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SCSL-2003-08-PT
(2490-2638)

2490

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

IN THE TRIAL CHAMBER

Before: Judge Thompson, Presiding
Judge Boutet
Judge Itoe

Registrar: Mr. Robin Vincent

Date filed: 13 October 2003

THE PROSECUTION

Against

SAMUEL HINGA NORMAN

CASE NO. SCSL – 2003 – 08 – PT

PROSECUTION RESPONSE TO THE DEFENCE "MOTION – DENIAL OF APPEAL"

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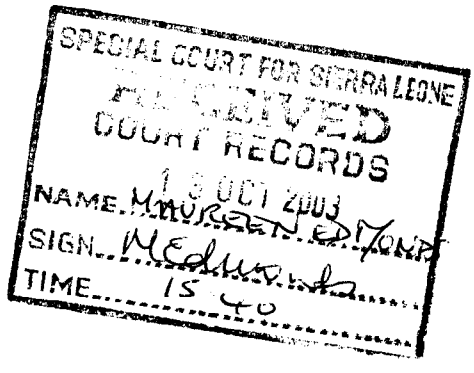

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INTRODUCTION

The Defence Motion challenges an amendment to Rule 72 of the Rules of Procedure and Evidence For the Special Court for Sierra Leone adopted by a plenary session of the judges of the Special Court for Sierra Leone in August 2003, which now requires that all preliminary motions "which raise a *serious* issue relating to jurisdiction *shall* be referred to the Appeals Chamber" (See Rule 72(E)). While there is merit to the arguments raised in the Defence Motion, the Prosecution does not believe that Rule 72, as amended, is *ultra vires* the Statute for the Special Court for Sierra Leone or either violates the International Covenant on Civil and Political Rights (ICCPR) or basic international human rights norms, as argued by the Defence. Furthermore, the Prosecution believes that it is within the basic and inherent authority of the judges to amend the Rules as has been done. The Prosecution does however maintain its position made at the plenary session that for policy reasons, issues of this magnitude should have the possibility of being decided by all eight judges of the Special Court.

1. The Prosecution files this response to the Defence preliminary motion entitled "Motion – Denial of Appeal" (the **"Defence Motion"**), filed on behalf of Samuel Hinga Norman (the "**Accused**") on 2nd October 2003.[1] In its Application, the Defence:

   a) Argues that by requiring all preliminary motions relating to jurisdiction be referred by the Trial Chamber to the Appeals under Rule 72 of the Rules of Procedure and Evidence (the "**Rules**") is contrary to and in breach of Article 14(5) of the International Covenant on Civil and Political Rights ("**ICCPR**") and international human rights norms;

   b) Argues that the hearing at first instance by the Appeals Chamber of preliminary motions relating to jurisdiction is *ultra vires* Article 20 of the Statute of the Special Court for Sierra Leone (the "**Statute**"), which provides for the jurisdiction of the Appeals Chamber, and not included within the inherent jurisdiction of the Appeals Chamber;

   c) Argues that the amendment to Rule 72 requiring the referral by the Trial Chamber to the Appeals Chamber of all Preliminary Motions relating to jurisdiction is outside the power to amend permitted under Article 14 of the SSCL;

   d) Requests a stay of the determination of all preliminary motions filed on behalf of the accused pending determination by the Trial Chamber and a stay of all time limits pursuant to Rule 72 (G);

   e) Requests a declaration that Rule 72 is *ultra vires* the Statute and/or violates the ICCPR and basic international human rights norms.

ARGUMENT

I. Procedural Matters

A. Request for Stay

2. From the outset, the Prosecution argues that the Trial Chamber should decline jurisdiction to grant a stay of the determination of all preliminary motions filed on behalf of the accused and of all time limits pursuant to Rule 72 (G). Since the Appeals Chamber is currently seized with the preliminary motions on jurisdiction, the Prosecution submits that there is a legal impediment for a Court of a lower instance to issue a stay of

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[1] Registry Page ("RP") 2270-2277.

proceedings in cases before a higher Court. Such an order would be contrary to basic principles of judicial hierarchy and therefore the Trial Chamber should decline jurisdiction to entertain such requests for a stay.

3. Furthermore Rule 72 (G) provides that "Where the trial Chamber refers a motion to the Appeals Chamber pursuant to Sub-Rules (E) or (F) . . . any extension of time may be granted by the Appeals Chamber". Clearly, the Defence request for a stay is outside the ambit of this provision. Any requested stay concerning the application of these delays can only be entertained and granted by the Appeals Chamber.

4. Finally, the Prosecution notes that an "Application to Stay Determination of all Preliminary Motions – Denial of Right to Appeal" was filed in the Appeals Chamber on behalf of Samuel Hinga Norman on 2nd October 2003, and therefore such request will be considered by the appropriate Chamber of the SCSL.

B. Request for a declaration that Rule 72 is *ultra vires*

5. As far as the Defence request for a declaration that Rule 72 is *ultra vires* the Statute and/or violates the ICCPR and basic international human rights norms, the Prosecution believes that this falls within the jurisdiction of the Trial Chamber as the first instance chamber which should decide upon the matter (See for example "Urgent Application for Release from Provisional Detention", *Prosecutor Against Moinina Fofana*, SCSL-2003-11-PD-007, 11 June 2003, which seeks a declaration that Rule 40bis is *ultra vires).*

6. However, the Prosecution notes that the Defence Motion is silent as to whether it is being filed under Rule 72 or Rule 73. Arguably, the Prosecution submits that the Defence Motion could be filed under either disposition.

7. As the Defence Motion challenges the jurisdiction of the Appeals Chamber to hear preliminary motions in the first instance, the Trial Chamber could find that the present Motion is filed under Rule 72. Despite the fact that Rule 72 prescribes a 21 day time limit following disclosure of Rule 66(A)(1) materials for the filing of preliminary motions relating to jurisdiction, the Prosecution notes that the disposition attacked by the Defence Motion came into force after the expiration of the said delay. The Prosecution further notes that the Defence Motion was filed soon after the exercise by the Trial Chamber of their discretion to refer the matter granted by the newly created Rule 72(E).

8. The Trial Chamber may therefore wish to exercise its inherent discretion to consider the Defence Motion under Rule 72. Therefore, if the Trial Chamber decides that the Defence Motion raises a serious issue of jurisdiction (Rule 72 (E)) or an issue that would significantly affect the proceedings (Rule 72 (F)) it must refer the Motion to the Appeals Chamber for a decision. In such a case, the Appeals Chamber would be properly seized of that issue.

9. The Prosecution submits that the Motion can also be properly considered by the Trial Chamber under Rule 73 since it challenges the legality of a Rule. The Trial Chamber should than decide on the matter which will be subject to appeal if leave to appeal is granted under Rule 73(B).

II. Rule 72 is not in breach of a fundamental right to appeal under international law

10. The Defence argues that Rule 72 as amended is contrary to or in breach of Article 14(5) of the ICCPR and international human rights norms by depriving him of a right of appeal on questions of law.[2]

11. Without doubt, challenges to jurisdiction are of great importance, especially in light of the novel questions of law to be raised in these proceedings as a result of the unique nature of the Special Court for Sierra Leone. However the Prosecution submits that the assertion in the Defence Motion of an inalienable right to appeal an interlocutory decision on jurisdiction can not be supported by current international humanitarian law and international human rights law.

12. Article 14(5) of the ICCPR provides for a right of appeal against conviction[3], and reflects an *imperative norm of international law* to which the courts must adhere[4]. However, in the present case, the Prosecution submits that it is not the right to appeal conviction that is in question, but the right to appeal an interlocutory decision on jurisdiction.

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[2] See paragraphs 11 and 12, Defence Motion, RPE 2267.

[3] Article 14(5) of the International Covenant of Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 reads: *"everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law"*.

[4] *Prosecutor v. Tadic (Vujin)*, IT-94-1-A-R77, "Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin", Appeals Chamber, 27 February 2001.

13. Furthermore, even the right to appeal a conviction as stipulated in Article 14(5) of the ICCPR is not an absolute right. As stated by the Judge Shahabuddeen of the Appeals Chamber of ICTR in his separate opinion in *Rutaganda*[5], several countries (including Austria, Germany, Belgium, Norway, Luxembourg and Italy) have made statements providing that ratification of the ICCPR did not guarantee the right to appeal a conviction made by a higher court in the first instance. With respect to the conviction of a senior official before a Constitutional Court, Judge Shahabuddeen in his aforementioned opinion also noted that "*the Human Rights Committee has upheld the validity of a reservation from the obligation to permit an appeal.*[6] *The Human Rights Committee therefore accepted that the right to an appeal can be removed in proper cases*".

14. Mirroring Article 14(5), Article 2(1) of the Seventh Protocol to the European Convention on Human Rights also provides for the right of appeal against conviction[7], but it is limited by Article 2(2) which states:

> This right shall be subject to exceptions in regard to offences of a minor character, as prescribed by law, **or in cases in which the person concerned was tried in the first instance by the highest tribunal** or was convicted following an appeal against acquittal (Emphasis added).

As noted by Judge Shahabuddeen in his aforementioned opinion:

> 35 of these states have (...) ratified the Protocol. I do not consider, that, in article 2, paragraph 2, of the Protocol, these 35 states (which were also parties to the ICCPR) intended to act at variance with any obligations under article 14(5) of the ICCPR. Rather, they were indicating that their view was that there was nothing in that provision which was efficacious to prohibit them from making exceptions to the obligation to provide for an appeal from a conviction. Certainly, with a total of 41 states (including the six states which signed the Seventh Protocol but have not yet ratified it) taking the position that a court of appeal could make a conviction even if there was no right to appeal from conviction, **it could not be said that there was any customary international law to the opposite effect** (Emphasis added).

15. The Prosecution believes that if the right to appeal against a conviction is not absolute or can not be said to be part of customary international law, in the cases that the first

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[5] *Rutaganda v. Prosecution*, ICTR-96-3-A, App. Ch., Judgment, Separate Opinion of Judge Shahabudeen, 26 May 2003.

[6] Diulio Fanali, Communication No. 75/1980: Italy. 31/03/83. CCPR/C/18/75/1980 para. 11.6, as quoted by Judge Shahabudeen

[7] Article 2(1) of Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, *entered into force* Nov. 1, 1988, 2(1) reads: "(e)*veryone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal*".

conviction is rendered by the highest tribunal of a State, *a fortiori* the right to appeal an interlocutory decision on jurisdiction can not be considered as a fundamental right particularly where the challenge on jurisdiction will be heard in first instance by the highest Chamber of the Special Court, namely the Appeals Chamber.

16. Of note, under Sierra Leonean law, there exists no right of appeal against an interlocutory decision in criminal proceedings (See Section 56, Courts Act). Likewise, Sections 124 and 127 of the Constitution of Sierra Leone direct original jurisdiction to the Supreme Court for Sierra Leone on all matters relating to the interpretation or enforcement of the provisions of the Constitution of Sierra Leone, including challenges to the jurisdiction of the Courts. In fact, in such instances, a stay of proceedings is invoked and the question is referred to the Supreme Court for Sierra Leone for determination from which there is no appeal.

17. The Prosecution also notes that the right to appeal an interlocutory decision on jurisdiction is not provided for in the Statutes of the ICTR, ICTY or the Special Court. The statutes of these respective tribunals only provide for a right to appeal against conviction along the lines of Article 14(5) of the ICCPR.

18. In international criminal law, the right to appeal an interlocutory decision on jurisdiction is a creation of the judges of ICTY and ICTR who, during their respective plenary sessions, introduced a provision for such through Rule 72 of the Rules of Procedure and Evidence of both tribunals. As was confirmed by the ICTY Appeals Chamber in *Delacic:*

> As the Appeals Chamber has noted (See "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" in the Tadic case (IT-94-1-AR72), paras 4 -5)), Rule 72 has *broadened* the right to appeal from the very limited right to appeal provided for in the Statute. Rule 72 has thus enhanced and strengthened the judicial rights of the accused (and, consequently, those of the Prosecution, on account of the principle of "equality of arms") (Emphasis in original).[8]

19. The original version of Rule 72 mirrored Rule 72 of the ICTR in accordance with Article 14(1) of the Statute, which required an application of the Rules of the ICTR *mutates*

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[8] *Prosecutor v. Zejnil Delalic, Zdravko Mucic*, also known as "Pavo", Hazim Delic and Esad Landzo, IT-96-21-T, "Decision on Application for Leave To Appeal (Provisional Release) Hazim Delic", 22 November 1996, paragraph 21.

mutandis at the time of the establishment of the Court.[9] In this form, Rule 72 provided for a right to appeal interlocutory decision on jurisdiction *"as of a right"* (See Rule 72 (B)(ii)), but was restricted to specific issues respecting: personal, temporal, territorial and substantive (specific crimes charged) jurisdiction (See Rule 72 (H)). The Prosecution notes that such limits would in fact have prevented many of the present preliminary motions relating to jurisdiction currently pending before the Court to be appealed since they would not have fallen within the category provided by Rule 72 (H) as it then existed.

20. The first plenary of the judges of the Special Court, held in March 2003, adopted a substantial amendment to Rule 72. First, the criteria of restricting jurisdictional motions to those specific issues requested in former paragraph (H) was removed, and all serious issues of jurisdiction were permitted under the Rules. At this point, the right to appeal interlocutory decision on jurisdiction was also removed and a new mechanism of direct referral to the Appeals Chamber of all *substantial issues relating to jurisdiction,* leaving certain discretion to the Trial Chamber by including *"may be referred"*, was introduced. The amendments then made to Rule 72 were taken in accordance with achieving a balance between fairness to the accused with maintaining efficiency in the proceedings.

21. At the second plenary of the SCSL, held in August 2003, the judges again amended Rule 72 by replacing the word *"may"* with *"shall"* in regards of preliminary motions which *"raise a serious issue relating to jurisdiction"*, to be referred to the Appeals Chamber. As a result, the Trial Chamber no longer had any discretion to hear preliminary motions raising a serious issue on jurisdiction. Again the principle consideration underpinning the amendment was maintaining efficiency by avoiding delays concerning issues that would ultimately have to be decided by the highest chamber of the Special Court - the Appeals Chamber. The Trial Chamber retained discretion only in its evaluation that the issue relating to jurisdiction meets the criteria of being *"a serious issue relating to jurisdiction"*.

22. Finally, the Prosecution agrees with the Appeals Chamber in *Tadic*, which held: that "(s)uch a fundamental matter as the jurisdiction of the International Tribunal should not

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[9] Article 14(1) provides: *"The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court."*

be kept for decision at the end of a potentially lengthy, emotional and expensive trial."[10] Clearly, it is imperative that fundamental questions of jurisdiction be resolved before the end of the Trial, however, the procedural mechanism through which such issues will be dealt with should remain flexible.

III. Rule 72 is not *ultra vires*

23. The Prosecution submits that the arguments of the Applicant regarding Article 20 of the Statute are based on a restrictive reading of the disposition and on balance, cannot support that Rule 72 is ultra vires of the Statute. Article 20 refers to the powers of the Appeals Chamber. However there is within the Statute the basis for the argument that the Appeals Chamber may exercise powers in addition to those stated in Article 20. For example under Article 21 of the Statute the Appeals Chamber has the faculty to retain jurisdiction over a matter if a new fact is discovered which was not known at the time of the proceedings and which could have been a decisive factor in reaching the decision. By definition therefore its judgment will then be definitive on a matter decided upon after only an initial hearing.

24. Furthermore, there is jurisprudence to support the position that Tribunals such as the Special Court have the inherent power to exercise jurisdiction over matters in order to fulfil their intrinsic purpose.[11] Barring an express prohibition in the Statute therefore, it appears clear that a Court can vary its practice beyond the explicit terms of its Statute.

25. Article 20 of the Statute is similar to Article 24 of the Statute of the ICTR and Article 25 of the Statute of the ICTY. Regarding the issue of jurisdictional competence, in essence the basis of the Court's existence, the ICTY found that it did have an *inherent jurisdiction* to decide issues beyond those specifically granted by the Statute. In *Tadic*, the Appeals Chamber of the ICTY held that:

> It [inherent jurisdiction] is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done (see, e.g., Statute of the International Court of Justice, Art. 36, para. 6).[12]

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[10] *Cf. Prosecutor v. Tadic,* "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", IT-94-1-AR72, App. Ch., 2 October 1995, paragraph 4

[11] *Prosecution v Tadić, id.*, paragraph 18.

12 *Prosecution v Tadić, supra* note 10, paragraph 18 .

