeking release. Brđanin based his application on the decision of the Appeals Chamber in the International Criminal Tribunal for Rwanda (ICTR) case of *Barayagwiza*, in which it had said that although a writ of *habeas corpus* was not expressly provided for in the Rules, the notion that an accused had recourse to a court to challenge the lawfulness of his or her detention was well established by the Statute and the Rules in accordance with universal human rights norms, as was the right to have the lawfulness of detention reviewed by a court.[56] (It is worth noting that in this case the writ of *habeas corpus* had been filed prior to the issuing of the indictment against the accused, the accused having been detained by a request of the prosecution without the indictment having been confirmed.)

In considering the motion, the Trial Chamber rejected the idea that it had any power to issue a writ in the name of any sovereign and proceeded to deal with it as a motion challenging the lawfulness of detention.[57] In doing so the

54. *Ibid.*, para. 15.

55. *Ibid.*, para. 23. See also *Prosecutor* v. *Brđanin & Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, Case No. IT-99-36-PT, 20 February 2001, para. 15; *Prosecutor* v. *Došen & Kolundžija*, Decision on Preliminary Motions, Case No. IT-95-8-PT, 10 February 2000, para. 21; *Prosecutor* v. *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 12; *Prosecutor* v. *Krstić*, Decision on Defendant's Preliminary Motion on the Form of the Amended Indictment, Counts 7-8, 28, Case No. IT-98-33-PT, 28 January 2000.

56. *Prosecutor* v. *Brđanin & Talić*, Decision On Petition For A Writ of Habeas Corpus On Behalf of Radoslav Brđanin, Case No. IT-99-36-PT, 8 December 1999, paras. 1-6.

57. *Ibid.*, paras. 6, 14. The accused argued that his detention was unlawful as there was no *prima facie* evidence to support the allegation against him, and he asked the prosecution to produce that material. He also argued that the charges upon which he had been arrested were not the charges against him because the prosecution had made an application to the confirming judge to amend the indictment. This constituted a denial of his right to be informed of the charges upon which he had been arrested: paras. 4-7. The Trial Chamber rejected the motion holding that the existence of *prima facie* evidence was irrelevant to the lawfulness of the detention in accordance with its view expressed above, and that the application to amend the indictment was not a violation of the right of the accused to be informed of the nature and cause of the case against him. Upon his arrest the accused had been informed of the charges that justified his initial detention and the application to amend the indictment did not mean that the charges upon which he had been arrested where no longer the charges against him. However, the Trial Chamber did not exclude the possibility that in some circumstances the failure to comply with the obligation to inform the accused promptly of the charge against him could lead to a dismissal of the indictment.

Trial Chamber claimed that its practices were in full conformity with the requirements of the human rights regime. The accused had been able to challenge the lawfulness of his detention by way of motion, either pursuant to Rule 72, if the challenge was to jurisdiction, or pursuant to Rule 73, if it was not.[58] As a challenge to the lawfulness of detention, the accused's motion was not a challenge to jurisdiction of the Tribunal under the terms of Rule 72, but was made pursuant to the more general provisions of Rule 73. In effect the Trial Chamber interpreted the motion as not being capable of challenging the exercise of jurisdiction by it, even though the challenge being asserted was that there was no evidentiary basis to justify the arrest of the accused by the Tribunal.

As is clear from these decisions, in the context of the Tribunal the process of confirming the indictment prior to the arrest of an accused has been interpreted as subsuming the right to challenge the lawfulness of the arrest on that basis.[59] The process of confirmation is determinative of an accused standing trial before the Tribunal, unless the prosecution seeks a withdrawal of that indictment and the Tribunal permits that withdrawal.[60] As was stated in the *Milošević* case, the purpose of confirming the indictment "is to determine whether there is a fit case to justify the commencement of the proceedings against the accused on the indictment, and to ensure that there is material to support the allegations in it, thus preventing the commencement of proceedings for which there is no support".[61] It was also noted in that decision that the performance of this task has been equated with that "performed by a grand jury or committing magistrate under the common law or a *juge d'instruction* under some civil law systems".[62]

58. *Ibid.*, para. 14.

59. In common law systems a preliminary hearing will be held to determine whether an accused should stand trial after arrest at which time an accused will be permitted to challenge the case alleged. Similarly, in most civil law systems whether an accused should be required to stand trial will be determined after arrest upon consideration of the contents of the case file and this will include consideration of any statements given by the accused challenging arrest. *Prosecutor* v. *Kordić* et al., Decision on the Review of the Indictment, Case No. IT-95-14-I, 10 November 1995; *Code de procédure pénale*, Articles 212, 214; *Ley de Enjuiciamiento* Criminal, Article 384; *Amtliche Sammlung der Entscheidungen des Bundesgerichtshofes* in Strafsachen, Vol. 23, p. 306.

60. Rule 51 states:

> (A) The Prosecutor may withdraw an indictment, without leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it. At or after such initial appearance an indictment may only be withdrawn by motion before that Trial Chamber pursuant to Rule 73.

61. *Prosecutor* v. *Milošević*, Decision on Review of Indictment, Case No. IT-01-51-I, 22 November 2001, para. 2.

62. *Ibid.*

However, by denying an accused the right to challenge the exercise of jurisdiction by the Tribunal on the ground that he or she is not a person who should have had an indictment confirmed against himself or herself, the Tribunal is effectively denying an accused a fundamental right of challenge to the legality of his or her arrest accorded by the human rights regime. In that regime an accused has a right to challenge arrest on the ground that there was no "reasonable suspicion" justifying the deprivation of liberty and to have that challenge determined by a lawful authority. If there is no reasonable evidential basis to justify that arrest then it is unlawful. However, Rule 72 refers specifically to challenges made on the basis that "an indictment does not relate to", making it clear by the reference to the word "indictment" that it is only what is stated in that document that may be challenged. Accordingly, the Rules have been interpreted as not providing for the setting aside of an indictment on the ground that it was improperly confirmed and there is nothing in the Statute which expressly provides otherwise.[63]

However, despite the reliance of the Tribunal upon the confirmation process as justifying the absence of an avenue of reviewing the confirmation of an indictment, other Trial Chambers have been clearly troubled by a perceived disparity between the approach of the Tribunal to the arrest of an accused and the procedure used by the human rights regime. To diminish this disparity they have attempted to accommodate the procedure of the human rights regime into the structure of the Tribunal, even though it is apparent that the two approaches are, on their face, incompatible.

For example, Article 5(1)(c) of the ECHR provides that an individual may only be detained where there is reasonable suspicion that a criminal offence has been committed, or if it is necessary to prevent a criminal offence or to prevent flight after an offence has been committed. When the reasonable suspicion ceases to exist, that detention becomes unlawful.[64] On the basis of the requirements of this provision, Trial Chambers have occasionally held that the process of confirmation does not erode the right of the accused to challenge the reasonableness of his or her detention on the basis of an absence of sub-

63. In *Prosecutor* v. *Delalić*, Judgment, Case No. IT-96-27-A, 20 February 2001, para. 607, however, the Appeals Chamber considered an argument by the accused Landžo of prosecutorial bias. He argued that he was the subject of a selective prosecution policy conducted by the prosecution and as such the indictment should never have been issued against him. The Appeals Chamber dismissed the challenge finding that Landžo had failed to establish his assertions. In this respect the Appeals Chamber stated:

> The burden of proof rests on Landžo, as an appellant alleging that the Prosecutor has improperly exercised prosecutorial discretion, to demonstrate that the discretion was improperly exercised in relation to him. Landžo must therefore demonstrate that the decision to prosecute him or to continue his prosecution was based on impermissible motives, such as race or religion, and that the Prosecution has failed to prosecute similarly situated defendants.

64. *Fox, Campbell and Hartley* v. *United Kingdom*, *supra* note 33, p. 16.

sisting reasonable suspicion for that arrest. In contrast to the decisions above, the material behind the indictment is subject to review if the detention of an accused pursuant to that indictment is to remain justified. In these decisions the challenge considered is not to the exercise of jurisdiction by the Tribunal, but to its continued detention of the accused pursuant to that indictment on the ground that the prosecution case is of insufficient strength to warrant that continued detention prior to that exercise of jurisdiction. However, the fact remains that in these decisions the Tribunal has accorded an accused a right of review of the confirming material, a right which the decisions above deny is available to an accused under the Statute and Rules of the Tribunal.

This view was first propounded in a decision in the *Čelebići* case. The Trial Chamber held that "to remain lawful the detention of the accused must be reviewed so that the Trial Chamber can assure itself that the reasons justifying detention remain". It stated that it must review "in a cursory manner" the strength of the case of the prosecution in deciding whether the accused has shown absence of reasonable suspicion, keeping in mind that it was not the time to consider the merits of the case.[65] In this respect the accused was permitted to adduce evidence additional to that which supported the confirmation of the indictment in accordance with the practice of the human rights regime that "the review of the continued necessity to detain [...] be judged according to the circumstances and facts as known at the time of the review".[66]

In adopting this approach the Trial Chamber reasoned that the process of review granted by the human rights regime was applicable to the Tribunal pursuant to Rule 47(A).[67] It requires the Prosecutor to be reasonably satisfied that an accused has committed an offence before submitting an indictment to a reviewing judge for confirmation. The Trial Chamber reasoned that this requirement was akin to the "reasonable suspicion" requirement of the human rights regime and as such the Tribunal was required, as the human rights regime, to satisfy itself that that initial basis justifying confirmation of the indictment and arrest continued throughout the period of detention.[68] In contrast to the human rights regime, however, the burden was placed upon the accused to show absence of reasonable suspicion, this burden being justified by the context in which the Tribunal must operate.[69]

65. *Prosecutor* v. *Delalić*, Decision on Motion For Provisional Release filed by the Accused Zejnil Delalić, Case No. IT-96-27-T, 25 September 1996. In *Delalić*, the Trial Chamber adopted the interpretation of the human rights regime holding that a reasonable suspicion presupposes "existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence".

66. *Ibid.*, para. 24.

67. *Ibid.*, paras. 21-24.

68. *Ibid.*, paras. 23-24.

69. This issue is discussed in the section dealing with undue delay and provisional release, *infra*.

This approach was subsequently followed in *Drljaca*.[70] The accused argued that his continued detention was unjustified because of an absence of reasonable suspicion that he committed the crimes. In examining the cogency of the case of the prosecution, the Trial Chamber found that the accused had failed to discharge his burden of *proving an absence of reasonable suspicion* that he had committed the crimes charged and that the evidence submitted was inadequate to rebut the *presumption of a reasonable suspicion* which exists by virtue of the confirmation of the indictment against the accused.[71]

By this approach the Trial Chambers have attempted to reconcile the actual practice of the Tribunal with the perceived obligations imposed by universal human rights principles by attempting to fit the requirements of the human rights regime within the structure of the Tribunal. In this respect, in contrast to the other decisions, the Trial Chamber did not consider that the absence of an express provision for the review of the confirming material precluded it from accommodating this process within its provisions. The power of the Tribunal to take such an approach inheres in the power of any court to maintain the integrity of its processes and is consistent with the obligation that it respect the rights of the accused at all stages of its proceedings.[72] Even so,

70. He argued that the prosecution had failed to lead any evidence of *mens rea* and that specific intent could not reasonably be inferred from the merely circumstantial facts of the position of the accused on the Municipality of Prijedor Crisis Staff, the body which the prosecution alleged was responsible for the criminal activities alleged against him. He claimed that the confirming judge erred in confirming the indictment without having evidence of any intent on his behalf. The Trial Chamber rejected the argument holding that there was no requirement that the prosecution prove *mens rea* at the pre-trial stage of the proceedings to establish the existence of a reasonable suspicion. Similarly it held that there was no requirement that the prosecution prove *mens rea* or intent to secure the confirmation of an indictment. *Prosecutor* v. *Kovačević*, Decision on Defence Motion for Provisional Release, Case No. IT-97-24-PT, 20 January 1998, para. 16.

71. *Ibid.*, para. 21; *Prosecutor* v. *Kupreškić* et al., Decision on Motion for the Provisional Release of Zoran and Mirjan Kupreškić or Separation of Proceedings, 24 April 2001, Case No. IT-95-16-A, 24 April 2001. In contrast to the *Drljaca* decision, Zoran and Mirjan Kupreškić sought provisional release pending the hearing of their appeal on the basis of material disclosed to them which they alleged to be exculpatory. In effect they were arguing that because of the disclosure of this material there was no longer evidence of reasonable suspicion that would justify their continued detention. The Appeals Chamber rejected the motion without issuing a reasoned decision, but noted that the material relied upon would have to be admitted for consideration on appeal by way of a motion for additional evidence under Rule 115 and such motion had not yet been considered by the Appeals Chamber.

72. The Tribunal has seen fit to take such an approach in other circumstances where it has perceived that its structure does not provide for adequate protection of individual rights. The most controversial is the decision of the Appeals Chamber in *Prosecutor* v. *Tadić*, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, Case No. IT-94-1-A-AR77, 27 February 2001, in which

this approach cannot detract from the fact that the structure of the Tribunal does not permit the establishment by an accused of an insufficient basis for continued detention to be a means by which the accused can seek to have the indictment set aside. Accordingly, the appearance of consistency intrinsic to this approach is perfunctory.