26. Further, regarding when the Court is free to implement this jurisdiction, *Tadić, supra,* held that:

> It is true that this power can be limited by an express provision ... in the constitutive instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character or the independence of the Tribunal. But it is absolutely clear that such a limitation, to the extent to which it is admissible, cannot be inferred without an express provision allowing the waiver or the shrinking of such a well-entrenched principle of general international law.[13]

27. It can therefore be argued that the authority of the Special Court to adopt specific procedures is in fact not dependent solely upon that which the Court is empowered to do by statute but also by that which it is inherently empowered to do, in order to accomplish its mission.

28. This is clearly demonstrated by the reasoning used by the Appeals Chamber of the ICTY in deciding to expand its jurisdiction, thereby enabling it to punish contempt:

> ...in order to ensure that its exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded.[14]

IV. The amendment to Rule 72 was made in conformity with Article 14 of the Statute

29. The Defence rightly asserts that the ability of the judges of the Special Court for Sierra Leone to amend the Rules is governed under Article 14, in instances where "*the applicable Rules do not, or do not adequately, provide for a specific situation*". Thus, the question is whether Rule 72 did not adequately provide for a procedure governing interlocutory appeals on preliminary motions relating to jurisdiction.

30. As outlined above, the Prosecution submits that the amendments to Rule 72 were in fact made to address a situation that was not "adequately provided for" by the Statute, and thus were made in accordance with Article 14 of the Statute. As stated earlier, the first amended Rules expanded the grounds to challenge jurisdiction on an interlocutory motion while at the same time abolished the right of appeal of such interlocutory decisions as created by the original Rules. The Prosecution submits that the amendment

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[13] *Prosecution v Tadić, supra* note 10, paragraph.19

14 *Prosecution v Tadić*, IT-94-1-A-R77, "Judgment on Allegations of Contempt against Prior Counsel, Mila Vujin", App. Ch., 31 January 2000, paragraph 18.

can be said to have been made to achieve a balance between judicial efficiency and fairness to the accused considering the limited timeframe of the Special Court and the importance of proceeding to a final determination of preliminary motions relating to serious issues of jurisdiction.

31. The Prosecution further notes that Article 14(b) of the Statute states that the Judges, when considering an amendment to the Rules, may be guided as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone. Although itself silent on the matter of a challenge to jurisdiction, the Act refers to the Constitution of Sierra Leone, wherein issues concerning the interpretation or enforcement of its provisions are directly referred to the Supreme Court for Sierra Leone for determination, as discussed in paragraph 16 above.

CONCLUSION

As reflected by its position during the August 2003 Plenary, the Prosecution submits that considering the importance of issues respecting jurisdiction, it would have been, on balance, preferable for the integrity of the proceedings of the Special Court as well as the development of international criminal law jurisprudence to have preserved the possibility for judges from both Chambers to decide on the matter.

Nonetheless, for the reasons stated above, the Prosecution submits that while the Applicant raised important issues worthy of consideration, ultimately these arguments cannot support that Rule 72 in its current incarnation is in breach of an existing fundamental right of appeal from an interlocutory decision on jurisdiction or that it is *ultra vires* of Articles 20 or 14 of the Statute.

Freetown, 13 October 2003.

For the Prosecution,

Desmond de Silva, QC
Deputy Prosecutor

Luc Côté
Chief of Prosecutions

James C. Johnson
Senior Trial Attorney

Robert Petit
Senior Trial Attorney

PROSECUTION INDEX OF AUTHORITIES

1. Article 14(5) of the International Covenant of Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

2. *Prosecutor v. Tadic (Vujin)*, IT-94-1-A-R77, "Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin", Appeals Chamber, 27 February 2001.

3. *Rutaganda v. Prosecution*, ICTR-96-3-A, App. Ch., Judgment, Separate Opinion of Judge Shahabudeen, 26 May 2003.

4. Article 2(1) of Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, *entered into force* Nov. 1, 1988.

5. *Prosecutor v. Zejnil Delalic, Zdravko Mucic*, also known as "Pavo", Hazim Delic and Esad Landzo, IT-96-21-T, "Decision on Application for Leave To Appeal (Provisional Release) by Hazim Delic, 22 November 1996.

6. *Prosecutor v. Tadic,* "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", IT-94-1-AR72, App. Ch., 2 October 1995.

7. *Prosecution v Tadić*, IT-94-1-A-R77, "Judgment on Allegations of Contempt against Prior Counsel, Mila Vujin", App. Ch., 31 January 2000.

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ANNEX 1.

Article 14(5) of the International Covenant of Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

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

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

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ANNEX 2

Prosecutor v. Tadic, IT-94-1-A-R77, "Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin", Appeals Chamber, 27 February 2001.

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IN THE APPEALS CHAMBER

Before:
President Claude Jorda
Judge Mohamed Bennouna
Judge Patricia Wald
Judge Fausto Pocar
Judge Liu Daqun

Registrar:
Mr. Hans Holthuis

Judgement of: 27 February 2001

PROSECUTOR

v.

DUSKO TADIC

APPEAL JUDGEMENT ON ALLEGATIONS OF CONTEMPT AGAINST PRIOR COUNSEL, MILAN VUJIN

Counsel for the Appellant:

Mr. Vladimir Domazet for Milan Vujin

Counsel for the Interested Party:

Mr. Anthony Abell for Dusko Tadic

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

NOTING the Judgement on allegations of contempt against prior counsel, Milan Vujin (hereinafter "the Appellant") issued by the Appeals Chamber, ruling in the first instance, on 31 January 2000 (IT-94-1-A-R77) (hereinafter "the Judgement");

NOTING that the Appeals Chamber, ruling in the first instance, found the Appellant guilty of contempt of the International Tribunal pursuant to Rule 77 of the Rules of Procedure and Evidence of the International Tribunal (hereinafter "the Rules") and, accordingly, fined the Appellant Dfl 15,000 and directed the Registrar to consider striking him off the list of assigned counsel kept pursuant to Rule 45 of the Rules;

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NOTING the Application for leave to appeal against the Judgement on allegations of contempt against prior counsel, Milan Vujin (IT-94-1-A-AR77), filed by the Appellant on 7 February 2000 (hereinafter "the Application");

NOTING the Response by the interested party, Dusko Tadic, to the Application for leave to appeal filed on 17 February 2000, (hereinafter "the Interested Party" and "the Response" respectively);

NOTING the Respondent's Reply to the Response by the Interested Party, Dusko Tadic, to the Application for leave to appeal filed confidentially on 22 February 2000;

NOTING the Order of the President assigning Judges to a bench of the Appeals Chamber (hereinafter "the Bench") issued in French on 8 March 2000;

NOTING the Decision on the Application for leave to appeal issued in French on 25 October 2000 whereby the Bench granted leave to appeal having concluded that "the arguments advanced in support of the Application for leave to appeal justify a more thorough review by the Appeals Chamber";

NOTING the Order of the President assigning Judges to the Appeals Chamber issued in French on 26 October 2000;

NOTING the Appellant's Brief filed confidentially on 3 November 2000, in which the Appellant submits, *inter alia*, that: (i) the Tribunal does not have the power to set up a procedure for contempt and to punish such contempt; (ii) that Rule 77 of the Rules does not provide for the striking off the list of eligible counsel by the Registrar; and (iii) that the Appeals Chamber, ruling in the first instance, incorrectly found him guilty in relation to the allegation that he had: (a) put forward to the Appeals Chamber in support of an application pursuant to Rule 115 of the Rules a case which was known to the Appellant to be false in relation to the weight to be given to statements made by one Mladjo Radic and in relation to the responsibility of one Goran Borovnica for the killing of the two Muslim policemen, and (b) manipulated the proposed testimony of witnesses A and B;

CONSIDERING the Response by the Interested Party, Dusko Tadic, to the Appellant's Brief filed on 5 December 2000 (hereinafter "the Response");

NOTING that Rule 77 of the Rules does not expressly provide for the right to appeal a contempt conviction of the Appeals Chamber;

CONSIDERING, however, that the Rules must be interpreted in conformity with the International Tribunal's Statute which, as the United Nations Secretary-General states in his report of 3 May 1993 (S/25704) must respect the "internationally recognized standards regarding the rights of the accused" including Article 14 of the International Covenant on Civil and Political Rights (hereinafter "the International Covenant");

CONSIDERING that Article 14(5) of the International Covenant on Civil and Political Rights guarantees that "SeCveryone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law";

CONSIDERING moreover that Article 14 of the International Covenant reflects an imperative norm of international law to which the Tribunal must adhere;

CONSIDERING that the procedure established under Rule 77 of the Rules is of a penal nature, and that

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a person convicted pursuant to Rule 77 of the Rules faces a potential custodial sentence of up to 7 years' imprisonment;

CONSIDERING that this means that a person found guilty of contempt by the Appeals Chamber must have the right to appeal the conviction;

CONSIDERING that the preferred course in this case would have been for the contempt trial to have been initially referred to a Trial Chamber, thereby providing for the possibility of appeal, rather than being heard by the Appeals Chamber, ruling in the first instance;

CONSIDERING however that it is the duty of the International Tribunal to guarantee and protect the rights of those who appear as accused before it;

DECIDES therefore that due to the special circumstances of this case, it is appropriate for the Appeals Chamber to consider the merits of the Appellant's complaints;

CONSIDERING paragraphs 12 to 29 of the Judgement in which the basis of the International Tribunal's power to prosecute and punish matters of contempt is clearly set out;

CONSIDERING that Article 15 of the Tribunal's Statute instructs the Judges of the International Tribunal to "adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and **other appropriate matters**" (*emphasis added*);

CONSIDERING that in order to function effectively and fairly, the International Tribunal must have the power to prosecute and punish contempt;

CONSIDERING that the adoption of rules to prosecute and punish contempt falls within the purview of "other appropriate matters" as required by Article 15 of the Statute;

DECIDES that the Appellant's submission regarding the International Tribunal's lack of power to prosecute and punish contempt is without merit;

NOTING that Rule 77 of the Rules does not provide for the striking off the list of eligible counsel as punishment following a conviction for contempt;

NOTING also that the Judgement of the Appeals Chamber did not order that the Appellant be struck off the list of eligible counsel but merely directed the Registrar to "consider" striking the Appellant off the list;

CONSIDERING that when convicted of contempt pursuant to Rule 77 of the Rules, counsel can expect to be either suspended or struck off the list of assigned counsel kept by the Registrar pursuant to Rule 45 of the Rules;

DECIDES that the Appellant's submission regarding the direction of the Appeals Chamber, ruling in the first instance, to the Registrar to consider striking him off the list is without merit;

CONSIDERING that the Appeals Chamber may only overturn a Chamber's finding of fact, when ruling in the first instance, "where the evidence relied on could not have been accepted by any reasonable tribunal or where the evaluation of evidence is wholly erroneous"[1];

CONSIDERING that it was not submitted during the contempt proceedings before the Appeals Chamber, in the first instance, that the allegations made against the Appellant, if established, would not constitute contempt of the International Tribunal in the sense of knowingly and wilfully interfering with the administration of justice;

CONSIDERING that the Appeals Chamber, ruling in the first instance, heard twelve witnesses who testified as to events which were capable of supporting the allegations of contempt, heard eight witnesses called by the Appellant, and heard the Appellant's testimony;

CONSIDERING the detailed and careful analysis of the evidence as set out by the Appeals Chamber, ruling in the first instance, in its Judgement;

NOTING that the Appellant sought to admit additional evidence for consideration, namely the statement of Vlado Krckovski, taken in Prijedor on 4 February 2000 (hereinafter "the Statement");

CONSIDERING that, pursuant to Rule 115 of the Rules, a party may present additional evidence to the Appeals Chamber only if such proof was not available to it during the trial;

CONSIDERING that the Appellant has not made any submissions regarding the availability or otherwise of the Statement at trial;

DECIDES therefore that the Statement is inadmissible for the purposes of the present appeal;

DECIDES that the evidence relied upon for the Judgement would have "been accepted by any reasonable tribunal" and that the evaluation of the evidence was not "wholly erroneous" and, accordingly, that there is no basis to consider overturning the findings of fact;

DECIDES that the Appellant's submissions regarding the Appeals Chamber's findings of fact, ruling in the first instance, are wholly without merit;

CONSIDERING that, pursuant to Rule 116 *bis* (A) of the Rules, an appeal of a Decision rendered pursuant to Rule 77 may be determined entirely on the basis of the parties' written briefs;

CONSIDERING also that, pursuant to Rule 116 *bis* (D) of the Rules, the Presiding Judge, after consulting members of the Appeals Chamber, may decide not to pronounce the judgement in public in the presence of the parties;

DECIDES that, pursuant to Rule 116 *bis* (A) and (D) of the Rules, this Appeal will be determined entirely on the basis of the written briefs and that the judgement will not be pronounced in public in the presence of the parties;

FOR THE FOREGOING REASONS,

ORDERS that:

(i) the Judgement of the Appeals Chamber, ruling in the first instance, is upheld;
(ii) the Appellant's appeal is dismissed;
(iii) the Appellant is to pay a fine of Dfl 15,000 to the Registrar of the Tribunal within twenty one days;
(iv) the Registrar may consider, bearing in mind the factual findings against the Appellant

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by the Appeals Chamber ruling in the first instance and in accordance with his powers, to strike off or suspend the Appellant for a set period from the list of assigned counsel kept pursuant to Rule 45 of the Rules and to report his conduct as found by the Appeals Chamber, ruling in the first instance, to the professional body to which he belongs.

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

Done this twenty-seventh day of February 2001
At The Hague
The Netherlands

/signed/

Claude Jorda
President
Appeals Chamber

Judge Wald has appended to this Judgement a Separate Opinion dissenting from the finding of jurisdiction.

[Seal of the Tribunal]

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1. Judgement, *The Prosecutor v. Zlatko Aleksovski*, Case no.: IT-95-14/1-A, Appeals Chamber, 24 March 2000, para. 63.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 3.

Prosecutor v. Rutaganda, ICTR-96-3-A, "Judgment", Separate Opinion of Judge Shahabudeen, 26 May 2003.

UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

LA CHAMBRE D'APPEL

Composée comme suit : **M. le Juge Theodor MERON, Président**
M. le Juge Fausto POCAR
M. le Juge Claude JORDA
M. le Juge Mohamed SHAHABUDDEEN
M. le Juge Mehmet GÜNEY

Greffier : **M. Adama DIENG**

Rendu le : **26 mai 2003**

Georges Anderson NDERUBUMWE RUTAGANDA

c/

Le PROCUREUR

Affaire n° ICTR-96-3-A

ARRÊT

Les Conseils du Procureur

M. Norman FARRELL
M. Mathias MARCUSSEN
Mme Norul RASHID
Mme Helen BRADY

Les Conseils de l'Appelant

M. David JACOBS
M. David PACIOCCO

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SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I agree with the judgment of the Appeals Chamber, but propose to deal with what appears to be a preliminary question as to whether the Appeals Chamber has competence to substitute convictions for acquittals, as the prosecution asks it to do. The question has not been raised by either side but, as it touches the competence of the Appeals Chamber and is within its notice, there is an obligation to look into it before going further.[1]

A. The issue

2. Some jurisdictions do not permit the prosecution to appeal from an acquittal. Some permit it to appeal on law only, without disturbing the acquittal. Some permit it to appeal against an acquittal, either on law or on fact or on a question of mixed law and fact. These models, considered in various combinations, were considered by interested bodies prior to the adoption of the Statute by the Security Council.[2] What is the principle which the Security Council adopted?

Article 24 of the Statute provides:

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

3. With respect to the corresponding provisions of the ICTY Statute, paragraph 117 of the report of the Secretary-General, appended to the ICTY Statute and approved by the Security Council, stated:

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[1] For the duty of the court to satisfy itself that it has jurisdiction, whether or not the point has been argued, see, by analogy, Judge Basdevant's dissenting opinion in *Certain Norwegian Loans, I.C.J.Reports 1957*, p. 9, at p. 74. The maxim *jura novit curia* applies.

[2] See generally Mark C. Fleming, "Appellate Review in the International Criminal Tribunals", (2002) 37 *Texas International Law Journal*, 111.

> The right of appeal should be exercisable on two grounds: an error on a question of law invalidating the decision or, an error of fact which has occasioned a miscarriage of justice. The Prosecutor should also be entitled to initiate appeal proceedings on the same grounds.

4. The import of this language was recognised by the judges when making Rule 99(B) of the Rules of Procedure and Evidence, which authorises a Trial Chamber to order the continued detention of an acquitted accused where the Prosecutor advises the Trial Chamber in open court of the Prosecutor's intention to file notice of appeal. Article 24(2) of the Statute, in turn, empowers the Appeals Chamber to "affirm, reverse or revise the decisions taken by the Trial Chambers". The combined effect of the two limbs of article 24 is that the Appeals Chamber may substitute a conviction for an acquittal and may do so either on fact or on law or on both.