Further, as the structure of the Tribunal does not provide for other than a perfunctory approach, these decisions actually undermine the legitimacy of the procedures the Tribunal has adopted. The Tribunal does not have to adhere to procedures adopted for the protection of human rights in domestic regimes. What it must do is show how the procedures it has adopted do not derogate from the rights of the accused. As established in *Brđanin*, the right of the accused not to be deprived of liberty arbitrarily is meant to be sufficiently protected by the process of confirmation. Ostensibly the Tribunal accords the same type of protection as the human rights regime by an inversion of the procedures set down by that regime. This process supposedly performs the same function as a review of arrest undertaken after the fact by a judicial authority in a municipal jurisdiction.[73] As such, in the development of its contextual approach to universal human rights principles, the Tribunal should be concerned with showing how the procedure it has adopted is justified by the context in which it must work.[74] The fact that the Tribunal must rely upon the co-operation of other States or other international bodies to effect the arrest of an accused is the foremost justification for the approach it has adopted. Whether this factor is sufficient, however, remains open to question. It may be justified if the process of confirmation legitimately subsumes the right of the accused. This may be established by demonstrating that it is itself beyond dispute on human rights grounds. However, it would seem that by this process the Tribunal in fact encroaches further upon the rights of the accused.

It is to be expected that the absence of a process of review of the grounds of arrest would mean that the importance of an indictment clearly stating the

a majority determined that the applicant, a prior counsel of the accused *Tadić*, had a right of appeal to another Appeals Chamber from a finding of the first Appeals Chamber that he was guilty of contempt. This finding led to a strong dissent by Judge Wald, who stated that "the goal of providing an appeal from all convictions for criminal contempt is an eminently worthy one. However, it must be accomplished without wrenching all meaning from the constraints on the jurisdiction of the Appeals Chamber as set out in the Statute and the Rules." In her view to do otherwise was in violation of the rule of law. As she observed, "the rule of law also requires that courts acknowledge the statutes and rules that bind them." Separate Opinion of Judge Wald Dissenting From the Finding of Jurisdiction, 27 February 2001, pp. 4-5.

73. See *Prosecutor* v. *Ademi*, Order on Motion for Provisional Release, Case No. IT-01-46-PT, 20 February 2002, para. 26, where the absence of the process of review was explicitly acknowledged.

74. The co-operation of these parties cannot be invoked without the issuing of an arrest warrant directed to them by the Tribunal. The process of confirmation is to ensure that that warrant is issued with good reason.

nature and cause of the case against an accused cannot be overemphasised – indeed the very jurisdiction of the Tribunal over the accused depends upon it. Accordingly, although an accused is not permitted to challenge the lawfulness of initial detention pursuant to a confirmed indictment, he or she is permitted by Rule 72 to challenge the form of the indictment itself. In most cases accused have done so on the basis that it does not inform them of the nature and cause of the charges. However, it was established by the Appeals Chamber in the *Kovačević* case, purportedly in accordance with human rights jurisprudence, that the right of an accused to be informed promptly of the charges will only be violated if there has been a failure to charge him or her with any crime at all at the time of arrest.[75] Following this decision of the Appeals Chamber, the Trial Chamber in the *Talić* case, in which the accused sought the dismissal of the indictment against him because of the long delay between his arrest and the issuing of the indictment in proper form, held that "[a]rguments regarding the form of the indictment are…irrelevant to the question of whether the accused had been promptly informed of the charges against him in accordance with Article 21(4)(a) of the Statute".[76]

By interpreting the level of information to be provided to an accused by the indictment at such a low standard, these decisions have the effect of eroding the protection accorded to an accused by that process of confirmation of the indictment. That process is meant to ensure that the facts stated in the indictment establish, upon the evidence adduced in support of that indictment, the *actual* case against the accused. By requiring such a low standard of information to be provided by the indictment these decisions impinge upon the potential of rights accorded to an accused to challenge the jurisdiction of the Tribunal upon the basis of the facts pleaded in the indictment. As a corollary it begins to appear as if the dominant purpose behind the confirmation of an indictment is to secure the presence of the accused before the Tribunal. All other matters, including the rights of the accused to be properly informed so as to be able to prepare a defence, are secondary to this main purpose. When considered against the absence of a right to challenge the confirmation of an indictment on the basis that it is without evidentiary basis, it appears that the Tribunal does not, as it claims, provide the accused with any effective avenues in which to challenge arrest. In this regard it is perhaps coincidental that the jurisdiction of the Tribunal as expressed in Article 1 of the Statute is over "persons responsible for serious violations of international humanitarian law" and not persons alleged to be responsible for those violations.[77]

Further, however, the reliance of the Tribunal upon the human rights regime to determine the limits of the right of the accused to be informed of

75. *Prosecutor* v. *Kovačević*, Decision Stating Reasons For Appeal Chamber's Order of 29 May 1998, Case No. IT-97-24-PT, 2 May 1998, paras. 35-36.

76. *Prosecutor* v. *Brđanin & Talić*, Decision On "Request For Dismissal" Filed by Momir Talić, Case No. IT-99-36-PT, 29 November 2001, para. 5.

77. Cf. the French text "… les personnes présumées responsables de violations…".

the "nature and cause" of the case at the time of arrest may be misplaced. The context in which the human rights regime has determined that the right of an accused to be informed of the charges at the time of arrest will only be violated where no reasons are given for that arrest at all, is one in which an individual is arrested within a domestic jurisdiction to answer charges alleged to have been committed within that jurisdiction. This is a very different situation to arrests by the Tribunal. Accused who appear before the Tribunal are arrested in their country of residence and then removed, thousands of miles from that place of arrest, to be prosecuted at The Hague. Comparable circumstances considered by the human rights regime are not cases of simple domestic criminal prosecution but cases of extradition from one jurisdiction to another for criminal prosecution. In most instances extradition cases are governed by bilateral treaty agreements between individual States and, if an accused is extradited in violation of the provisions of agreed instruments, it is the rights of the State that are violated by the infringement, and not the rights of the individuals as such. However, in these types of cases, where it is established that the State authorities have colluded in the circumvention of the requirements of an extradition agreement, it is well established by the human rights regime that it is an egregious violation of the rights of an individual to extradite an accused from one jurisdiction for trial in another without informing that individual of the actual reasons for that arrest. It is also fairly well established in the human rights regime that it is an egregious violation of the rights of an individual to justify an extradition from the place of arrest on the basis of one allegation and then to prosecute in the jurisdiction to which he or she has been extradited for another offence.[78] Where these types of violations have been established courts have considered that they have a discretion to refuse the exercise of jurisdiction over an accused on the basis that to do so would countenance behaviour that threatens basic human rights, or the rule of law, and brings their own proceedings into disrepute.[79] Accordingly, if the Tribunal is to justify its holdings with respect to the right of an accused to be informed of the allegations at the time of arrest by reference to the requirements of the human rights regime, it must be able to do so by reference to the more comparable extradition-type cases, and not those involving purely domestic criminal proceedings. It is clear that it would not easily be able to do so.