5. The ICTY Appeals Chamber substituted a conviction for an acquittal in *Tadić*[3]. In *Aleksovski,*[4] it made a new finding against the accused on a question of aiding and abetting although not making a conviction, the matter being treated as pertinent to sentence which for certain reasons was not increased; on another branch of the case, it disagreed with the Trial Chamber as to the gravity of the crimes and increased sentence.[5] In *Bagilishema*,[6] this Appeals Chamber, though affirming an acquittal by the Trial Chamber, entertained an appeal by the Prosecutor who sought a conviction in lieu of the acquittal. Obviously, in appropriate circumstances the Appeals Chamber would have substituted a conviction for the acquittal, its stated view being that "[c]e type d'appel est prévu par le Statut du Tribunal dans son article 24, qui dispose que les deux parties peuvent interjeter appel, et ce, sur des questions de droit et de fait."[7]

6. Thus far, there would seem to be something against the proposition that "the Statute was not intended to authorise the Appeals Chamber to reverse an acquittal by the court of first instance and enter a conviction at the appellate level."[8] Nevertheless, it is proposed to go a little further by examining the aspects mentioned below.

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[3] IT-94-1-A, of 15 July 1999.
[4] IT-95-14/1-A, of 24 March 2000, paras. 155-172, 189 and 192(6).
[5] Ibid., paras. 174-191 and 192(7).
[6] ICTR-95-1A-A, of 3 July 2002. See in particular paras. 8-14.
[7] Ibid., para. 8.
[8] Virginia Morris and Michael P. Scharf, *An Insider's View of the International Criminal Tribunal for the former Yugoslavia*, Vol.1, New York, 1995, p. 295. And see, also by them, *The International Criminal Tribunal for Rwanda*, Vol. 1, New York, 1998, p. 606. See also Mark C. Fleming, "Appellate Review in the International Criminal Tribunals", (2002) 37 *Texas International Law Journal*, 135.

7. First, it may be said that the Appeals Chamber has competence to convict only if there is a right of appeal from a conviction by it, that under the Statute there is no such right of appeal, and that accordingly the Appeals Chamber has no competence to make a conviction, whether based on an error of law or on an error of fact. Thus, it is not merely a question whether there is a right of appeal from a conviction made by the Appeals Chamber; that, by itself, assumes that the Appeals Chamber can convict. The question is an anterior one of whether the Appeals Chamber has jurisdiction to convict if there is no right of appeal from the conviction. In my view, the Statute provides for no right of appeal from a decision of the Appeals Chamber but this does not prevent it from making a conviction in lieu of an acquittal by a Trial Chamber. The issues involved are considered in the following section.

8. Second, it may be said that the Appeals Chamber may make a conviction provided it is not based on facts. To that argument, *Tadić*[9] is a sufficient response. If the proposition was being advanced that the Appeals Chamber could only reverse an acquittal on grounds of law, it would be helpful to show that its decision in that case was really based on law notwithstanding an apparent outcrop of facts; but it will not be persuasive to suggest that some of the crucially important facts were not assessed differently by the ICTY Appeals Chamber from the way in which they were assessed by the Trial Chamber[10] and that this was not the true ground of relevant parts of the decision. In *Bagilishema*, this Appeals Chamber had no doubt that it was competent to allow an appeal on facts by the prosecution against an acquittal, observing only that in this respect the prosecution had a heavier task than that which confronted a convicted person who sought to appeal on facts from his conviction.[11]

9. Nor is there a basis for suggesting that the reference to "miscarriage of justice" in article 24(1) of the Statute necessarily points only to an appeal by the accused. No doubt, "miscarriage of justice" is customarily associated with an appeal by a convicted person in jurisdictions in which the prosecution has no right of appeal from an acquittal.[12] But that is not a reason for supposing that where, as here, the prosecution clearly has a right of appeal, the meaning customary in such jurisdictions of necessity overbears the natural and ordinary meaning of the words as capable of including a miscarriage of justice to either side arising from a mistake in the assessment of facts.

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[9] IT-94-1-A, of 15 July 1999.
[10] In paragraph 183 of its judgment, the Appeals Chamber said: "In the light of the facts found by the Trial Chamber, the Appeals Chamber holds that, in relation to the possibility that another armed group killed the five men, the Trial Chamber misapplied the test of proof beyond reasonable doubt. On the facts found, the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which the Appellant belonged killed the five men in Jaskići."
[11] ICTR-95-1A-A, of 3 July 2002, para. 14, last two sentences.
[12] Fleming, *supra*, p. 141.

10. The prosecution side embraces the interests of the international community. Certainly, the interests of the international community comprehend the necessity to ensure that the defence has a fair trial. But justice is also due to the international community. If the Trial Chamber's assessment of facts is patently erroneous, there could be a miscarriage of justice to that community. I do not appreciate why the prosecution, as representing the interests of that community, may not appeal on the ground that there has been an "an error of fact which has occasioned a miscarriage of justice" within the meaning of article 24(1) of the Statute. I do not propose to add anything more on this second question, and so I turn to the first.

B. The Statute provides for no right of appeal from a decision made by the Appeals Chamber, but the absence of such a right does not prevent the Appeals Chamber from making a conviction

11. The appeal provisions of the ICTY Statute correspond to those of the Statute of this Tribunal. In paragraph 116 of the Secretary-General's Report to the Security Council on the draft Statute of the ICTY, there was a statement that "the right of appeal ... is a fundamental element of individual civil and political rights and has, inter alia, been incorporated in the International Covenant on Civil and Political Rights" ("ICCPR"). But the question is not as to the applicability of the ICCPR but as to its meaning, or more particularly what is the extent of the right of appeal to which it refers. There is no question that there is a right of appeal from a conviction made by the Trial Court. Is there a right of appeal from a conviction made by the Appeals Chamber? If there is not such a right of appeal, does this mean that, by reason of the ICCPR, the Appeals Chamber cannot make such a conviction?

12. The relevant provision is of course Article 14(5) of the ICCPR. This states: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Referring to the provision, one commentator says that should "a conviction ... first result at the appellate level, the person convicted must be afforded a further right of appeal."[13] It is easy to accommodate that view where the conviction is made by an intermediate court of appeal in a three-stage system. But what where the conviction is sought to be made by a court of appeal in a two-stage system? To say that there has to be a right of appeal from a conviction made on appeal means that a conviction cannot be made by an appeal court in such a system.

13. It is proposed to consider the resulting problem on two alternative bases. First, article 14(5) of the ICCPR has the effect of imposing a prohibition on the making of a conviction on appeal in the absence of a right of appeal from the conviction, but there can be reservations to that prohibition and the circumstances of the Tribunal operate to give it the benefit of an appropriate reservation. Second, the prohibition so imposed is not absolute but itself permits of exceptions being made. Again, the circumstances of the Tribunal operate to give it the benefit of an appropriate exception.

14. Beginning with the first of these two alternatives, it is to be observed that statements made by some states on ratification of the ICCPR took the position that the requirement for a right of appeal from a conviction would not apply in relation to a conviction made on appeal. These statements turn on a distinction between legal systems which do not permit appeals from acquittals at first instance and legal systems which do, with the consequence that, in the second category, a conviction may, for the first time, be made at the appellate stage. In the latter case, if there is no third tier in the judicial system, it will not be possible to comply with article 14(5) of the ICCPR if this imposes an absolute prohibition on the making of a conviction on appeal in the absence of a right of appeal from the conviction.

15. Paragraph 4(b) of the Austrian statement said that article 14 of the ICCPR will be applied, provided that -

> paragraph 5 is not in conflict with legal regulations which stipulate that after an acquittal or a lighter sentence passed by a court of the first instance, a higher tribunal may pronounce conviction or a heavier sentence for the same offence, while they exclude the convicted person's right to have such conviction or heavier sentence reviewed by a still higher tribunal.

16. Paragraph 3(a) of the statement made by Germany stipulated that article 14(5) of the ICCPR shall be applied in such manner that -

> [a] further appeal does not have to be instituted in all cases solely on the grounds the accused person, having been acquitted by the lower court, was convicted for the first time in the proceedings concerned by the appellate court.

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[13] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, Strasbourg, 1993, p. 268.

A reservation by Belgium stated:

> Paragraph 5 of the article [i.e., article 14] shall not apply to persons who, under Belgian law, are convicted and sentenced at second instance following an appeal against their acquittal of first instance or who, under Belgian law, are brought directly before a higher tribunal such as the Court of Cassation, the Appeals Court or the Assize Court.

A Norwegian reservation said that in cases –

> where the defendant has been acquitted in the first instance, but convicted by an appellate court, the conviction may not be appealed on grounds of error in the assessment of evidence in relation to the issue of guilt. If the appellate court convicting the defendant is the Supreme Court, the conviction may not be appealed whatsoever.

A reservation by Luxembourg read:

> The Government of Luxembourg declares that it is implementing article 14, paragraph 5, since that paragraph does not conflict with the relevant Luxembourg legal statutes, which provide that, following an acquittal or conviction by a court of first instance, a higher tribunal may deliver a sentence, confirm the sentence passed or impose a harsher penalty for the same crime. However, the tribunal's decision does not give the person declared guilty on appeal the right to appeal that conviction to a higher appellate jurisdiction.

17. There were other reservations excepting the validity of a conviction of senior officials on trial by the highest court - necessarily without appeal.[14] Thus, Italy's reservation to article 14(5) of the ICCPR read:

> Article 14, paragraph 5, shall be without prejudice to the application of existing Italian provisions which, in accordance with the Constitution of the Italian Republic, govern the conduct, at one level only, of proceedings instituted before the Constitutional Court in respect of charges brought against the President of the Republic and its Ministers.

[14] P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer) 3rd ed., p. 687, stating that, in cases in which a person is tried and convicted by the highest tribunal, it "is obvious that ... review by a higher tribunal is not possible."

18. Some of these statements lean towards interpretative declarations, others towards reservations. As to the difference, it is said that "[i]f a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation. Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation".[15] Thus considered, it is clear that some at any rate of these statements were reservations. So the question which arises is this: if the effect of the ICCPR is to impose a prohibition on the making of a conviction on appeal unless there is a right of appeal from the conviction, can the prohibition be excluded by a reservation?

19. It would not be compatible[16] with the object and purpose of the ICCPR as a principal human rights treaty[17] to make a reservation to its requirement, one of clear centrality, that a trial must be fair. The Human Rights Committee has rightly observed that "while reservations to particular clauses of Article 14 [of the ICCPR] may be acceptable, a general reservation to the right to a fair trial would not be."[18] But a reservation to a requirement for an appeal from a conviction which is made on appeal does not mean that the reserving state is signifying an intention not to be bound by the requirement for a fair trial. No doubt the right to an appeal is a guarantee of the right to a fair trial, but the non-availability of a right of appeal from a conviction made on appeal does not mean that the requirement for fairness does not apply; the requirement applies at all stages of the proceedings, even during a final appeal from which there is necessarily no appeal.

20. It may be noted that, in respect of a conviction of a senior official on his trial before a Constitutional Court, the Human Rights Committee has upheld the validity of a reservation from the obligation to permit an appeal.[19] The Human Rights Committee therefore accepted that the right to an appeal can be removed in proper cases. It follows, in my view, that a reservation in respect of a requirement for the provision of a right of appeal from a conviction made on appeal is not incompatible with the object and purpose of the ICCPR.

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[15] Paragraph 3 of the General Comment of the Human Rights Committee (1995) 34 I.L.M. 839.
[16] See article 19(c) of the Vienna Convention of the Law of Treaties, 1969, which provides for the making of a reservation which is not prohibited by the treaty, or outside of specified reservations which are permitted, and, if it is not of these kinds, is not "incompatible with the object and purpose of the treaty".
[17] This is correctly stressed in the literature. See, in particular, the Human Rights Committee's General Comment, UN Document CCPR/C/21/Rev.1/Add.6, 2 November 1994, in 34 I.L.M. 839.
[18] The character of such a treaty has been stressed in the literature. See para.8 of the General Comment of the Human Rights Committee, *supra.*
[19] *Diulio Fanali*, Communication No. 75/1980: Italy. 31/03/83. CCPR/C/18/75/1980. (Jurisprudence), para..11.6.

21. If a state-party to the ICCPR can make such a reservation, what is the position of the Tribunal? The Tribunal, not being a state-party, could not make a reservation. If the principles of the ICCPR apply to the Tribunal - as they do - this must be on the basis that the Tribunal is given a benefit equivalent to the opportunity possessed by states to make reservations. This must mean that the provisions of the ICCPR have to be construed with modifications which take account of the special circumstances of the Tribunal.

22. This view is consistent with the jurisprudence of the ICTY. Paragraph 19 of the decision of the ICTY Trial Chamber in *Delalić* made reference to a provision of the ICCPR but also to the non-applicability of the provision because of "the unique circumstances under which the International Tribunal operates."[20] More generally, the point was made by the ICTY Trial Chamber in *Kunarac* that "notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law."[21]

23. I reach the conclusion then that, by reason of its circumstances, the Tribunal stands free of any prohibition imposed by article 14(5) of the ICCPR on the making of a conviction on appeal in the absence of a right of appeal from the conviction.

24. The second alternative argument is that it is possible that states participating in the ICCPR were signifying, either by making the abovementioned statements or by omission to object to them, that, in their view, the ICCPR did not impose an absolute prohibition on the making of a conviction on appeal in the absence of a right of appeal from the conviction but that it permitted exceptions. Other developments seem consistent with this understanding.

25. Article 2, paragraph 1, of the Seventh Protocol to the European Convention on Human Rights, which entered into force in 1988, provides that "[e]veryone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal." Paragraph 2 then states:

[20] IT-96-21-T of 25 September 1996.
[21] IT-96-23-T & IT-96-23/1-T, of 22 February 2001, para. 471.

> This right shall be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

26. So, there, the fact that the conviction was made "following an appeal against acquittal" does not automatically give a right of appeal; such a case may be regarded as having been excepted out of the requirements of paragraph 1 of article 2 of the Protocol.

27. Forty-one states have signed that Protocol to the European Convention on Human Rights; 35 of these states have also ratified the Protocol. I do not consider that, in article 2, paragraph 2, of the Protocol, these 35 states (which were also parties to the ICCPR) intended to act at variance with any obligations under article 14(5) of the ICCPR. Rather, they were indicating that their view was that there was nothing in that provision which was efficacious to prohibit them from making exceptions to the obligation to provide for an appeal from a conviction. Certainly, with a total of 41 states (including the six states which signed the Seventh Protocol but have not yet ratified it) taking the position that a court of appeal could make a conviction even if there was no right of appeal from the conviction, it could not be said that there was any customary international law to the opposite effect.

28. Again, I consider that, given the special circumstances of the Tribunal, it acts within the realm of permissible exceptions when it makes a conviction on appeal in the absence of a right of appeal from that conviction.

29. Thus, whether the proper meaning of article 14(5) of the ICCPR is that it has the effect of imposing a prohibition on the making of a conviction on appeal unless there is a right of appeal from the conviction but permits a reservation being made to that prohibition, or that the prohibition is not absolute but itself permits of exceptions being made, it follows that a conviction may be made on appeal to the Appeals Chamber although there is no right of appeal from such a conviction. If, on the contrary, the view is held that such a conviction may be made but only on the basis that there is such a right of appeal, consideration may be given to certain structural implications of the suggested right of appeal and to the juridical force of any decision purporting to set aside such a conviction.

30. With respect to the structural aspects, if there is a right of appeal from a conviction made by the Appeals Chamber, to what body would it lie? There being no other appeals court, the appeal would have to lie to another panel of the same Appeals Chamber. But, since each panel

equally represents the Appeals Chamber, that looks like saying that a convicted person can appeal from the Appeals Chamber to the Appeals Chamber: the members may be different, but the institution is the same. So it bears observing that what is involved here is not a reconsideration. In a case of reconsideration, the later deciding entity is, in law, the same as the previous deciding entity. This case involves an appeal. In an appeal, there is a hierarchical relationship of authority between the two bodies, even if they otherwise have the same legal status. This is recognised in article 14(5) of the ICCPR, which speaks of the review being conducted by a "higher tribunal". One panel of the Appeals Chamber is not a "higher tribunal" than another panel of the Appeals Chamber: each is a form through which the same Appeals Chamber acts.