However, although relying upon the human rights regime to support its approach the Tribunal also purports to be able to depart from the requirements of that regime because of the different context in which it operates.

78. See generally, J. Paust *et al.*, *International Criminal Law, Cases and Materials*, 1996, Chapter 5, "Obtaining Persons Abroad", pp. 281-498.

79. *R.* v. *Horseferry Magistrates' Court: ex parte Bennett*, [1994] 1 AC 42; *R.* v. *Latif; R.* v. *Shazad*, [1996] 1 All ER 353; *R.* v. *Hartley*, [1978] 2 NZLR 199; *United States* v. *Alvarez-Machain*, 504 US 655 (1992); *United States* v. *Toscanino*, 500 F.2d 267; *United States* v. *Cordero*, 668 F.2d 32 (1981); *United States ex rel Lujan* v. *Gengler*, 510 F.2d 62 (1975); *Beahan* v. *State*, [1992] LRC (Crim) 32; *State* v. *Ebrahim*, [1991] 2 SALR 553.

In the decisions of the Tribunal concerning the form of the indictment, a common theme is that the prosecution cannot be expected to provide an accused with the specificity of information generally provided in domestic criminal proceedings.[80] This is because of the complexity of the subject matter with which the Tribunal is concerned, and the absence of guiding legal precedents. It is for these reasons that the Tribunal has considered that it is justified in placing little emphasis on the need to ensure that an indictment will only be confirmed, and an arrest warrant issued, when that indictment is in proper form. Rather than allowing this complexity to provide a platform for the accused to challenge the exercise of jurisdiction by the Tribunal, it has used this complexity to justify a restriction of the rights of the accused to clarity in the indictment. Moreover, it is by reference to this complexity that the Tribunal has allowed the Prosecutor a large measure of flexibility in the pleading of indictments.

For example, the Prosecutor has not been required to identify the precise basis of criminal responsibility alleged under Articles 7(1) and/or Article 7(3) of the Statute,[81] to plead factual allegations in detail,[82] to identify the requisite

80. Article 6(3)(a) of the ECHR requires that this information be given "in detail". The level of detail actually required is unclear. It need not be "in minute detail" but it must be of sufficient detail so that the accused can adequately prepare a defence. See generally: *Offner* v. *Austria* (Appl. 524/59), (1960) 3 *Yearbook* 322, p. 344); *X.* v. *Austria*, (1981) 22 D. & R. 140, p. 142; *Brozicek* v. *Italy*, Series A, Vol. 167, p. 31; *X.* v. *Federal Republic of Germany* (App. No. 1169/61), (1963) 6 *Yearbook* 520, at p. 584.

81. *Prosecutor* v. *Hadžihasanović*, Decision of the Form of the Indictment, Case No. IT-01-47-PT, 7 December 2001, para. 18-19; *Prosecutor* v. *Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para. 189; *Prosecutor* v. *Kupreškić*, Case No. IT-95-16-T, Judgment, 14 January 2000, para. 746; *Prosecutor* v. *Kunarac*, Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 398; *Prosecutor* v. *Krstić*, Judgment, IT-98-33-T, 2 August 2001, para. 602; *Prosecutor* v. *Krajišnik*, Decision on Motion from Momčilo Krajišnik to Compel the Prosecution to Provide Particulars, Case No. IT 00-39 & 40 PT, 8 May 2000; *Prosecutor* v. *Delalić*, Decision On Application for Leave to Appeal by Hazim Delić, Defects in the Form of the Indictment, Case No. IT-96-21-PT, 6 December 1999, paras. 30-31; *Prosecutor* v. *Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), Case No. IT-95-14-PT, 4 April 1997; *Prosecutor* v. *Došen & Kolundžija*, Decision on Preliminary Motions, Case No. IT-95-8-PT, 10 February 2000; *Prosecutor* v. *Kordić & Čerkez*, Decision on Joint Motion to Strike Paragraph 20 and 22 and all References to Article 7(3) as Providing a Separate or an Alternative Basis for Imputing Criminal Responsibility, Case No. IT-95-14/2-PT, 2 March 1999; *Prosecutor* v. *Delalić* et al., Judgment, IT-95-21-T, 16 November 1998, para. 343.

82. *Prosecutor* v. *Kvočka* et al., Decision on Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30-T, 12 April 1999, para. 17; *Prosecutor* v. *Blaškić*, *ibid.*, 4 April 1997.

mens rea[83] or to specify the legal elements of offences alleged.[84] The Prosecutor has been permitted to plead cumulatively,[85] and to plead ostensibly inconsistent factual allegations between indictments.[86] As a result, indictments appear to have relied upon a form of *à la carte* justice. The Prosecutor has pleaded as broadly as possible and, in some cases, shaped the precise contours of her case during trial depending upon how the evidence turns out.[87] This has led a number of accused to complain on appeal that they were denied the right to be informed of the nature and cause of the case because of the vagueness of the initial indictment.[88] In one case this ground of appeal has been argued successfully.[89]

Although some of the pleading practice of the prosecution may have been justifiable in the initial stages of the history of the Tribunal, when the basis of responsibility and precise legal elements of offences were relatively undefined, these justifications are no longer present. But further, not all of these practices

83. *Prosecutor* v. *Kordić & Čerkez*, Decision on Defence Application for Bill of Particulars, Case No. IT-98-30-T, 2 March 1999; *Prosecutor* v. *Kvočka* et al., *ibid.*, paras. 34-36.

84. *Prosecutor* v. *Krstić*, Decision on Preliminary Motion on the Form of the Amended Indictment, Count 7-8, Case No. IT-98-33-PT, 28 January 2000, p. 5; *Prosecutor* v. *Naletilić*, Decision on Vinko Matinović Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, Case No. IT-98-34-PT, 14 February 2001, p. 10; *Prosecutor* v. *Delalić*, Decision on Application for Leave to Appeal By Hazim Delić, (Defects in the Form of the Indictment), Case No. IT-95-21-PT, 6 December 1996, paras. 25-31; *Prosecutor* v. *Došen & Kolundžija*, Decision on Preliminary Motions, Case No. IT-95-8-PT, 10 February 2000.

85. *Prosecutor* v. *Kupreškić*, *supra* note 81, paras. 721-727; *Prosecutor* v. *Krstić*, *ibid.*, pp. 5-7; *Prosecutor* v. *Naletilić*, *ibid.*, p. 10; *Prosecutor* v. *Brđanin & Talić*, *supra* note 55, paras.37-41; *Prosecutor* v. *Furundžija*, Decision of the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment Lack of Subject Matter Jurisdiction, Case No. IT-95-17/1-PT, 29 May 1998, para. 12.

86. *Prosecutor* v. *Hadžihasanović*, Decision on Form of the Indictment, Case No. IT-01-47-PT, 7 December 2001, paras. 36-38. In this case the Trial Chamber held that it was within the Prosecutor's discretion to plead whatever version of events she wished "within the confines of the Statute and the Rules, even if that version is diametrically opposed to versions it put forward in other cases" (at paras. 36-38).

87. In civil law systems it would appear that the pleading practices of the Prosecutor are not as objectionable as they may be in common law jurisdictions, because of the role of the investigating judge. However, the Tribunal has adopted an adversarial system of trial which requires the parties to be in control of the cases they bring. The issue here is how these practices impact upon the ability of the accused to prepare a defence to the charges alleged.

88. See generally *Prosecutor* v. *Kupreškić*, Judgment, Case No. IT-95-16-A, 23 October 2001. This decision has arguably set new standards for the pleading of indictments at the Tribunal.

89. *Ibid.*

are explicable by reference to the absence of guiding precedents, or the complexity of the subject matter with which the Tribunal must deal. As such, in sanctioning these pleading practices the Tribunal has exhibited a sympathetic approach to the difficulties faced by the prosecution in bringing the first truly international prosecutions for war crimes. No doubt this is partly because of its desire to ensure that it successfully achieves the objects of its mandate. However, it has meant that less than full consideration has been given to the fact that an accused labours under the same type of disadvantages. The concessions made to the prosecution have ultimately been at the expense of the right of the accused to be adequately informed of the case against him or her.

It is noteworthy in this respect that in domestic jurisdictions where proceedings alleged against an accused are of great complexity, particularly those of the common law where jury trials are common, the courts have developed techniques to counter some of these complexities. In doing so they have often reasoned in terms of placing an undue burden upon a jury, but the difficulties faced by an accused in defending the charges have also figured in their considerations. An example relevant to proceedings at the Tribunal is the prohibition against overloading of indictments.[90] To be fair, the Tribunal has developed some techniques aimed at countering the complexity of its proceedings,[91] but

90. See *Prosecutor* v. *Milošević*, Decision on Prosecution's Motion for Joinder, Case No. IT-99-37-PT; IT-01-50-PT; IT-01-51-PT, 13 December 2001. Following the approach of these courts similar considerations were identified as relevant by the Trial Chamber in determining the prosecution's application for the joinder of the three indictments against the accused. The Trial Chamber held that where the prosecution has satisfied the terms of Rule 49, which set out the requirements to be met before crimes can be joined, relevant to its discretion as to whether or not joinder should be permitted was whether the accused's right to a fair hearing would be prejudiced by that joinder (at para. 38). The Trial Chamber formed the view that to require the accused to defend himself "on the contents of three indictments together would be onerous and prejudicial, particularly in the case of the Kosovo indictment and its different circumstances" (para. 50). On appeal by the Prosecutor, the Appeals Chamber overturned the refusal of the Trial Chamber to grant the joinder application on the ground that it erred in its interpretation of Rule 49. It considered that although the effect of the joinder upon the rights of the accused to a fair trial was a relevant fact to the exercise of the discretion that in the circumstances before it such prejudice had not been established; *Prosecutor* v. *Milošević*, Reasons For Decision on Prosecution Interlocutory Appeal From Refusal To Order Joinder, 18 April 2002, paras. 13-18.

91. See, for example, *Prosecutor* v. *Milošević*, Trial Transcript, 10 April 2002, pp. 2782-2784, 3029; *Prosecutor* v. *Galić*, Decision, Case No. IT-98-29-AR73, 16 November 2001. In both of these cases, time limits were imposed on the presentation of the parties' cases and were appealed by the Prosecutor. The imposition of such restrictions is explicitly provided for in Rule 73*bis*. In *Galić* the Appeals Chamber allowed the appeal because the Trial Chamber had erred in imposing restrictions as the issues in the case had not yet been clearly defined (Decision on Application by Prosecution for Leave to Appeal, 14 December 2001). Leave to appeal was refused in *Milošević*. In other cases the Trial Chamber has suggested to the prosecution that it consider reducing the number of counts alleged, or that it

in general it has accepted that complexity as part of its obligation to the international community to provide a historical record of the crimes that occurred in the former Yugoslavia. It is questionable, however, whether this object is more laudable than its obligation to ensure that the rights of the accused are respected at all stages of its criminal proceedings. To place other considerations before those of an accused may cause the historical record of the Tribunal to be judged harshly in the future. Such a possibility should be vigilantly guarded against.

However, there are recent signs that the Tribunal is beginning to appreciate that its pleading practices are not merely manifestations of the complexity of the subject matter and ill-defined offences with which the Tribunal must deal. As the Tribunal has become more comfortable with its jurisdiction, and as the international community has begun to put pressure upon the Tribunal to complete its mandate, it has begun to accept that part of the problem of the vagueness of indictments is due to the fact that the prosecution often does not know what its case is with sufficient clarity.[92] Acknowledging this factor, and by reference to the rights of the accused to be informed of the "nature and cause" of the case, recent decisions have evidenced a shift in the attitude of the Tribunal with regard to the measure of flexibility to be accorded to the Prosecutor in the pleading of the indictment. The Prosecutor has been directed to identify with greater specificity the precise heads of responsibility under the provisions of the Statute upon which she relies, to specify with greater detail the legal elements of the offences she seeks to prove,[93] and to provide greater specificity as to the factual basis of offences charged.[94] In a recent decision[95] the Appeals Chamber emphasised that the prosecution is "expected to know its case before it goes to trial" and held that "[i]t is not acceptable to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds".[96] However, in making these statements the Appeals Chamber was not merely summarising the established jurisprudence of the Tribunal, it was

consider abandoning charges under Article 2 of the Statute when the offences are sufficiently covered by Articles 3 and 5 of the Statute, so as to avoid the necessity of proving that the armed conflict was international in character.

92. *Prosecutor* v. *Brđanin & Talić*, *supra* note 55, para. 11.

93. *Prosecutor* v. *Brđanin & Talić*, Decision on Form of Third Amended Indictment, Case No. IT-99-36-PT, paras. 19-20; *Prosecutor* v. *Ljubičić*, Decision on the Defence Motion on the Form of the Indictment, Case No. IT-00-14-PT, 15 March 2002, p. 6.

94. *Prosecutor* v. *Hadžihasanović* et al., Decision on Form of Indictment, Case No. IT-01-46, 7 December 2001, paras. 31-35.

95. The Appeals Chamber in *Kupreškić* acknowledged that "an indictment, as the primary accusatory instrument must plead with sufficient detail the essential aspects of the Prosecution case. If it fails to do so, it suffers from a material defect". *Prosecutor* v. *Kupreškić*, *supra* note 88, para. 114.