31. The structure of the Tribunal, as laid down by the Security Council, establishes a two-tier system. To suggest that there has to be a right of appeal from a conviction made by the Appeals Chamber is an attempt to create a three-tier system in which the second panel will be sitting as a "higher tribunal". That has to be done by the main law. It cannot be done by case law. Nor can it be done by amending the Rules.[22] Wide as the rule-making competence is, Rules made under article 14 of the Statute are intended to regulate matters which are "appropriate" to the functioning of the structure created by the Statute, not to vary it. Human rights cannot operate of their own force to amend the structure established by the Security Council; they will be effecting such an amendment if they are regarded as sufficient to give a right of appeal to a "higher tribunal" from a conviction made by the Appeals Chamber.

32. Further, if there is a right of appeal from one panel of the Appeals Chamber to another panel of the Appeals Chamber, it has to be remembered that a contempt, which was the subject of *Tadić*,[23] may equally be committed before the second panel. So there would have to be a right of appeal to a third panel, and so on. Several "higher tribunals" may be needed. The Tribunal would soon run out of available judicial personnel. In *Lonhro*,[24] for the reasons given in that case,[25] a contempt of the House of Lords was determined by another committee of the appellate committee

[22] This has been done in cases of contempt of the ICTY Appeals Chamber by Rule 77(K), passed on 12 July 2002 by the ICTY plenary. The validity of the provision may be considered.
[23] IT-94-1-A-AR77 of 27 February 2001.
[24] [1990] 2 A.C.178
[25] What happened was that the members of the original committee effectively recused themselves and so the second committee acted in their place. Lonhro had sent four of the five members of the original committee, individually, copies of certain offending material. Their "Lordships were therefore reluctant to leave Lonhro with a sense of grievance, however misguided, by insisting on hearing the proceedings themselves."([1990] 2 AC 178). That consideration does not apply where the offence is directed to the court in its corporate capacity; on the contrary, as was observed by Lord Keith in *Lonhro,* " ... the normal and natural forum for the hearing of contempt relating to proceedings before this House is the House itself." ([1990] 2 AC 176).

of the House. But there was no question of an appeal lying from the adjudicating committee to another committee.

33. An appeal from one formation of a judicial entity to another formation of the same entity – say, the plenary – may be possible, but only where such an appeal is authorised by the master law. In this case, has the master law - the Statute - done so? It seems to indicate the contrary intent. For, whatever the formation of the Appeals Chamber, by the Statute the formation can hear an appeal only from decisions of a lower body in the hierarchy. This is evidenced by paragraph 1 of article 24 of the Statute; paragraph 2 empowers the Appeals Chamber to "affirm, reverse or revise the decisions taken by the Trial Chambers". So the Statute did not contemplate that decisions of the Appeals Chamber could be challenged on appeal.[26] Even if the decision of the first panel of the Appeals Chamber is regarded as a decision made "in the first instance,"[27] that does not make that panel of the Appeals Chamber a "Trial Chamber". At any rate, in a case of the kind under review, the first panel does not hear the case in the same way as a Trial Chamber does; it hears the case on appeal.

34. With respect to the juridical force of the decision of the second panel of the Appeals Chamber, nothing in the Statute or in the ICCPR authorises the strangeness of an arrangement whereby one panel of the same judicial body can overturn a decision of, or remit to, or otherwise direct, another panel of the same judicial body. It is difficult to see that the Statute gives more juridical force to decisions of one panel of the Appeals Chamber than to those of another. Thus, two decisions of equal juridical force and on the same matter would be left on record. There would appear to be some difficulty in reconciling this with the implications of Judge Anzilotti's dictum that it "is clear that, in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences ... [E]ither the contradiction is only apparent ... or else one [rule] prevails over the other ..."[28]

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[26] The "gatekeeping" character of a bench of three judges of the Appeals Chamber is not being considered; in any event, there is really no appeal from their decision to the full Appeals Chamber on whether an appeal should go forward, even though the latter may come to a different conclusion as to whether the appeal should have been referred to it.

[27] In *Tadić*, IT-94-1-A-AR77 of 27 February 2001, para. (i) of the operative paragraph stated that "the Judgement of the Appeals Chamber, ruling in the first instance is upheld." As a nullity cannot be upheld, the implication is that the validity of the judgment of the Appeals Chamber in so far as it concerned conviction, which was sought to be appealed from, was recognised.

[28] *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 77*, p. 90, dissenting opinion; and see, *ibid.*, at p. 105 per Judge Urrutia, also dissenting. Mr Elihu Lauterpacht, Q.C., thought that Judge Anzilotti's view could be

35. Apart from the contempt decision of the ICTY Appeals Chamber in *Tadic*,[29] there is no precedent for empowering one panel of the Appeals Chamber to hear an appeal from a decision by another panel of the same Chamber. My respectful view is that, in this Appeals Chamber, preference is to be given to the dissenting opinion of Judge Wald in that case.

36. These difficulties in the "panel" solution lead to examination of an alternative possibility. This is that the Appeals Chamber, if it considers that there should be a conviction, should refrain from convicting and instead refer the case to the Trial Chamber in order to preserve a right of appeal from a conviction made by the latter. But the idea is not persuasive. This is because the Trial Chamber can scarcely disregard the indications previously given by the Appeals Chamber if it is to reverse its decision to acquit, and because an ultimate appeal to the Appeals Chamber would collide with those same indications. The principle of fairness which is sought to be served would thus be defeated.

37. If, as I think, nothing in conventional law, customary international law, or general principles of law prohibits the making of a conviction by the Appeals Chamber in lieu of an acquittal by a Trial Chamber and without a right of appeal from the conviction, is the position different in respect of sentencing by the Appeals Chamber for such a conviction? It is difficult to see why. Sentencing is a consequence of conviction and is complementary to the latter. Accordingly, it is expected to be done by the convicting tribunal. In particular circumstances, the Appeals Chamber may remand the case to a Trial Chamber for sentence to be passed in respect of a conviction made by the Appeals Chamber.[30] But, if that is possible in some circumstances, it is not obligatory in all circumstances. The reason for it cannot be the object of providing the accused with a right of appeal. If, as I consider, there is no right of appeal from a conviction by the Appeals Chamber, it is difficult to see why there has to be a right of appeal from a sentence passed by it for such a conviction.

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challenged but he did not pursue the point. See *1973 I.C.J. Pleadings, Nuclear Tests (Australia v. France)*, Vol. 1, p. 238.

[29] IT-94-1-A-AR77 of 27 February 2001.

[30] This was done in *Tadić*, IT-94-1-A, of 10 September 1999. Initially the Appeals Chamber deferred sentencing, by itself, to a further stage of the appeal proceedings. See *Tadić*, IT-94-1-A, of 15 July 1999, para. 327(6), in which it said that it was deferring "sentencing on the Counts mentioned in sub-paragraphs (4) and (5) above to a further stage of sentencing proceedings". In later remitting sentencing to a Trial Chamber, the Appeals Chamber in *Tadić* was careful to say "that, for the purposes of this case, it is sufficient for the Appeals Chamber to decide ... that it is competent to remit sentencing to a Trial Chamber and that in the circumstances of the case it is preferable to do so". This was said after it was noted that the parties had "indicated that they recognised the competence of the Appeals Chamber itself to pronounce sentences but considered that the Appeals Chamber was also competent to remit sentencing to a Trial Chamber, which latter course they considered preferable in the circumstances of the case". See IT-94-1-A, of 10 September 1999, p. 3. The Appeals Chamber did not tie itself to a position that it was not competent both to convict and to sentence.

C. Conclusion

38. One of two possible grounds for objecting to the competence of the Appeals Chamber to substitute a conviction for an acquittal by the Trial Chamber is that there is no right of appeal from a conviction made by the Appeals Chamber. If, indeed, there is a right of appeal from a conviction made by the Appeals Chamber, as was thought to be the position in *Tadic*[31] and as was sought to be implemented in that case, that answers the objection and so leaves the Appeals Chamber free to make a conviction. However, for the reasons given, I do not think the objection is sound: there is no right of appeal from a conviction by the Appeals Chamber but this does not prevent the Appeals Chamber from making such a conviction. The other possible ground of challenge to the competence of the Appeals Chamber – or to part of its competence - to substitute a conviction for an acquittal by a Trial Chamber is that this may be done provided that the conviction is not based on facts. For the reasons given, I do not think that argument is right.

39. It is possible that, if many appeals were successively available, an acquittal by the court of first instance could be replaced by a conviction by the first appeal court, only in turn to be restored by the second appeal court, to be in turn replaced by a conviction by the third appeal court, and so on. The suggestion of decisional futility is not surprising. In one jurisdiction, it was once estimated that about 33 per cent. of all appeals succeeded, whether from the lower courts to an intermediate court of appeal or from the latter to a higher court of appeal. Thus, as it was observed, there was "no reason for believing that if there was a higher tribunal still the proportion of successful appeals to it would not reach at least that figure."[32] To insist on further rights of appeal is to ignore the truth that the "fundamental human right is not to a legal system which is infallible but to one that is fair."[33] That has to be borne in mind in designing the architecture of a legal system: there has to be an end to litigation.

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[31] IT-94-1-A-AR77, of 27 February 2001.

[32] Lord Justice Atkin, "Appeal in English Law" (1927-29), 3 Camb. L.J. 1, at 9.

[33] *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)*, [1979] A.C. 385, P.C., at 399, per Lord Diplock. See also *Bell v. Director of Public Prosecutions (Jamaica)*, [1985] 1 A.C. 937, P.C., per Lord Templeman.

40. Thus, I hold that there is no right of appeal from a conviction made by the Appeals Chamber, but that, notwithstanding the absence of such a right of appeal, the Appeals Chamber is competent to make a conviction, whether or not this is based on facts.

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

Mohamed Shahabuddeen

Dated this 26th day of May 2003
At Arusha
Tanzania

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PROSECUTION INDEX OF AUTHORITIES

ANNEX 4.

Article 2(1) of Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, *entered into force* Nov. 1, 1988.

Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, *entered into force* Nov. 1, 1988.

Article 2

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 5.

Prosecutor v. Zejnil Delalic, Zdravko Mucic, also known as "Pavo", Hazim Delic and Esad Landzo, IT-96-21-T, "Decision on Application for Leave To Appeal (Provisional Release) by Hazim Delic, 22 November 1996.

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BEFORE A BENCH OF THE APPEALS CHAMBER

Before: Judge Antonio Cassese, Presiding

Judge Haopei Li

Judge Jules Deschênes

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 22 November 1996

PROSECUTOR

v.

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

DECISION ON APPLICATION FOR LEAVE TO APPEAL (PROVISIONAL RELEASE) BY HAZIM DELIC

The Office of the Prosecutor

Mr. Eric Ostberg

Ms. Teresa McHenry

Mr. Giuliano Turone

Counsel for the Accused

Mr. Salih Karabdic for Hazim Delic

I

APPLICATION FOR LEAVE TO APPEAL

1. In an application filed with the Registry on 5 November 1996, the accused seeks leave to appeal from the "Decision on Motion for Provisional Release filed by the accused Hazim Delic" ("*Decision*"),

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rendered by Trial Chamber II on 24 October 1996 in the case of *the Prosecutor v. Zejnil Delalic, Zdravko Mucic, also known as "Pavo", Hazim Delic and Esad Landzo* (IT-96-21-T). In the *Decision*, the Chamber denied the accused's motion for provisional release under Rule 65 of the Rules of Procedure and Evidence ("the Rules").

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

> (B) The Trial Chamber shall dispose of preliminary motions in *limine litis* and without interlocutory appeal, save
>
> [...]
>
> (ii) in other cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon serious cause being shown, within seven days following the impugned decision.

3. In his application, the Applicant argues that, under international law, there exists a fundamental right to liberty, and that this right must be guaranteed by judicial procedures which ensure that effective remedies exist to protect that right. It is argued that one such judicial remedy is the right to appeal which is available to an accused when his right not to be deprived of his liberty is violated.

4. The Applicant states that the Tribunal, being governed by international law, should provide for the right to appeal on decisions regarding detention. The Applicant asserts that the appellate proceedings as set out in Article 25 of the Statute of the Tribunal are meant to include not only the right to appeal upon conviction but also the right to appeal upon detention.

5. Thus concluding that there is a right to appeal upon detention, the Applicant challenges the procedure of the Tribunal pursuant to Rule 72 B(ii) of the Rules whereby an applicant, in order to appeal a Decision regarding provisional release, must first obtain leave to appeal from a Bench of three Judges, and may not appeal as a right before the full Appeals Chamber. The Applicant contends that the Statute of the Tribunal does not provide for the establishment of such a Bench and that the Judges of the Tribunal, having constituted such a Bench through the Rules of Procedure and Evidence, have acted *ultra vires*. The Applicant contends that the power to constitute such a Bench lies solely with the United Nations Security Council by way of amending the Statute of the Tribunal.

6. The Applicant further avers that leave to appeal under Rule 72(B)(ii) should not be limited to those matters specifically enumerated in Rule 73(A). He submits that the word "include" in Rule 73(A) demonstrates that the list of preliminary motions enumerated under 73(A) is not exhaustive.

7. The Applicant thus argues that the Rules of Procedure and Evidence contravene various international instruments by not allowing for the right to appeal upon detention as of right and that "serious cause", as per Rule 72 B(ii) of the Rules of Procedure and Evidence, has been shown, justifying the granting of leave to appeal.

II

PROSECUTION RESPONSE

8. The Prosecutor filed her reply to the Application on 11 November 1996. In the "Prosecution Response to Delic's Application for Leave to Appeal the Decision of the Trial Chamber denying Motion for Provisional Release" (*"Prosecution Response"),* the Prosecutor notes, first of all, that the accused's Application does not fulfil the first condition of the three-fold test of cumulative conditions adopted by the Bench of the Judges of the Appeals Chamber in their Decision in the *Delalic* case of 14 October 1996, and, therefore, applying that test, the Application must fail.

9. Addressing, nonetheless, the substantive arguments raised in the Application, the Prosecutor submits, as a general principle, that "absent an erroneous application of law or an abuse of discretion, the decision of the Trial Chamber must be respected". She avers that no such misapplication of the law or abuse of discretion in the Trial Chamber's Decision has been demonstrated by the Applicant, and hence that no "serious cause" justifying the granting of leave to appeal has been shown.

10. The Prosecutor rebuts the Applicant's claim that international human rights law entitles the Applicant to appeal the Trial Chamber's Decision on Provisional Release by arguing that the guarantees contained in the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms are incorporated in the Statute and Rules of the Tribunal, and that the Trial Chamber's review of detention under Rule 65 of the Rules of Procedure and Evidence satisfies the requirement of those human rights instruments that there be "an initial expeditious review, by a detached and objective judicial officer, of the deprivation of liberty and the necessity of continuing confinement". *Prosecution Response* at p.3. The Prosecution argues that, "No other 'generally proclaimed right of appeal' against a decision on deprivation of liberty can be found in international law". *Id.* at p.3.

11. Finally, the Prosecutor, responding indirectly, it would seem, to the Applicant's claim that leave to appeal under Rule 72(B)(ii) should not have been limited by the Bench of the Appeals Chamber to those matters specifically enumerated in Rule 73(A), argues that, since the accused "has no further rights under international law", the Tribunal "is free to shape its appellate jurisdiction as it sees fit". *Id.* at p.3.

III

SCOPE OF RULE 72(B)(ii)

12. Rule 72(B)(ii) was first applied in the "Decision on Application for Leave to Appeal (Separate Trials)" of this Bench on 14 October 1996 regarding the accused Zejnil Delalic. As this Bench noted, a three-fold test of cumulative conditions is to be applied whenever an application for leave to appeal under Rule 72(B)(ii) is concerned:

(1) Does the application relate to one of the issues covered by Rule 73 (A)(ii),(iii),(iv), (v).?

(2) Is the application frivolous, vexatious, manifestly ill-founded, an abuse of the process of court or so vague and imprecise as to be unsusceptible of any serious consideration?

(3) Does the application show a serious cause, namely does it either show a grave error in the decision which would cause substantial prejudice to the accused or is detrimental to the interests of justice or raise issues which are not only of general importance but are also directly relevant to the future development of trial proceedings, in that the decision by the Appeals Chamber

would seriously impact upon further proceedings before the Trial Chamber?

IV

DISCUSSION

13. Applying the first of these tests, it is apparent that the application of Hazim Delic requesting provisional release, pursuant to Rule 65, does not relate to any one of the issues covered by Rule 73 (A) (ii),(iii),(iv),(v), and is therefore not within the interlocutory jurisdiction of Appeals Chamber.

14. Nevertheless, since the Applicant raises a number of fundamental issues, notably the right to liberty under international law and the legality of the Rules of Procedure and Evidence adopted by the Judges of the Tribunal, the Bench considers it proper to respond to the arguments raised in the Application.