96. *Prosecutor* v. *Kupreškić*, *supra* note 88, para. 92.

setting down new guidelines as to what that jurisprudence required from the prosecution.[97] Following this decision a recent judgment of the Tribunal refused to consider the accused's liability under heads of responsibility not specifically pleaded, and the accused's liability for offences not specifically pleaded.[98] In doing so it signalled a clear departure from earlier practices.

Nonetheless, the Tribunal has been slow in recognising that by its initial sanctioning of such broad pleading practices on the part of the prosecution, the right of the accused to be informed of the "nature and cause" of the case, and his or her ability to challenge the exercise of jurisdiction by the Tribunal upon that basis, has been considerably undermined. This is against a backdrop in which the Tribunal relies upon its confirmation process as adequately providing for, and subsuming, the right of an accused to challenge arrest on the ground that it lacks an evidentiary basis. The approach adopted by the Tribunal to the arrest of the accused is made necessary by the fact that it must have the co-operation of other entities in effecting arrests. However, for that approach to accord with a rule of international law, the Tribunal must adhere to its obligation to ensure that the rights of the accused are sufficiently protected by that process if it is to rely upon it as restricting other rights an accused is entitled to under the framework of the human rights regime.

Although there are signs of change the Tribunal has not, as yet, established pleading practices that are commensurate with its interpretation of the requirements of a rule of law on the international plane. These practices do not "provide all the guarantees of fairness, justice and even-handedness" to an accused at the Tribunal. By demanding that the prosecution plead its indictments with greater clarity it is not only the accused that benefits. By forcing the prosecution to have a clear idea of what its case is at the indictment stage the Tribunal is facilitating the task of the prosecution to prove its case. It goes without saying that it is much easier to establish a case when you know what that case is at the outset. Moreover, by requiring a higher standard from the prosecution in the pleading of its indictments the integrity of the practices adopted by the Tribunal will be better protected. If an accused's rights are to be sufficiently protected within those practices it is essential that those procedures be beyond dispute.

97. In *Brđanin & Talić* the Trial Chamber developed a body of jurisprudence on the form of the indictment. However, the standards set by these decisions were not standards typically adopted by other Trial Chambers. Indeed the prosecution alleged that they were "out of line" with the jurisprudence of the Tribunal. See for example, *Prosecutor* v. *Brđanin & Talić*, *supra* note 55; *Prosecutor* v. *Brđanin & Talić*, *supra* note 93.

98. *Prosecutor* v. *Krnojelac*, Judgment, Case No. IT-97-25-T, 15 March 2002, paras. 84-86, 476. By way of contrast, see *Prosecutor* v. *Krstić*, Judgment, Case No. IT-98-33-T, 2 August 2001, para. 602, where the Trial Chamber determined that it was entitled to consider the accused's liability for the crimes alleged pursuant to a joint criminal enterprise where this basis of liability had not been pleaded in the indictment.

ciples to the situation of the Tribunal. Applying the principles of the human rights regime, the prohibition on a system of mandatory detention required the Trial Chamber to interpret Rule 65 "with regard to the factual basis of the single case and with respect to the concrete situation of the individual human being and not in *abstracto*".[157] Thus the Trial Chamber was not to start with any preconceptions about the fact that detention was the rule and release the exception. Rather it was to assess the circumstances of the individual in light of the evidence presented to the Trial Chamber in support of the application for provisional release.

Applying this principle to the provisional release of the applicant, the Trial Chamber reasoned that the measure (detention) must be suitable and necessary in the circumstances and must remain in a reasonable relationship to the envisaged target (trial of the accused). If a more lenient measure is sufficient, that more lenient measure should be applied.[158] Applying these criteria to the provisional release application of Hadžihasanović, the Trial Chamber considered that it was no longer necessary to detain him on remand pending trial. This decision was made in the light of seventeen guarantees offered by the accused and seven from the government of Bosnia and Herzegovina,[159] the fact of voluntary surrender[160] and his high level of co-operation with the Office of the Prosecutor (OTP) prior to the indictment being issued.[161] The accused was released subject to a number of stringent conditions, which included surrender of his passport; no contact with co-accused or witnesses and victims; no access to documents and archives; no discussion of his case with anyone, including the media but excluding his counsel and immediate family; and his undertaking of future compliance with orders of the Tribunal.[162] The co-accused of Hadihžasanović were also granted provisional release on the basis of the same application of human rights jurisprudence and subject to similar conditions.[163]

In the *Jokić* case the Trial Chamber again adopted this approach. In a more comprehensively reasoned decision, it stated its view that the ICCPR and

157. *Prosecutor* v. *Hadžihasanović, Alagić & Kubura*, Decision Granting Provisional Release to Enver Hadžihasanović, Case No. IT-01-47-PT, 19 December 2001, para. 7.

158. *Ibid.*, para. 8.

159. *Ibid.*, paras. 9–11.

160. *Ibid.*, para. 14.

161. *Ibid.*, para. 15.

162. *Ibid.*, Disposition, p. 6.

163. *Prosecutor* v. *Hadžihasanović, Alagić & Kubura*, Decision Granting Provisional Release to Amir Kubura, Case No. IT-01-47-PT, 19 December 2001; *Prosecutor* v. *Hadžihasanović, Alagić & Kubura*, Decision Granting Provisional Release to Mehmed Alagić, Case No. IT-01-47-PT, 19 December 2001. See also *Prosecutor* v. *Simić* et al., Decision on Milan Simić's Application For Provisional Release, Case No. IT-95-9-PT, 29 May 2000, in which provisional release was also granted.

the ECHR formed part of public international law and as such Rule 65 had to be read in light of their requirements. Again, in applying the provisions of these instruments to the interpretation of Rule 65 the Trial Chamber applied the "general principle of proportionality" stating that it "must be taken into account".[164]

It is difficult to decide what to make of this approach. Use of language and principles of interpretation adopted by the human rights regime gives the impression that the Trial Chamber is doing more than merely applying the terms of the Rule. No doubt this approach has been adopted to accommodate the sense of obligation felt by the Trial Chamber to abide by the interpretations of human rights principles as adopted by the human rights regime. It tends to equate the Rules of the Tribunal with a human rights instrument when it is clearly not one. It also tends to emasculate the idea that human rights are contextual principles and that the Tribunal is entitled to formulate its own way of protecting them consistent with its particular framework. In the end, all this approach achieves is to thinly shroud the discrepancy between the approach of the Tribunal and that of the human rights regime. It does not make them any more consistent. It is doubtful whether this is helpful to the development by the Tribunal of standards of human rights protection commensurate with its particular structure and in accordance with the international rule of law.

The approach taken by the Tribunal to the issue of preventive detention is in contrast to the approach demanded by the human rights regime. This has clearly troubled the Tribunal and various attempts have been made by Trial Chambers to reconcile these issues. However, the real issue is whether the approach to preventive detention is in accordance with the international rule of law. Arguably, the placing of a persuasive burden (if that is indeed the nature of the burden) upon an accused to establish facts is inconsistent with that idea and unnecessarily so. In the context in which the Tribunal operates it would not be too difficult a burden for the prosecution to establish in most cases where the risk of flight or harassment of witnesses was legitimate that an accused should not be granted provisional release. Accordingly, a solution could be achieved by the placing of an evidentiary burden on the accused in much the same way as defences are treated, and as argued in the *Brđanin* decision discussed above.

Conclusion

An assessment of the standards the Tribunal has set itself with respect to the rights of an accused considered in this chapter is a complicated task. A small sample of a large number of decisions have been considered. It is apparent that

164. *Prosecutor* v. *Blagojević* et al., *supra* note 109, paras. 9–18.

the Tribunal is ambiguous about how to define its obligations under universal human rights principles as stipulated in the Secretary-General's Report, and used as a basis in the *Tadić* Jurisdiction Decision to justify a finding that the Tribunal was established by law. However, although asserting in the *Tadić* Protective Measures Decision that it had a right to adopt a contextual approach to the interpretation of universal human rights principles, the jurisprudence of the Tribunal shows that it is uncomfortable about its departures from interpretations of those principles by the human rights regime.

As a consequence, instead of embracing the view that human rights are contextual principles, and reasoning persuasively as to why a different interpretation of human rights is warranted by the context of the Tribunal, the Tribunal often betrays in its jurisprudence an ambivalence to this issue. Claims that it adheres to the interpretation of human rights by the human rights regimes, where its framework is clearly incompatible with their requirements, discredits the legitimate interpretation of human rights. In some circumstances, the Tribunal has interpreted the provisions of its Statute by explicit reference to general interpretative concepts developed by the human rights regime in reference to its instruments. Accordingly, although the departures of the Tribunal from established interpretations of universal human rights are in most instances justifiable by reference to its context as an international criminal court prosecuting individuals for serious violations of international humanitarian law, it has in some respects not reasoned persuasively that this is so. However, the fact that established interpretations of human rights by the human rights regime are insufficient in the context of the Tribunal supports the proposition that human rights are contextual concepts. By taking a contextual approach to the application of human rights principles and setting the parameters for doing so, the Tribunal would make a considerable contribution to establishing how human rights are to be properly established within international criminal trials.

DARYL A. MUNDIS*

Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute

International law provides two primary bases for holding an individual criminally responsible: individual or personal criminal responsibility; and superior or command responsibility.[1] Article 7(1)[2] and Article 7(3)[3] of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) respectively reflect these two modes of criminal responsibility. This chapter will discuss and analyse the jurisprudence of the ICTY relating to superior responsibility under Article 7(3) of the Statute. The doctrine of superior responsibility[4] differs from other forms of criminal liability in that it is a form of liability based on *omission*. Thus, the alleged perpetrator must have affirmatively done a certain act, such as ordering or committing the alleged criminal act, to be responsible under Article 7(1) of the ICTY Statute. Under the doctrine of superior responsibility, the accused may be convicted based on failure to prevent the crime from occurring in the first place, or to punish the

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1. In addition, instruments proscribing genocide often provide for additional modes of liability (which are alternatively considered as inchoate crimes in many jurisdictions), including conspiracy to commit genocide, attempt to commit genocide and complicity in genocide. See, for example, ICTY Statute, Article 4(3), and ICTR Statute Article 2(3),. The basis for these forms of liability may be found in the Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277, Article III.
2. ICTY Statute, Article 7(1), which is identical to ICTR Statute, Article 6(1), states: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime."
3. ICTY Statute, Article 7(3), which corresponds with ICTR Statute, Article 6(3), provides: "The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

Bons & Schabas, eds, International Criminal Law Developments in the Case Law of the ICTY, 239–275.

ANNEX 4

A. Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights", *European Journal of Human Rights*, (14) 2003, pp. 529-568

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Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights

Alexander Orakhelashvili*

Abstract

The European Convention on Human Rights was adopted as an instrument to protect the rights and interests of individual human beings rather than of state parties. It thus embodies obligations which objectively protect human beings and are not reducible to mutual or reciprocal legal commitments of states. The jurisprudence of the Convention organs has recognized the importance of the nature of the Convention obligations, and has interpreted and applied a number of its substantive and procedural provisions accordingly. This has become possible through the use of appropriate methods of treaty interpretation, dictated by the character of the Convention obligations. In particular, the Convention organs refused to interpret the Convention restrictively, as this would endanger its integral application which is inherent to the Convention's object and purpose. However, the recent jurisprudence of the European Court of Human Rights indicates some trends which undermine the rationale of the Convention through the use of interpretive methods that are of doubtful value in cases in which they are applied. This article examines the Court's recent jurisprudence, and concludes that adherence to such interpretation approaches endangers the very rationale of the European Convention and its ability to effectively benefit those it has been designed to protect.

1 Introduction

At the end of 2001, the European Court of Human Rights rejected two human rights claims — with a very narrow majority on the merits in *Al-Adsani*[1] and unanimously

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[1] Judgment of 21 November 2001, 34 EHRR 11(2002).

These obligations of a special type are assumed by each contracting state to persons within its jurisdiction, and not to other contracting states.[6]

This special nature of the European Convention follows from its characterization as a human rights treaty, and is comparable with other conventions of a similar nature, whether regional or universal. It may be recalled that in its Advisory Opinion on *Reservations*, the International Court of Justice emphasized the similar character of the 1948 Genocide Convention. The Court stressed in particular that:

> in such a convention the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties.[7]

The Inter-American Court of Human Rights has said much the same thing of the American Convention of Human Rights: 'the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of states, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality.'[8] It went on to state that:

> Modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.[9]

Furthermore, the Inter-American Court emphasized the similarity between regional human rights treaties and universal treaties such as the Genocide Convention.[10] Similarly, the UN Human Rights Committee emphasized that the International Covenant on Civil and Political Rights is not a web of inter-state obligations, but is designed to safeguard individual human beings.[11] Humanitarian law treaties also possess a similar nature. They are not intended to benefit or protect state interests; they are primarily designed to protect human beings *qua* human beings.[12] Accordingly, the objective nature of a specific human rights treaty, and the consequences following therefrom, seem to be attributable to the character of the substantive obligations enshrined in the treaty and not to whether the treaty is universal or regional in scope. This is significant for the purpose of interpretation of

[6] *Cyprus v. Turkey*, 8007/77, 13 *DR*, 147; P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), at 40–41.
[7] ICJ Reports (1951), at 23.
[8] *Effect of Reservations*, para. 27, 67 ILR (1984), at 568.
[9] *Ibid.*, para. 29.
[10] *Ibid.*, para. 30.
[11] General Comment 24(52), para. 17, 2 *IHRR* (1995) 10.
[12] *Kupreskic*, IT-95-16-T, Judgment of 14 January 2000, para. 518.

clauses in such treaties. The nature of these obligations means that similar principles of interpretation are applicable to different treaties, whether universal or regional.