15. The issues raised by the Applicant shall be dealt with under the following headings: (1) the right under international law to an effective remedy for a violation of a fundamental human right; (2) the scope of any "right to appeal" under international law; (3) the legality of Rule 72(B)(ii) and its establishment of a Bench of Judges to entertain applications for leave to appeal; and (4) the interpretation of Rule 72(B)(ii).

(1) the right under international law to an effective remedy for a violation of a fundamental human right

16. The right to liberty is without question a fundamental human right. The Applicant has cited a number of international human rights instruments in this connection, but the proposition is axiomatic. The right also entails the right to an effective remedy for deprivation or violation of that right.

17. The mistake which the Applicant makes, however, is to consider that the Trial Chamber, by denying the motion for provisional release, has violated the Applicant's right to liberty and that the Applicant is therefore entitled to an effective judicial remedy for that violation. The correct analysis is that the Trial Chamber *is the effective judicial remedy* for any alleged violation of the right to liberty. By applying to the Trial Chamber, the Applicant exercises his right to challenge the lawfulness of his detention and deprivation of liberty. The word "effective" does not mean that the Application has to *succeed*; this would be a nonsense. It is enough that the competent judicial authority reviews the position in accordance with the appropriate norms and human rights standards, which the Trial Chamber has done quite properly.

(2) the scope of any "right to appeal" under international law

18. It follows from this that, to the extent that the Applicant bases his right to appeal on a right to an effective judicial remedy, the argument is ill-founded. The Applicant has, however, also referred to a substantive right to review which is to be found in Article 14(5) of the International Covenant on Civil and Political Rights ("ICCPR"), which reads:

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

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19. It is clear, however, from the plain words of this Article, that the right to review in question applies only to *conviction and sentence*, not to provisional release or other interlocutory matters. This substantive provision is, in any case, reproduced in the Tribunal's Statute which also provides for the right to appeal from conviction (Article 25). Although the Statute is silent on the question of appeal from sentence, the Judges sitting in plenary considered that such a right to appeal was to be implied and so Rule 108(A) explicitly provides for appeal from "judgement or sentence". Hence the substantive guarantees contained in Article 14(5) of the ICCPR are also guaranteed in the Tribunal's proceedings.

(3) the legality of Rule 72(B)(ii) and its establishment of a Bench of Judges to entertain applications for leave to appeal

20. Paradoxically, while applying for leave to appeal from the Bench, the Applicant also challenges the legality of establishing such a Bench in the first place. The Applicant considers that the Appeals Chamber can only sit as a Chamber of five judges and there is no authority for a three-member panel.

21. The Applicant's assertion that the appellate proceedings as set out in Article 25 of the Statute of the Tribunal are meant to include also the right to appeal upon detention cannot be sustained by the express provisions of that Article. As the Appeals Chamber has noted (See "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" in the *Tadic* case (IT-94-1-AR72), paras 4 -5)), Rule 72 has *broadened* the right to appeal from the very limited right to appeal provided for in the Statute. Rule 72 has thus enhanced and strengthened the judicial rights of the accused (and, consequently, those of the Prosecutor, on account of the principle of "equality of arms"). Since they introduced ex novo interlocutory appeal, the Judges had the authority to lay down conditions for its use, notably by providing the "filter mechanism" of Rule 72(B)(ii) for appeals other than those concerning jurisdiction. This "filter mechanism" was set up in the interest of good and expeditious administration of justice, namely for the purpose of promptly rejecting abusive interlocutory appeals while promptly admitting admissible interlocutory appeals. The Judges also had the authority to lay down in their jurisprudence the test to be applied for granting leave to appeal under Rule 72(B)(ii), which brings us to the next point.

(4) the interpretation of Rule 72(B)(ii).

22. Without explicitly mentioning the Bench's Decision in the *Delalic* case ("Application for leave to appeal (Separate Trials)"), where the Bench laid down a three-fold test for the granting of leave to appeal, the Applicant nevertheless indirectly challenges the first limb of that test when he argues that: "The interlocutory appeal according to Rule 72(B)(ii) cannot be limited only to objection mentioned in the Rule 73(A)(ii),(iii),(iv) and (v)". He bases his argument on the word, "include" in Rule 73(A), which "shows that the list of preliminary motions enumerated in that sub-Rule does not exclude the possibility of some other preliminary motions". The Applicant is quite right to consider that Rule 73(A) does not preclude the accused from bringing motions other than those specifically mentioned in Rule 73(A). What is significant about the motions mentioned in Rule 73(A), however, is that they must, according to Rule 73(B), be brought within sixty days after the accused's initial appearance, and, in any case, before the hearing on the merits, indicating that they are important preliminary matters which must be brought at an early stage. It was for this reason that the Bench considered that only those motions should be subject to possible interlocutory appeal under Rule 72(B)(ii). Provisional release, on the other hand, is not by its nature an application which must be brought prior to trial and a matter which is therefore essentially preliminary. As the Bench remarked in the *Delalic* (provisional release) application for leave to appeal, an application for provisional release can indeed be brought at any time.

23. For good measure, it should be added that, in considering whether leave to appeal should be granted, the Bench should not lose sight of the Decision itself which is challenged. Its objective merits should weigh heavily in the balance and should not be interfered with light-heartedly.

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24. In the instant case, Trial Chamber II has quite fairly set out and analysed the various arguments advanced by Delic and has disposed of them convincingly. The Applicant has failed to show any serious ground of complaint against either the discussion or the disposition of his motion for provisional release.

25. Indeed the Applicant has not even alleged, still less established, either that the Trial Chamber misdirected itself on the law or misapprehended the factual underpinnings of his motion for release.

26. For these reasons, the Bench considers that the Application has not demonstrated "serious cause" within the meaning of Rule 72(B)(ii) of the Rules of Procedure and Evidence and leave to appeal must therefore be refused.

V

DISPOSITION

The Bench of the Appeals Chamber,

Ruling unanimously,

For the above reasons,

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

REJECTS the application of Accused Hazim Delic for leave to appeal the Decision of 24 October 1996 denying his motion for provisional release.

DONE in English and French, both versions being authoritative.

Antonio
Cassese

President

Dated this 22nd day of November 1996

At The Hague

The Netherlands

PROSECUTION INDEX OF AUTHORITIES

ANNEX 6.

Prosecutor v. Tadic, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", IT-94-1-AR72, App. Ch., 2 October 1995.

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Before:
Judge Cassese, Presiding
Judge Li
Judge Deschênes
Judge Abi-Saab Judge Sidhwa

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 October 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simic

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

2. Before the Trial Chamber, Appellant had launched a three-pronged attack: 2574

a) illegal foundation of the International Tribunal;
b) wrongful primacy of the International Tribunal over national courts;
c) lack of jurisdiction *ratione materiae.*

The judgement under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

> "THE TRIAL CHAMBER [. . .]HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal." (Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, 10 August 1995 (Case No. IT-94-1-T), at 33 (hereinafter *Decision at Trial*).)

Appellant now alleges error of law on the part of the Trial Chamber.

3. As can readily be seen from the operative part of the judgement, the Trial Chamber took a different approach to the first ground of contestation, on which it refused to rule, from the route it followed with respect to the last two grounds, which it dismissed. This distinction ought to be observed and will be referred to below.
From the development of the proceedings, however, it now appears that the question of jurisdiction has acquired, before this Chamber, a two-tier dimension:

a) the jurisdiction of the Appeals Chamber to hear this appeal;
b) the jurisdiction of the International Tribunal to hear this case on the merits.

Before anything more is said on the merits, consideration must be given to the preliminary question: whether the Appeals Chamber is endowed with the jurisdiction to hear this appeal at all.

B. Jurisdiction Of The Appeals Chamber

4. Article 25 of the Statute of the International Tribunal (Statute of the International Tribunal (originally published as annex to *the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)* (U.N. Doc. S/25704) and adopted pursuant to Security Council resolution 827 (25 May 1993) (hereinafter *Statute of the International Tribunal*)) adopted by the United Nations Security Council opens up the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal (International Covenant on Civil and Political Rights, 19 December 1966, art. 14, para. 5, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) (hereinafter *ICCPR*)).

As the Prosecutor of the International Tribunal has acknowledged at the hearing of 7 and 8 September 1995, the Statute is general in nature and the Security Council surely expected that it would be supplemented, where advisable, by the rules which the Judges were mandated to adopt, especially for "*Trials and Appeals*" (Art.15). The Judges did indeed adopt such rules: Part Seven of the Rules of Procedure and Evidence (Rules of Procedure and Evidence, 107-08 (adopted on 11 February 1994 pursuant to Article 15 of the Statute of the International Tribunal, as amended (IT/32/Rev. 5))

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(hereinafter *Rules of Procedure*)).

5. However, Rule 73 had already provided for "*Preliminary Motions by Accused*", including five headings. The first one is: "objections based on lack of jurisdiction." Rule 72 (B) then provides:

> "The Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction." (Rules of Procedure, Rule 72 (B).)

This is easily understandable and the Prosecutor put it clearly in his argument:

> "I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.
>
> Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.
>
> So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.
>
> [. . .]
>
> So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole." (Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, at 4 (hereinafter *Appeal Transcript*).)

The question has, however, been put whether the three grounds relied upon by Appellant really go to the jurisdiction of the International Tribunal, in which case only, could they form the basis of an interlocutory appeal. More specifically, can the legality of the foundation of the International Tribunal and its primacy be used as the building bricks of such an appeal?

In his Brief in appeal, at page 2, the Prosecutor has argued in support of a negative answer, based on the distinction between the validity of the creation of the International Tribunal and its jurisdiction. The second aspect alone would be appealable whilst the legality and primacy of the International Tribunal could not be challenged in appeal. (Response to the Motion of the Defence on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 7 July 1995 (Case No. IT-94-1-T), at 4 (hereinafter *Prosecutor Trial Brief*).)

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

C. Grounds Of Appeal

7. The Appeals Chamber has accordingly heard the parties on all points raised in the written pleadings. It has also read the *amicus curiae* briefs submitted by *Juristes sans Frontières* and the Government of the United States of America, to whom it expresses its gratitude.

8. Appellant has submitted two successive Briefs in appeal. The second Brief was late but, in the absence of any objection by the Prosecutor, the Appeals Chamber granted the extension of time requested by Appellant under Rule 116.
The second Brief tends essentially to bolster the arguments developed by Appellant in his original Brief. They are offered under the following headings:

a) unlawful establishment of the International Tribunal;
b) unjustified primacy of the International Tribunal over competent domestic courts;
c) lack of subject-matter jurisdiction.

The Appeals Chamber proposes to examine each of the grounds of appeal in the order in which they are raised by Appellant.

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

9. The first ground of appeal attacks the validity of the establishment of the International Tribunal.

A. Meaning Of Jurisdiction

10. In discussing the Defence plea to the jurisdiction of the International Tribunal on grounds of invalidity of its establishment by the Security Council, the Trial Chamber declared:

> "There are clearly enough matters of jurisdiction which are open to determination by the International Tribunal, questions of time, place and nature of an offence charged. These are properly described as jurisdictional, whereas the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather the lawfulness of its creation [. . .]" (Decision at Trial, at para. 4.)

There is a *petitio principii* underlying this affirmation and it fails to explain the criteria by which it the

Trial Chamber disqualifies the plea of invalidity of the establishment of the International Tribunal as a plea to jurisdiction. What is more important, that proposition implies a narrow concept of jurisdiction reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (*ratione temporis, loci, personae and materiae*). But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is visible from the Latin origin of the word itself, *jurisdictio* - a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.

This is the meaning which it carries in all legal systems. Thus, historically, in common law, the **Termes de la ley** provide the following definition:

> "jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him." (Stroud's Judicial Dictionary, 1379 (5th ed. 1986).)

The same concept is found even in current dictionary definitions:

> "[Jurisdiction] is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." Black's Law Dictionary, 712 (6th ed. 1990) (citing Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633).)

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

B. Admissibility Of Plea Based On The Invalidity Of The Establishment Of The International Tribunal

13. Before the Trial Chamber, the Prosecutor maintained that:

> (1) the International Tribunal lacks authority to review its establishment by the Security Council (Prosecutor Trial Brief, at 10-12); and that in any case
> (2) the question whether the Security Council in establishing the International Tribunal complied with the United Nations Charter raises "political questions" which are "non-justiciable" (id. at 12-14).

The Trial Chamber approved this line of argument.

This position comprises two arguments: one relating to the power of the International Tribunal to consider such a plea; and another relating to the classification of the subject-matter of the plea as a "political question" and, as such, "non-justiciable", i.e.", regardless of whether or not it falls within its jurisdiction.

1. Does The International Tribunal Have Jurisdiction?

14. In its decision, the Trial Chamber declares:

> "[I]t is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal." (Decision at Trial, at para. 8.)

Both the first and the last sentences of this quotation need qualification. The first sentence assumes a subjective stance, considering that jurisdiction can be determined exclusively by reference to or inference from the intention of the Security Council, thus totally ignoring any residual powers which may derive from the requirements of the "judicial function" itself. That is also the qualification that needs to be added to the last sentence.

Indeed, the jurisdiction of the International Tribunal, which is defined in the middle sentence and described in the last sentence as "the full extent of the competence of the International Tribunal", is not, in fact, so. It is what is termed in international law "original" or "primary" and sometimes "substantive" jurisdiction. But it does not include the "incidental" or "inherent" jurisdiction which derives automatically from the exercise of the judicial function.

15. To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council (see United Nations Charter, Arts. 7(2) & 29), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal.

16. In treating a similar case in its advisory opinion on the *Effect of Awards of the United Nations Administrative Tribunal,* the International Court of Justice declared:

> "[T]he view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgements cannot bind the General Assembly which established it.
>
> [. . .]
>
> The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was

established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body." (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. Reports 47, at 60-1 (Advisory Opinion of 13 July) (hereinafter *Effect of Awards*).)

17. Earlier, the Court had derived the judicial nature of the United Nations Administrative Tribunal ("UNAT") from the use of certain terms and language in the Statute and its possession of certain attributes. Prominent among these attributes of the judicial function figures the power provided for in Article 2, paragraph 3, of the Statute of UNAT:

> "In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal." (Id. at 51-2, *quoting* Statute of the United Nations Administrative Tribunal, art. 2, para. 3.)

18. This power, known as the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction." It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done (see, e.g., Statute of the International Court of Justice, Art. 36, para. 6). But in the words of the International Court of Justice:

> "[T]his principle, which is accepted by the general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal [. . .] but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation." (Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. Reports 7, 119 (21 March).)

This is not merely a power in the hands of the tribunal. In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court - as of any other judicial body - is to ascertain its own competence." (Judge Cordova, dissenting opinion, advisory opinion on Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 I.C.J. Reports, 77, 163 (Advisory Opinion of 23 October)(Cordova, J., dissenting).)

19. It is true that this power can be limited by an express provision in the arbitration agreement or in the constitutive instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character or the independence of the Tribunal. But it is absolutely clear that such a limitation, to the extent to which it is admissible, cannot be inferred without an express provision allowing the waiver or the shrinking of such a well-entrenched principle of general international law.
As no such limitative text appears in the Statute of the International Tribunal, the International Tribunal can and indeed has to exercise its "*compétence de la compétence*" and examine the jurisdictional plea of the Defence, in order to ascertain its jurisdiction to hear the case on the merits.

20. It has been argued by the Prosecutor, and held by the Trial Chamber that:

> "[T]his International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers,

> involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council." (Decision at Trial, at para. 5; *see also* paras. 7, 8, 9, 17, 24, *passim.*)

There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own "creator." It was not established for that purpose, as is clear from the definition of the ambit of its "primary" or "substantive" jurisdiction in Articles 1 to 5 of its Statute.

But this is beside the point. The question before the Appeals Chamber is whether the International Tribunal, in exercising this "incidental" jurisdiction, can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own "primary" jurisdiction over the case before it.

21. The Trial Chamber has sought support for its position in some dicta of the International Court of Justice or its individual Judges, (see Decision at Trial, at paras. 10 - 13), to the effect that:

> "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Reports 16, at para. 89 (Advisory Opinion of 21 June) (hereafter the *Namibia Advisory Opinion*).)

All these dicta, however, address the hypothesis of the Court exercising such judicial review as a matter of "primary" jurisdiction. They do not address at all the hypothesis of examination of the legality of the decisions of other organs as a matter of "incidental" jurisdiction, in order to ascertain and be able to exercise its "primary" jurisdiction over the matter before it. Indeed, in the *Namibia Advisory Opinion*, immediately after the dictum reproduced above and quoted by the Trial Chamber (concerning its "primary" jurisdiction), the International Court of Justice proceeded to exercise the very same "incidental" jurisdiction discussed here:

> "[T]he question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions." (Id. at para. 89.)

The same sort of examination was undertaken by the International Court of Justice, *inter alia,* in its advisory opinion on the *Effect of Awards Case*:

> "[T]he legal power of the General Assembly to establish a tribunal competent to render judgements binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter." (Effect of Awards, at 56.)

Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter.

22. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.

2. Is The Question At Issue Political And As Such Non-Justiciable?

23. The Trial Chamber accepted this argument and classification. (See Decision at Trial, at para. 24.)

24. The doctrines of "political questions" and "non-justiciable disputes" are remnants of the reservations of "sovereignty", "national honour", etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the "political question" argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.

The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law. As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue. On this question, the International Court of Justice declared in its advisory opinion on *Certain Expenses of the United Nations:*

> "[I]t has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision." (Certain Expenses of the United Nations, 1962 I.C.J. Reports 151, at 155 (Advisory Opinion of 20 July).)

This dictum applies almost literally to the present case.

25. The Appeals Chamber does not consider that the International Tribunal is barred from examination of the Defence jurisdictional plea by the so-called "political" or "non-justiciable" nature of the issue it raises.

C. The Issue Of Constitutionality

26. Many arguments have been put forward by Appellant in support of the contention that the establishment of the International Tribunal is invalid under the Charter of the United Nations or that it was not duly established by law. Many of these arguments were presented orally and in written submissions before the Trial Chamber. Appellant has asked this Chamber to incorporate into the argument before the Appeals Chamber all the points made at trial. (See Appeal Transcript, 7 September 1995, at 7.) Apart from the issues specifically dealt with below, the Appeals Chamber is content to allow the treatment of these issues by the Trial Chamber to stand.

27. The Trial Chamber summarized the claims of the Appellant as follows:

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was

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never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong." (Decision at Trial, at para. 2.)

These arguments raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal. Put in the interrogative, they can be formulated as follows:

1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?
2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?
3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

1. The Power Of The Security Council To Invoke Chapter VII

28. Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It provides:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, 26 June 1945, Art. 39.)

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).

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In particular, Article 24, after declaring, in paragraph 1, that the Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security", imposes on it, in paragraph 3, the obligation to report annually (or more frequently) to the General Assembly, and provides, more importantly, in paragraph 2, that:

> "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII." (Id., Art. 24(2).)

The Charter thus speaks the language of specific powers, not of absolute fiat.

29. What is the extent of the powers of the Security Council under Article 39 and the limits thereon, if any?

The Security Council plays the central role in the application of both parts of the Article. It is the Security Council that makes the **determination** that there exists one of the situations justifying the use of the "exceptional powers" of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes **recommendations (i.e.,** opts not to use the exceptional powers but to continue to operate under Chapter VI) or decides to use the exceptional powers by ordering measures to be taken in accordance with Articles 41 and 42 with a view to maintaining or restoring international peace and security.
The situations justifying resort to the powers provided for in Chapter VII are a "threat to the peace", a "breach of the peace" or an "act of aggression." While the "act of aggression" is more amenable to a legal determination, the "threat to the peace" is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

30. It is not necessary for the purposes of the present decision to examine any further the question of the limits of the discretion of the Security Council in determining the existence of a "threat to the peace", for two reasons.

The first is that an armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words "breach of the peace" (between the parties or, at the very least, would be a as a "threat to the peace" of others).

But even if it were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.

The second reason, which is more particular to the case at hand, is that Appellant has amended his position from that contained in the Brief submitted to the Trial Chamber. Appellant no longer contests the Security Council's power to determine whether the situation in the former Yugoslavia constituted a

threat to the peace, nor the determination itself. He further acknowledges that the Security Council "has the power to address to such threats [. . .] by appropriate measures." [Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 August 1995 (Case No. IT-94-1-AR72), at para. 5.4 (hereinafter *Defence Appeal Brief*).) But he continues to contest the legality and appropriateness of the measures chosen by the Security Council to that end.

2. The Range of Measures Envisaged Under Chapter VII

31. Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action: as noted above (see para. 29) it can either continue, in spite of its determination, to act via recommendations, i.e., as if it were still within Chapter VI ("*Pacific Settlement of Disputes*") or it can exercise its exceptional powers under Chapter VII. In the words of Article 39, it would then "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, art. 39.)

A question arises in this respect as to whether the choice of the Security Council is limited to the measures provided for in Articles 41 and 42 of the Charter (as the language of Article 39 suggests), or whether it has even larger discretion in the form of general powers to maintain and restore international peace and security under Chapter VII at large. In the latter case, one of course does not have to locate every measure decided by the Security Council under Chapter VII within the confines of Articles 41 and 42, or possibly Article 40. In any case, under both interpretations, the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

These powers are **coercive** *vis-à-vis* the culprit State or entity. But they are also **mandatory** *vis-à-vis* the other Member States, who are under an obligation to cooperate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Articles 49), in the implementation of the action or measures decided by the Security Council.

3. The Establishment Of The International Tribunal As A Measure Under Chapter VII

32. As with the determination of the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace. But here again, this discretion is not unfettered; moreover, it is limited to the measures provided for in Articles 41 and 42. Indeed, in the case at hand, this last point serves as a basis for the Appellant's contention of invalidity of the establishment of the International Tribunal.

In its resolution 827, the Security Council considers that "in the particular circumstances of the former Yugoslavia", the establishment of the International Tribunal "would contribute to the restoration and maintenance of peace" and indicates that, in establishing it, the Security Council was acting under Chapter VII (S.C. Res. 827, U.N. Doc. S/RES/827 (1993)). However, it did not specify a particular Article as a basis for this action.

Appellant has attacked the legality of this decision at different stages before the Trial Chamber as well

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as before this Chamber on at least three grounds:

> a) that the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; as witnessed by the fact that it figures nowhere in the provisions of that Chapter, and more particularly in Articles 41 and 42 which detail these measures;
>
> b) that the Security Council is constitutionally or inherently incapable of creating a judicial organ, as it is conceived in the Charter as an executive organ, hence not possessed of judicial powers which can be exercised through a subsidiary organ;
>
> c) that the establishment of the International Tribunal has neither promoted, nor was capable of promoting, international peace, as demonstrated by the current situation in the former Yugoslavia.

(a) What Article of Chapter VII Serves As A Basis For The Establishment Of A Tribunal?

33. The establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Articles 41 and 42.

Obviously, the establishment of the International Tribunal is not a measure under Article 42, as these are measures of a military nature, implying the use of armed force. Nor can it be considered a "provisional measure" under Article 40. These measures, as their denomination indicates, are intended to act as a "holding operation", producing a "stand-still" or a "cooling-off" effect, "without prejudice to the rights, claims or position of the parties concerned." (United Nations Charter, art. 40.) They are akin to emergency police action rather than to the activity of a judicial organ dispensing justice according to law. Moreover, not being enforcement action, according to the language of Article 40 itself ("before making the recommendations or deciding upon the measures provided for in Article 39"), such provisional measures are subject to the Charter limitation of Article 2, paragraph 7, and the question of their mandatory or recommendatory character is subject to great controversy; all of which renders inappropriate the classification of the International Tribunal under these measures.

34. *Prima facie*, the International Tribunal matches perfectly the description in Article 41 of "measures not involving the use of force." Appellant, however, has argued before both the Trial Chamber and this Appeals Chamber, that:"

> ...[I]t is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures." (Brief to Support the Motion [of the Defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 3.2.1 (hereinafter *Defence Trial Brief*).)

It has also been argued that the measures contemplated under Article 41 are all measures to be undertaken by Member States, which is not the case with the establishment of the International Tribunal.

35. The first argument does not stand by its own language. Article 41 reads as follows:"

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the

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severance of diplomatic relations." (United Nations Charter, art. 41.)

It is evident that the measures set out in Article 41 are merely illustrative **examples** which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force." It is a negative definition.

That the examples do not suggest judicial measures goes some way towards the other argument that the Article does not contemplate institutional measures implemented directly by the United Nations through one of its organs but, as the given examples suggest, only action by Member States, such as economic sanctions (though possibly coordinated through an organ of the Organization). However, as mentioned above, nothing in the Article suggests the limitation of the measures to those implemented by States. The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be.

Moreover, even a simple literal analysis of the Article shows that the first phrase of the first sentence carries a very general prescription which can accommodate both institutional and Member State action. The second phrase can be read as referring particularly to one species of this very large category of measures referred to in the first phrase, but not necessarily the only one, namely, measures undertaken directly by States. It is also clear that the second sentence, starting with "These [measures]" not "Those [measures]", refers to the species mentioned in the second phrase rather than to the "genus" referred to in the first phrase of this sentence.

36. Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can a fortiori undertake measures which it can implement directly via its organs, if it happens to have the resources to do so. It is only for want of such resources that the United Nations has to act through its Members. But it is of the essence of "collective measures" that they are collectively undertaken. Action by Member States on behalf of the Organization is but a poor substitute *faute de mieux,* or a "second best" for want of the first. This is also the pattern of Article 42 on measures involving the use of armed force.

In sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.

(b) Can The Security Council Establish A Subsidiary Organ With Judicial Powers?

37. The argument that the Security Council, not being endowed with judicial powers, cannot establish a subsidiary organ possessed of such powers is untenable: it results from a fundamental misunderstanding of the constitutional set-up of the Charter.

Plainly, the Security Council is not a judicial organ and is not provided with judicial powers (though it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings). The principal function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers.

38. The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace

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and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East ("UNEF") in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT. In its advisory opinion in the *Effect of Awards,* the International Court of Justice, in addressing practically the same objection, declared:

> "[T]he Charter does not confer judicial functions on the General Assembly [. . .] By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations." (Effect of Awards, at 61.)

(c) Was The Establishment Of The International Tribunal An Appropriate Measure?

39. The third argument is directed against the discretionary power of the Security Council in evaluating the appropriateness of the chosen measure and its effectiveness in achieving its objective, the restoration of peace.

Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.

It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).

40. For the aforementioned reasons, the Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.

4. Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be "Established By Law"?

41. Appellant challenges the establishment of the International Tribunal by contending that it has not been established by law. The entitlement of an individual to have a criminal charge against him determined by a tribunal which has been established by law is provided in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. It provides: "

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (ICCPR, art. 14, para. 1.)

Similar provisions can be found in Article 6(1) of the European Convention on Human Rights, which states: "

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]"(European Convention for the Protection of Human

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> Rights and Fundamental Freedoms, 4 November 1950, art. 6, para. 1, 213 U.N.T.S. 222 (hereinafter ECHR))

and in Article 8(1) of the American Convention on Human Rights, which provides: "

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law." (American Convention on Human Rights, 22 November 1969, art. 8, para. 1, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2 (hereinafter ACHR).)"

Appellant argues that the right to have a criminal charge determined by a tribunal established by law is one which forms part of international law as a "general principle of law recognized by civilized nations", one of the sources of international law in Article 38 of the Statute of the International Court of Justice. In support of this assertion, Appellant emphasises the fundamental nature of the "fair trial" or "due process" guarantees afforded in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. Appellant asserts that they are minimum requirements in international law for the administration of criminal justice.

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law."

43. Indeed, there are three possible interpretations of the term "established by law." First, as Appellant argues, "established by law" could mean established by a legislature. Appellant claims that the International Tribunal is the product of a "mere executive order" and not of a "decision making process under democratic control, necessary to create a judicial organisation in a democratic society." Therefore Appellant maintains that the International Tribunal not been "established by law." (Defence Appeal Brief, at para. 5.4.)

The case law applying the words "established by law" in the European Convention on Human Rights has favoured this interpretation of the expression. This case law bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. (See Zand v. Austria, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70, at 80 (1979); Piersack v. Belgium, App. No. 8692/79, 47 Eur. Ct. H.R. (ser. B) at 12 (1981); Crociani, Palmiotti, Tanassi and D'Ovidio v. Italy, App. Nos. 8603/79, 8722/79, 8723/79 & 8729/79 (joined) 22 Eur. Comm'n H.R. Dec. & Rep. 147, at 219 (1981).)

Or, put another way, the guarantee is intended to ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature.

It is clear that the legislative, executive and judicial division of powers which is largely followed in most

municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.

44. A second possible interpretation is that the words "established by law" refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions. In our view, one such body is the Security Council when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter.

According to Appellant, however, there must be something more for a tribunal to be "established by law." Appellant takes the position that, given the differences between the United Nations system and national division of powers, discussed above, the conclusion must be that the United Nations system is not capable of creating the International Tribunal unless there is an amendment to the United Nations Charter. We disagree. It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter. As set out above (paras. 28-40) we are of the view that the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII in the light of its determination that there exists a threat to the peace.

In addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the "representative" organ of the United Nations, the General Assembly: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions. (See G.A. Res. 48/88 (20 December 1993) and G.A. Res. 48/143 (20 December 1993), G.A. Res. 49/10 (8 November 1994) and G.A. Res. 49/205 (23 December 1994).)

45. The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.

This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. As noted by the Trial Chamber, at the time Article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law and not merely "established by law" (Decision at Trial, at para. 34). Two similar proposals to this effect were made (one

by the representative of Lebanon and one by the representative of Chile); if adopted, their effect would have been to prevent all *ad hoc* tribunals. In response, the delegate from the Philippines noted the disadvantages of using the language of "pre-established by law":

> "If [the Chilean or Lebanese proposal was approved], a country would never be able to reorganize its tribunals. Similarly it could be claimed that the Nürnberg tribunal was not in existence at the time the war criminals had committed their crimes." (*See* E/CN.4/SR 109. United Nations Economic and Social Council, Commission on Human Rights, 5th Sess., Sum. Rec. 8 June 1949, U.N. Doc. 6.)

As noted by the Trial Chamber in its Decision, there is wide agreement that, in most respects, the International Military Tribunals at Nuremberg and Tokyo gave the accused a fair trial in a procedural sense (Decision at Trial, at para. 34). The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.

This concern about *ad hoc* tribunals that function in such a way as not to afford the individual before them basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation of the phrase "established by law" contained in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. While the Human Rights Committee has not determined that "extraordinary" tribunals or "special" courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it "extraordinary" or not, should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights. (See General Comment on Article 14, H.R. Comm. 43rd Sess., Supp. No. 40, at para. 4, U.N. Doc. A/43/40 (1988), Cariboni v. Uruguay H.R.Comm. 159/83. 39th Sess. Supp. No. 40 U.N. Doc. A/39/40.) A similar approach has been taken by the Inter-American Commission. (*See*, e.g., Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am C.H.R., Annual Report 1973, OEA/Ser. P, AG/doc. 409/174, 5 March 1974, at 2-4.) The practice of the Human Rights Committee with respect to State reporting obligations indicates its tendency to scrutinise closely "special" or "extraordinary" criminal courts in order to ascertain whether they ensure compliance with the fair trial requirements of Article 14.

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the Judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.

47. In conclusion, the Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial. It is thus "established by law."

48. The first ground of Appeal: unlawful establishment of the International Tribunal, is accordingly dismissed.

III. UNJUSTIFIED PRIMACY OF THE INTERNATIONAL TRIBUNAL OVER COMPETENT

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DOMESTIC COURTS

49. The second ground of appeal attacks the primacy of the International Tribunal over national courts.

50. This primacy is established by Article 9 of the Statute of the International Tribunal, which provides:

"Concurrent jurisdiction

> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
>
> 2. *The International Tribunal shall have primacy over national courts.* At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." (Emphasis added.)

Appellant's submission is material to the issue, inasmuch as Appellant is expected to stand trial before this International Tribunal as a consequence of a request for deferral which the International Tribunal submitted to the Government of the Federal Republic of Germany on 8 November 1994 and which this Government, as it was bound to do, agreed to honour by surrendering Appellant to the International Tribunal. (United Nations Charter, art. 25, 48 & 49; Statute of the Tribunal, art. 29.2(e); Rules of Procedure, Rule 10.)

In relevant part, Appellant's motion alleges: " [The International Tribunal's] primacy over domestic courts constitutes an infringement upon the sovereignty of the States directly affected." ([Defence] Motion on the Jurisdiction of the Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 2.)

Appellant's Brief in support of the motion before the Trial Chamber went into further details which he set down under three headings:

(a) domestic jurisdiction;

(b) sovereignty of States;

(c) *jus de non evocando.*

The Prosecutor has contested each of the propositions put forward by Appellant. So have two of the *amicus curiae*, one before the Trial Chamber, the other in appeal.

The Trial Chamber has analysed Appellant's submissions and has concluded that they cannot be entertained.