Moreover, the objective nature of Convention obligations mirrors their place and status in general international law, which is, as we shall see below, an important factor in their applicability in face of interaction or conflict with other principles of international law. The Convention protects individuals irrespective of their nationality. It does not give rise to bilateral or reciprocal legal relations between states, but protects common interests. This feature is identical to the characteristic of international public order in general international law. For instance, peremptory norms[13] safeguard the interests of the international community as a whole. They give rise to *erga omnes* obligations, which vest legal interest in their protection in all states irrespective of their individual prejudice.[14] This feature of the European Convention is similar in nature to features of certain universal treaties. As the International Criminal Tribunal for the Former Yugoslavia emphasized, the objective nature of the obligations embodied in humanitarian law treaties stems from their *erga omnes* character, in accordance with the dictum of the International Court.[15]

The objective nature of the obligations embodied in the European Convention — and the link between the obligations embodied therein and the norms of public order in general international law — is important in terms of its interpretation. In particular, this factor may influence the scope and reach of the Convention's specific provisions regarding their material or territorial applicability. In other words, the objective nature of an obligation influences the methods of interpretation applicable to a treaty and accordingly has an impact on the material or territorial scope of a treaty provision. It is crucial here that extraterritorial application and the non-reciprocity of obligations follow from the nature of those obligations. As we shall see below, non-reciprocity, which itself follows from the objective nature of the obligations, may and indeed does, imply extraterritorial applicability. Apart from the specific examples in practice to be dealt with below, such a perspective is supported by the attitude of the International Court of Justice which, by reference to the Advisory Opinion of 1951 affirming the objective nature of the obligations contained in the Genocide Convention, held that 'the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*'. This entails, as a consequence, that 'the obligation each state thus has to prevent and punish the crime of genocide is not territorially limited by the Convention'.[16]

3 Applicable Methods of Interpretation

There is an established trend in the interpretation of human rights treaties and in the methods of interpretation which assume priority. General guidance is still provided by

[13] Article 53 of the Vienna Convention on the Law of Treaties (1969).
[14] *Barcelona Traction*, ICJ Reports (1970), para. 33.
[15] *Kupreskic*, *supra* note 12, at para. 519.
[16] ICJ Reports (1996) 616.

the Vienna Convention on the Law of Treaties of 1969. In addition, human rights bodies have elaborated on the specific applications of the principles enshrined in the Vienna Convention.

As in general international law, restrictive interpretation is hardly ever admissible in the European Convention. In *Wemhoff*, the European Court held that it was necessary 'to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.'[17] As an alternative, Judge Fitzmaurice considered in *Golder* that the Convention, which makes heavy inroads into the domestic jurisdiction of states, not only justifies but also demands a restrictive, cautious and conservative interpretation.[18] But the Convention organs have never approved this approach. It has been noted that 'such an argument, which emphasizes the character of the Convention as a contract by which sovereign States agree to limitations upon their sovereignty, has now totally given way to an approach that focuses upon the Convention's law-making character.'[19] In this connection, it is relevant to note that the Convention is part of the public order of Europe and imposes objective obligations on states. Relying on this factor, Professor Bernhardt, a former President of the European Court, suggested that:

> Treaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty. It is obvious that this conclusion can have considerable conclusions for human rights conventions: Every effective protection of individual freedoms restricts State sovereignty, and it is by no means State sovereignty which in case of doubt has priority. Quite the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on one hand and restrictions on State activities on the other.[20]

Fitzmaurice himself later changed his point of view. In *Belgian Police*, he emphasized that he was not 'suggesting that a Convention such as the Human Rights Convention should be interpreted in a narrowly restrictive way' and that a liberal construction of the Convention's provisions should be undertaken in the light of the legal environment prevailing at the time of interpretation.[21]

As for the value of restrictive interpretation, the European Commission has emphasized that 'a restrictive interpretation of the individual rights and freedoms guaranteed by the European Convention on Human Rights would be contrary to the object and purpose of this treaty'.[22] Having given an overview of the general approach underlying the Convention's interpretation, it remains to examine the specific interpretive methods applicable to the Convention.

[17] *Wemhoff*, Judgment of 27 June 1968, Series A No 7, para. 8.
[18] Separate Opinion of Judge Sir Gerald Fitzmaurice, *Golder*, 57 ILR (1980), at 250–251.
[19] D. J. Harris, M. O'Boyle and C. Warbrick, *The Law of the European Convention on Human Rights* (1995), at 7.
[20] Bernhardt, *supra* note 3, at 14.
[21] Separate Opinion of Judge Sir Gerald Fitzmaurice, *Belgian Police*, 57 ILR (1980), at 295.
[22] *East African Asians*, 3 EHRR 76, 80–81.

A *The Plain Meaning as Understood in the Light of the Object and Purpose of a Treaty*

Article 31(1) of the Vienna Convention requires that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' This method is most suitable for ascertaining the content of human rights treaties. As the Inter-American Court has explained,

> This method of interpretation respects the principle of the primacy of the text, that is, the application of objective criteria of interpretation. In the case of human rights treaties, moreover, objective criteria of interpretation that look to the texts themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the Parties. This is so because human rights treaties, as the Court has already noted, 'are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States;' rather 'their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States'.[23]

In similar terms, the European Commission emphasized that the European Convention 'should be interpreted objectively and not by reference to what may have been the understanding of one Party at the time of its ratification'.[24]

The object and purpose of human rights treaties, as described above, has to be consistently kept in mind when interpreting their clauses. To reiterate, reference to the object and purpose of a treaty assumes particular importance in the case of treaties of a humanitarian nature.[25] Consequently, 'any ambiguity in the terms must be resolved in favour of an interpretation that is consistent with the humanitarian character of the Convention'.[26]

B *Subsequent Practice*

In accordance with Article 31§3(b) of the Vienna Convention, 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' is relevant for clarification of the meaning of that treaty. This method is not *per se* excluded under human rights treaties, including the European Convention.

The real utility of this principle in our context is, however, rather limited. Where treaties provide for a supervisory body entrusted with the function of interpretation and application of the treaty, it follows naturally that it is not only the practice and attitudes of the contracting states that matter, but also the attitudes expressed by the supervisory body itself. In the context of the European Convention, subsequent practice encompasses both the practice of the states and the practice of the Convention's organs.

[23] *Restrictions to Death Penalty*, para. 50, 70 ILR (1986), at 466.
[24] *East African Asians*, 3 EHRR 76, 81.
[25] Lauterpacht and Bethlehem, *The Scope and Content of the Principle of* Non-Refoulement (2001), at 17.
[26] *Ibid.*, at 29.