51. Before this Chamber, Appellant has somewhat shifted the focus of his approach to the question of primacy. It seems fair to quote here Appellant's Brief in appeal:

> "The defence submits that the Trial Chamber should have denied it's [sic] competence to exercise primary jurisdiction while the accused was at trial in the Federal Republic of Germany and the German judicial authorities were adequately meeting their obligations under international law." (Defence Appeal Brief, at para. 7.5.)

However, the three points raised in first instance were discussed at length by the Trial Chamber and, even though not specifically called in aid by Appellant here, are nevertheless intimately intermingled when the issue of primacy is considered. The Appeals Chamber therefore proposes to address those three points but not before having dealt with an apparent confusion which has found its way into Appellant's brief.

52. In paragraph 7.4 of his Brief, Appellant states that "the accused was diligently prosecuted by the German judicial authorities"(*id.*, at para 7.4 (Emphasis added)). In paragraph 7.5 Appellant returns to the period "while the accused was at trial." (*id.*, at para 7.5 (Emphasis added.)
These statements are not in agreement with the findings of the Trial Chamber I in its decision on deferral of 8 November 1994:

> "The Prosecutor asserts, and it is not disputed by the Government of the Federal Republic of Germany, nor by the Counsel for Du{ko Tadic, that the said Du{ko Tadic is the subject of an *investigation* instituted by the national courts of the Federal Republic of Germany in respect of the matters listed in paragraph 2 hereof." (Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Du{ko Tadic, 8 November 1994 (Case No. IT-94-1-D), at 8 (Emphasis added).)

There is a distinct difference between an investigation and a trial. The argument of Appellant, based erroneously on the existence of an actual trial in Germany, cannot be heard in support of his challenge to jurisdiction when the matter has not yet passed the stage of investigation.

But there is more to it. Appellant insists repeatedly (*see* Defence Appeal Brief, at paras. 7.2 & 7.4) on impartial and independent proceedings diligently pursued and not designed to shield the accused from international criminal responsibility. One recognises at once that this vocabulary is borrowed from Article 10, paragraph 2, of the Statute. This provision has nothing to do with the present case. This is not an instance of an accused being tried anew by this International Tribunal, under the exceptional circumstances described in Article 10 of the Statute. Actually, the proceedings against Appellant were deferred to the International Tribunal on the strength of Article 9 of the Statute which provides that a request for deferral may be made "at any stage of the procedure" (Statute of the International Tribunal, art. 9, para. 2). The Prosecutor has never sought to bring Appellant before the International Tribunal for a new trial for the reason that one or the other of the conditions enumerated in Article 10 would have vitiated his trial in Germany. Deferral of the proceedings against Appellant was requested in accordance with the procedure set down in Rule 9 (iii):

> "What is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal [. . .]" (Rules of Procedure, Rule 9 (iii).)

After the Trial Chamber had found that that condition was satisfied, the request for deferral followed automatically. The conditions alleged by Appellant in his Brief were irrelevant.

Once this approach is rectified, Appellant's contentions lose all merit.

53. As pointed out above, however, three specific arguments were advanced before the Trial Chamber, which are clearly referred to in Appellant's Brief in appeal. It would not be advisable to leave this ground of appeal based on primacy without giving those questions the consideration they deserve.

The Chamber now proposes to examine those three points in the order in which they have been raised by

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Appellant.

A. Domestic Jurisdiction

54. Appellant argued in first instance that:

> "From the moment Bosnia-Herzegovina was recognised as an independent state, it had the competence to establish jurisdiction to try crimes that have been committed on its territory." (Defence Trial Brief, at para. 5.)

Appellant added that:

> "As a matter of fact the state of Bosnia-Herzegovina does exercise its jurisdiction, not only in matters of ordinary criminal law, but also in matters of alleged violations of crimes against humanity, as for example is the case with the prosecution of Mr Karadzic et al."(Id. at para. 5.2.)

This first point is not contested and the Prosecutor has conceded as much. But it does not, by itself, settle the question of the primacy of the International Tribunal. Appellant also seems so to realise. Appellant therefore explores the matter further and raises the question of State sovereignty.

B. Sovereignty Of States

55. Article 2 of the United Nations Charter provides in paragraph 1: "The Organization is based on the principle of the sovereign equality of all its Members."

In Appellant's view, no State can assume jurisdiction to prosecute crimes committed on the territory of another State, barring a universal interest "justified by a treaty or customary international law or an *opinio juris* on the issue." (Defence Trial Brief, at para. 6.2.)

Based on this proposition, Appellant argues that the same requirements should underpin the establishment of an international tribunal destined to invade an area essentially within the domestic jurisdiction of States. In the present instance, the principle of State sovereignty would have been violated. The Trial Chamber has rejected this plea, holding among other reasons:

> "In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from the State." (Decision at Trial, para. 41.)

The Trial Chamber relied on the judgement of the District Court of Jerusalem in *Israel v. Eichmann:*

> "The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State." (36 **International Law Reports** 5, 62 (1961), affirmed by Supreme Court of Israel, 36 **International Law Reports** 277 (1962).)

Consistently with a long line of cases, a similar principle was upheld more recently in the United States of America in the matter of *United States v. Noriega:*

> "As a general principle of international law, individuals have no standing to challenge violations

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> of international treaties in the absence of a protest by the sovereign involved." (746 F. Supp. 1506, 1533 (S.D. Fla. 1990).)

Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.

Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.

56. That Appellant be recognised the right to plead State sovereignty does not mean, of course, that his plea must be favourably received. He has to discharge successfully the test of the burden of demonstration. Appellant's plea faces several obstacles, each of which may be fatal, as the Trial Chamber has actually determined.

Appellant can call in aid Article 2, paragraph 7, of the United Nations Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State [. . .]." However, one should not forget the commanding restriction at the end of the same paragraph: "but this principle shall not prejudice the application of enforcement measures under Chapter VII." (United Nations Charter, art. 2, para. 7.)

Those are precisely the provisions under which the International Tribunal has been established. Even without these provisions, matters can be taken out of the jurisdiction of a State. In the present case, the Republic of Bosnia and Herzegovina not only has not contested the jurisdiction of the International Tribunal but has actually approved, and collaborated with, the International Tribunal, as witnessed by:

> a) Letter dated 10 August 1992 from the President of the Republic of Bosnia and Herzegovina addressed to the Secretary-General of the United Nations (U.N. Doc. E/CN.4/1992/S-1/5 (1992));
>
> b) Decree with Force of Law on Deferral upon Request by the International Tribunal 12 Official Gazette of the Republic of Bosnia and Herzegovina 317 (10 April 1995) (translation);
>
> c) Letter from Vasvija Vidovic, Liaison Officer of the Republic of Bosnia and Herzegovina, to the International Tribunal (4 July 1995).

As to the Federal Republic of Germany, its cooperation with the International Tribunal is public and has been previously noted.

The Trial Chamber was therefore fully justified to write, on this particular issue:

> "[I]t is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against

the accused - Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction." (Decision at Trial, at para. 41.)

57. This is all the more so in view of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind.

As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held:

"These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one.

[. . .]

The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be.

[. . .]

Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lèse-humanité (reati di lesa umanità)* and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed (articles 537 and 604 of the penal code)." (13 March 1950, in **Rivista Penale** 753, 757 (Sup. Mil. Trib., Italy 1950; unofficial translation).1

Twelve years later the Supreme Court of Israel in the *Eichmann* case could draw a similar picture:

"[T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct. [. . .]

Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilised nations.

[. . .]

> [T]hey involve the perpetration of an international crime which all the nations of the world are interested in preventing."(Israel v. Eichmann, 36 **International Law Reports** 277, 291-93 (Isr. S. Ct. 1962).)

58. The public revulsion against similar offences in the 1990s brought about a reaction on the part of the community of nations: hence, among other remedies, the establishment of an international judicial body by an organ of an organization representing the community of nations: the Security Council. This organ is empowered and mandated, by definition, to deal with trans-boundary matters or matters which, though domestic in nature, may affect "international peace and security" (United Nations Charter, art 2. (1), 2.(7), 24, & 37). It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity. In the Barbie case, the Court of Cassation of France has quoted with approval the following statement of the Court of Appeal:

> "[. . .]by reason of their nature, the crimes against humanity [. . .] do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign. *(Fédération Nationale de Déportés et Internés Résistants et Patriotes And Others v. Barbie,* 78 *International Law Reports* 125, 130 (Cass. crim.1983).)2

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes" (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being "designed to shield the accused", or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)).

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.

59. The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules 9 and 10 of the Rules of Procedure of the International Tribunal.

The Trial Chamber was fully justified in writing:

> "Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community."(Decision at Trial, at para. 42.)

60. The plea of State sovereignty must therefore be dismissed.

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C. *Jus De Non Evocando*

61. Appellant argues that he has a right to be tried by his national courts under his national laws.

No one has questioned that right of Appellant. The problem is elsewhere: is that right exclusive? Does it prevent Appellant from being tried - and having an equally fair trial (see Statute of the International Tribunal, art. 21) - before an international tribunal?

Appellant contends that such an exclusive right has received universal acceptance: yet one cannot find it expressed either in the Universal Declaration of Human Rights or in the International Covenant on Civil and Political Rights, unless one is prepared to stretch to breaking point the interpretation of their provisions.

In support of this stand, Appellant has quoted seven national Constitutions (Article 17 of the Constitution of the Netherlands, Article 101 of the Constitution of Germany (unified), Article 13 of the Constitution of Belgium, Article 25 of the Constitution of Italy, Article 24 of the Constitution of Spain, Article 10 of the Constitution of Surinam and Article 30 of the Constitution of Venezuela). However, on examination, these provisions do not support Appellant's argument. For instance, the Constitution of Belgium (being the first in time) provides:

> "**Art. 13**: No person may be withdrawn from the judge assigned to him by the law, save with his consent." (Blaustein & Flanz, Constitutions of the Countries of the World, (1991).)

The other constitutional provisions cited are either similar in substance, requiring only that no person be removed from his or her "natural judge" established by law, or are irrelevant to Appellant's argument.

62. As a matter of fact - and of law - the principle advocated by Appellant aims at one very specific goal: to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial.

This principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations. No rights of accused are thereby infringed or threatened; quite to the contrary, they are all specifically spelt out and protected under the Statute of the International Tribunal. No accused can complain. True, he will be removed from his "natural" national forum; but he will be brought before a tribunal at least equally fair, more distanced from the facts of the case and taking a broader view of the matter.

Furthermore, one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.

63. The objection founded on the theory of jus de non evocando was considered by the Trial Chamber which disposed of it in the following terms:

> "Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers

conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter." (Decision at Trial, at para. 37.)

No new objections were raised before the Appeals Chamber, which is satisfied with concurring, on this particular point, with the views expressed by the Trial Chamber.

64. For these reasons the Appeals Chamber concludes that Appellant's second ground of appeal, contesting the primacy of the International Tribunal, is ill-founded and must be dismissed.

IV. LACK OF SUBJECT-MATTER JURISDICTION

65. Appellant's third ground of appeal is the claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged. The basis for this allegation is Appellant's claim that the subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute of the International Tribunal is limited to crimes committed in the context of an international armed conflict. Before the Trial Chamber, Appellant claimed that the alleged crimes, even if proven, were committed in the context of an internal armed conflict. On appeal an additional alternative claim is asserted to the effect that there was no armed conflict at all in the region where the crimes were allegedly committed.

Before the Trial Chamber, the Prosecutor responded with alternative arguments that: (a) the conflicts in the former Yugoslavia should be characterized as an international armed conflict; and (b) even if the conflicts were characterized as internal, the International Tribunal has jurisdiction under Articles 3 and 5 to adjudicate the crimes alleged. On appeal, the Prosecutor maintains that, upon adoption of the Statute, the Security Council determined that the conflicts in the former Yugoslavia were international and that, by dint of that determination, the International Tribunal has jurisdiction over this case.

The Trial Chamber denied Appellant's motion, concluding that the notion of international armed conflict was not a jurisdictional criterion of Article 2 and that Articles 3 and 5 each apply to both internal and international armed conflicts. The Trial Chamber concluded therefore that it had jurisdiction, regardless of the nature of the conflict, and that it need not determine whether the conflict is internal or international.

A. Preliminary Issue: The Existence Of An Armed Conflict

66. Appellant now asserts the new position that there did not exist a legally cognizable armed conflict - either internal or international - at the time and place that the alleged offences were committed. Appellant's argument is based on a concept of armed conflict covering only the precise time and place of actual hostilities. Appellant claims that the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (though movements of tanks are admitted). This argument presents a preliminary issue to which we turn first.

67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of

fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 5, 75 U.N.T.S. 970 (hereinafter *Geneva Convention I*); Convention relative to the Treatment of Prisoners of War, 12 August 1949, art. 5, 75 U.N.T.S. 972 (hereinafter *Geneva Convention III*); *see also* Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, 75 U.N.T.S. 973 (hereinafter *Geneva Convention IV*).)

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

> "[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations." (Geneva Convention IV, art. 6, para. 2 (Emphasis added).)

Article 3(b) of Protocol I to the Geneva Conventions contains similar language. (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, art. 3(b), 1125 U.N.T.S. 3 (hereinafter *Protocol I*).) In addition to these textual references, the very nature of the Conventions - particularly Conventions III and IV - dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions (a treaty which, as we shall see in paragraphs 88 and 114 below, may be regarded as applicable to some aspects of the conflicts in the former Yugoslavia) also suggests a broad scope. First, like common Article 3, it explicitly protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities." (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, art. 4, para.1, 1125 U.N.T.S. 609 (hereinafter Protocol II). Article 2, paragraph 1, provides:

> "[t]his Protocol shall be applied [. . .] to all persons *affected* by an armed conflict as defined in Article 1."(Id. at art. 2, para. 1 (Emphasis added).)

The same provision specifies in paragraph 2 that:

"[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty."(*Id.* at art. 2, para. 2.)

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states that in 1992 Bosnian Serbs took control of the Opstina of Prijedor and established a prison camp in Omarska. It further alleges that crimes were committed against civilians inside and outside the Omarska prison camp as part of the Bosnian Serb take-over and consolidation of power in the Prijedor region, which was, in turn, part of the larger Bosnian Serb military campaign to obtain control over Bosnian territory. Appellant offers no contrary evidence but has admitted in oral argument that in the Prijedor region there were detention camps run not by the central authorities of Bosnia-Herzegovina but by Bosnian Serbs (Appeal Transcript; 8 September 1995, at 36-7). In light of the foregoing, we conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict.

B. Does The Statute Refer Only To International Armed Conflicts?

1. Literal Interpretation Of The Statute

71. On the face of it, some provisions of the Statute are unclear as to whether they apply to offences occurring in international armed conflicts only, or to those perpetrated in internal armed conflicts as well. Article 2 refers to "grave breaches" of the Geneva Conventions of 1949, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict. By contrast, Article 5 explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. An argument *a contrario* based on the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of conflict rather than to both of them. In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and

purpose behind the enactment of the Statute.

2. Teleological Interpretation Of The Statute

72. In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international.

As the members of the Security Council well knew, in 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof. The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven). It is notable that the parties to this case also agree that the conflicts in the former Yugoslavia since 1991 have had both internal and international aspects. (*See* Transcript of the Hearing on the Motion on Jurisdiction, 26 July 1995, at 47, 111.)

73. The varying nature of the conflicts is evidenced by the agreements reached by various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts, on 27 November 1991 representatives of the Federal Republic of Yugoslavia, the Yugoslavia Peoples' Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I to those Conventions. (See Memorandum of Understanding, 27 November 1991.) Significantly, the parties refrained from making any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives of Mr. Alija Izetbegovic (President of the Republic of Bosnia and Herzegovina and the Party of Democratic Action), Mr. Radovan Karadzic (President of the Serbian Democratic Party), and Mr. Miljenko Brkic (President of the Croatian Democratic Community) committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement No. 1, 22 May 1992, art. 2, paras. 1-6 (hereinafter **Agreement No. 1**).) Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross ("ICRC"), at

whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were **internal**, it would have acted blatantly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. ("No special agreement shall adversely affect the situation of [the protected persons] as defined by the present Convention, nor restrict the rights which it confers upon them." (Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7.) If the conflicts were, in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the aforementioned Geneva provisions. On account of the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal.

Taken together, the agreements reached between the various parties to the conflict(s) in the former Yugoslavia bear out the proposition that, when the Security Council adopted the Statute of the International Tribunal in 1993, it did so with reference to situations that the parties themselves considered at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict.

74. The Security Council's many statements leading up to the establishment of the International Tribunal reflect an awareness of the mixed character of the conflicts. On the one hand, prior to creating the International Tribunal, the Security Council adopted several resolutions condemning the presence of JNA forces in Bosnia-Herzegovina and Croatia as a violation of the sovereignty of these latter States. See, e.g., S.C. Res. 752 (15 May 1992); S.C.Res. 757 (30 May 1992); S.C. Res. 779 (6 Oct. 1992); S.C. Res. 787 (16 Nov. 1992). On the other hand, in none of these many resolutions did the Security Council explicitly state that the conflicts were international.

In each of its successive resolutions, the Security Council focused on the practices with which it was concerned, without reference to the nature of the conflict. For example, in resolution 771 of 13 August 1992, the Security Council expressed "grave alarm" at the

> "[c]ontinuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property." (S.C. Res. 771 (13 August 1992).)

As with every other Security Council statement on the subject, this resolution makes no mention of the nature of the armed conflict at issue. The Security Council was clearly preoccupied with bringing to justice those responsible for these specifically condemned acts, regardless of context. The Prosecutor makes much of the Security Council's repeated reference to the grave breaches provisions of the Geneva Conventions, which are generally deemed applicable only to international armed conflicts. This argument ignores, however, that, as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in internal armed conflicts as well.

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75. The intent of the Security Council to promote a peaceful solution of the conflict without pronouncing upon the question of its international or internal nature is reflected by the Report of the Secretary-General of 3 May 1993 and by statements of Security Council members regarding their interpretation of the Statute. The Report of the Secretary-General explicitly states that the clause of the Statute concerning the temporal jurisdiction of the International Tribunal was

> "clearly intended to convey the notion that no judgement as to the international or internal character of the conflict was being exercised." (Report of the Secretary-General, at para. 62, U.N. Doc. S/25704 (3 May 1993) (hereinafter *Report of the Secretary-General*).)

In a similar vein, at the meeting at which the Security Council adopted the Statute, three members indicated their understanding that the jurisdiction of the International Tribunal under Article 3, with respect to laws or customs of war, included any humanitarian law agreement in force in the former Yugoslavia. (See statements by representatives of France, the United States, and the United Kingdom, Provisional Verbatim Record of the 3217th Meeting, at 11, 15, & 19, U.N. Doc. S/PV.3217 (25 May 1993).) As an example of such supplementary agreements, the United States cited the rules on internal armed conflict contained in Article 3 of the Geneva Conventions as well as "the 1977 Additional Protocols to these [Geneva] Conventions [of 1949]." (*Id.* at 15). This reference clearly embraces Additional Protocol II of 1977, relating to internal armed conflict. No other State contradicted this interpretation, which clearly reflects an understanding of the conflict as both internal and international (it should be emphasized that the United States representative, before setting out the American views on the interpretation of the Statute of the International Tribunal, pointed out: "[W]e understand that other members of the [Security] Council share our view regarding the following clarifications related to the Statute."(*id.*)).

76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a *reductio ad absurdum* argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches", because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.

77. On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in

either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.

78. With the exception of Article 5 dealing with crimes against humanity, none of the statutory provisions makes explicit reference to the type of conflict as an element of the crime; and, as will be shown below, the reference in Article 5 is made to distinguish the nexus required by the Statute from the nexus required by Article 6 of the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg. Since customary international law no longer requires any nexus between crimes against humanity and armed conflict (*see below*, paras. 140 and 141), Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal. As previously noted, although Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions suggest that it is limited to international armed conflicts. It would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. To illustrate, the Security Council has repeatedly condemned the wanton devastation and destruction of property, which is explicitly punishable only under Articles 2 and 3 of the Statute. Appellant maintains that these Articles apply only to international armed conflicts. However, it would have been illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct about which they were concerned, only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both.

Thus, the Security Council's object in enacting the Statute - to prosecute and punish persons responsible for certain condemned acts being committed in a conflict understood to contain both internal and international aspects - suggests that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts.

In light of this understanding of the Security Council's purpose in creating the International Tribunal, we turn below to discussion of Appellant's specific arguments regarding the scope of the jurisdiction of the International Tribunal under Articles 2, 3 and 5 of the Statute.

3. Logical And Systematic Interpretation Of The Statute

(a) Article 2

79. Article 2 of the Statute of the International Tribunal provides:

> "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (a) wilful killing;
>
> (b) torture or inhuman treatment, including biological experiments;

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

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

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

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

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

(h) taking civilians as hostages."

By its explicit terms, and as confirmed in the Report of the Secretary-General, this Article of the Statute is based on the Geneva Conventions of 1949 and, more specifically, the provisions of those Conventions relating to "grave breaches" of the Conventions. Each of the four Geneva Conventions of 1949 contains a "grave breaches" provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate (see, e.g.,[*Amicus Curiae*] Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, 17 July 1995, (Case No. IT-94-1-T), at 35-6 (hereinafter, *U.S. Amicus Curiae Brief*), it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. Appellant argues that, as the grave breaches enforcement system only applies to international armed conflicts, reference in Article 2 of the Statute to the grave breaches provisions of the Geneva Conventions limits the International Tribunal's jurisdiction under that Article to acts committed in the context of an international armed conflict. The Trial Chamber has held that Article 2:

> "[H]as been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of 'persons or property protected'."
>
> [. . .]
>
> [T]he requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met.
>
> [. . .]
>
> [T]here is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention [sic] to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things." (Decision at Trial, at paras. 49-51.)

80. With all due respect, the Trial Chamber's reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal.

The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches." The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system.

81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of "grave breaches." However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: "persons or property protected under the provisions of the relevant Geneva Conventions." (Statute of the Tribunal, art. 2.) For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of "protected persons or property" must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions.

82. The above interpretation is borne out by what could be considered as part of the preparatory works of the Statute of the International Tribunal, namely the Report of the Secretary-General. There, in introducing and explaining the meaning and purport of Article 2 and having regard to the "grave breaches" system of the Geneva Conventions, reference is made to "international armed conflicts" (Report of the Secretary-General at para. 37).

83. We find that our interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2. However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (see paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the *amicus curiae* brief submitted by the Government of the United States, where it is contended that:

> "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." (U.S. *Amicus Curiae* Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its

significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual mentioned below (para. 131), whereby grave breaches of international humanitarian law include some violations of common Article 3. In addition, attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (*see above,* para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the "grave breaches" provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (see id. at 7-8)). This judgement indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal.

84. Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts.

85. Before the Trial Chamber, the Prosecutor asserted an alternative argument whereby the provisions on grave breaches of the Geneva Conventions could be applied to internal conflicts on the strength of some agreements entered into by the conflicting parties. For the reasons stated below, in Section IV C (para. 144), we find it unnecessary to resolve this issue at this time.

(b) Article 3

86. Article 3 of the Statute declares the International Tribunal competent to adjudicate violations of the laws or customs of war. The provision states:

> "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

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

(e) plunder of public or private property."

As explained by the Secretary-General in his Report on the Statute, this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal's interpretation of those Regulations. Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is *in casu* an internal armed conflict; therefore, to the extent that the jurisdiction of the International Tribunal under Article 3 is based on the Hague Regulations, it lacks jurisdiction under Article 3 to adjudicate alleged violations in the former Yugoslavia. Appellant's argument does not bear close scrutiny, for it is based on an unnecessarily narrow reading of the Statute.

(i) The Interpretation of Article 3

87. A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict. As stated above, it is clear from the Report of the Secretary-General that the old-fashioned expression referred to above was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto (Report of the Secretary-General, at para. 41). However, as the Report indicates, the Hague Convention, considered *qua* customary law, constitutes an important area of humanitarian international law. (*Id.*) In other words, the Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law" and that the so-called "Hague Regulations" constitute an important segment of such law. Furthermore, the Secretary-General has also correctly admitted that the Hague Regulations have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in hostilities (prisoners of war), the wounded and the sick) but also the conduct of hostilities; in the words of the Report: "The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions." (Id., at para. 43.) These comments suggest that Article 3 is intended to cover both Geneva and Hague rules law. On the other hand, the Secretary-General's subsequent comments indicate that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions (*id.*, at paras. 43-4). As pointed out above, this list is, however, merely illustrative: indeed, Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover **all violations** of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

88. That Article 3 does not confine itself to covering violations of Hague law, but is intended also to refer to all violations of international humanitarian law (subject to the limitations just stated), is borne out by the debates in the Security Council that followed the adoption of the resolution establishing the International Tribunal. As mentioned above, three Member States of the Council, namely France, the United States and the United Kingdom, expressly stated that Article 3 of the Statute also covers obligations stemming from agreements in force between the conflicting parties, that is Article 3 common to the Geneva Conventions and the two Additional Protocols, as well as other agreements entered into by the conflicting parties. The French delegate stated that:

> "[T]he expression 'laws or customs of war' used in Article 3 of the Statute covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed." (Provisional Verbatim Record of the 3217th Meeting, at 11, U.N. Doc. S/PV.3217 (25 May 1993).)

The American delegate stated the following:

> "[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute:
>
> Firstly, it is understood that the 'laws or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions." (Id., at p. 15.)

The British delegate stated:

> "[I]t would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions." (*Id.*, at p. 19.)

It should be added that the representative of Hungary stressed:

> "the importance of the fact that the jurisdiction of the International Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of the former Yugoslavia." (*Id.*, at p. 20.)

Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law.

89. In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law (on this point *see below,* para. 143).

90. The Appeals Chamber would like to add that, in interpreting the meaning and purport of the expressions "violations of the laws or customs of war" or "violations of international humanitarian law",

one must take account of the context of the Statute as a whole. A systematic construction of the Statute emphasises the fact that various provisions, in spelling out the purpose and tasks of the International Tribunal or in defining its functions, refer to "**serious violations**" of international humanitarian law" (*See* Statute of the International Tribunal, Preamble, arts. 1, 9(1), 10(1)-(2), 23(1), 29(1) (Emphasis added.)). It is therefore appropriate to take the expression "violations of the laws or customs of war" to cover serious violations of international humanitarian law.

91. Article 3 thus confers on the International Tribunal jurisdiction over **any** serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely "grave breaches" of the Geneva Conventions or violations of the "Hague law." Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

93. The above interpretation is further confirmed if Article 3 is viewed in its more general perspective, that is to say, is appraised in its historical context. As the International Court of Justice stated in the *Nicaragua* case, Article 1 of the four Geneva Conventions, whereby the contracting parties "undertake to respect and ensure respect" for the Conventions "in all circumstances", has become a "general principle [. . .] of humanitarian law to which the Conventions merely give specific expression." (Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), 1986 I.C.J. Reports 14, at para. 220 (27 June) (hereinafter *Nicaragua Case*). This general principle lays down an obligation that is incumbent, not only on States, but also on other international entities including the United Nations. It was with this obligation in mind that, in 1977, the States drafting the two Additional Protocols to the Geneva Conventions agreed upon Article 89 of Protocol I, whereby:

> "In situations of **serious violations** of the Conventions or of this Protocol, the High Contracting Parties **undertake to act, jointly or individually, in co-operation with the United Nations** and in conformity with the United Nations Charter." (Protocol I, at art. 89 (Emphasis added).)

Article 3 is intended to realise that undertaking by endowing the International Tribunal with the power to prosecute all "serious violations" of international humanitarian law.

(ii) The Conditions That Must Be Fulfilled For A Violation Of International Humanitarian Law To Be Subject To Article 3

94. The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions

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must be met (see below, para. 143);

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the existence of customary international rules governing internal strife: and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber focuses on these two requirements because before the Trial Chamber the Defence argued that they had not been met in the case at issue. This examination is also appropriate because of the paucity of authoritative judicial pronouncements and legal literature on this matter.

(iii) **Customary Rules of International Humanitarian Law Governing Internal Armed Conflicts**

a. **General**

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed

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violence has taken on such a magnitude that the difference with international wars has increasingly dwindled (suffice to think of the Spanish civil war, in 1936-39, of the civil war in the Congo, in 1960-1968, the Biafran conflict in Nigeria, 1967-70, the civil strife in Nicaragua, in 1981-1990 or El Salvador, 1980-1993). Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

98. The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. **Principal Rules**

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard

the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

> "The rules of international law as to what constitutes a military objective are undefined and pending the conclusion of the examination of this question [. . .] I am not in a position to make any statement on the subject. The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty's Government's protest was based on information which led them to the conclusion that the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature." (333 House of Commons Debates, col. 1177 (23 March 1938).)

More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:

> "I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed." (337 House of Commons Debates, cols. 937-38 (21 June 1938).)

101. Such views were reaffirmed in a number of contemporaneous resolutions by the Assembly of the League of Nations, and in the declarations and agreements of the warring parties. For example, on 30 September 1938, the Assembly of the League of Nations unanimously adopted a resolution concerning both the Spanish conflict and the Chinese-Japanese war. After stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law", the Assembly expressed the hope that an agreement could be adopted on the matter and went on to state that it

> "[r]ecognize[d] the following principles as a necessary basis for any subsequent regulations:
>
> (1) The intentional bombing of civilian populations is illegal;
> (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
> (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence." **(League of Nations, O.J. Spec. Supp. 183**, at 135-36 (1938).)

102. Subsequent State practice indicates that the Spanish Civil War was not exceptional in bringing about the extension of some general principles of the laws of warfare to internal armed conflict. While the rules that evolved as a result of the Spanish Civil War were intended to protect civilians finding themselves in the theatre of hostilities, rules designed to protect those who do not (or no longer) take part in hostilities emerged after World War II. In 1947, instructions were issued to the Chinese "peoples' liberation army" by Mao Tse-Tung who instructed them not to "kill or humiliate any of Chiang Kai-Shek's army officers and men who lay down their arms." (*Manifesto of the Chinese People's Liberation Army,* in Mao Tse-Tung, 4 Selected Works (1961) 147, at 151.) He also instructed the insurgents, among other things, not to "ill-treat captives", "damage crops" or "take liberties with women." (*On the Reissue of the Three Main Rules of Discipline and the Eight Points for Attention - Instruction of the General Headquarters of the Chinese People's Liberation Army,* in *id.*, 155.)

In an important subsequent development, States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The International Court of Justice has confirmed that these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of an internal or international character. (Nicaragua Case, at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.

103. Common Article 3 contains not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts in the former Yugoslavia, parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities. For example, in the 1967 conflict in Yemen, both the Royalists and the President of the Republic agreed to abide by the essential rules of the Geneva Conventions. Such undertakings reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict.

104. Agreements made pursuant to common Article 3 are not the only vehicle through which international humanitarian law has been brought to bear on internal armed conflicts. In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law.

105. As a notable example, we cite the conduct of the Democratic Republic of the Congo in its civil war. In a public statement issued on 21 October 1964, the Prime Minister made the following commitment regarding the conduct of hostilities:

> "For humanitarian reasons, and with a view to reassuring, in so far as necessary, the civilian population which might fear that it is in danger, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives.
>
> In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [sic]. It also expects the rebels - and makes an urgent appeal to them to that effect - to act in the same manner.
>
> As a practical measure, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Convention [sic] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), *reprinted* in **American Journal of International Law** (1965) 614, at 616.)

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This statement indicates acceptance of rules regarding the conduct of internal hostilities, and, in particular, the principle that civilians must not be attacked. Like State practice in the Spanish Civil War, the Congolese Prime Minister's statement confirms the status of this rule as part of the customary law of internal armed conflicts. Indeed, this statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelled out the notion that the Congolese Government would fully comply with them.

106. A further confirmation can be found in the "Operational Code of Conduct for Nigerian Armed Forces", issued in July 1967 by the Head of the Federal Military Government, Major General Y. Gowon, to regulate the conduct of military operations of the Federal Army against the rebels. In this "Operational Code of Conduct", it was stated that, to repress the rebellion in Biafra, the Federal troops were duty-bound to respect the rules of the Geneva Conventions and in addition were to abide by a set of rules protecting civilians and civilian objects in the theatre of military operations. (See A.H.M. Kirk-Greene, **1 Crisis and Conflict in Nigeria, A Documentary Sourcebook 1966-1969**, 455-57 (1971).) This "Operational Code of Conduct" shows that in a large-scale and protracted civil war the central authorities, while refusing to grant recognition of belligerency, deemed it necessary to apply not only the provisions of the Geneva Conventions designed to protect civilians in the hands of the enemy and captured combatants, but also general rules on the conduct of hostilities that are normally applicable in international conflicts. It should be noted that the code was actually applied by the Nigerian authorities. Thus, for instance, it is reported that on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba, (see New Nigerian, 28 June 1968, at 1). In addition, reportedly on 3 September 1968, a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba. (See Daily Times - Nigeria, 3 September 1968, at 1; Daily Times, - Nigeria, 4 September 1968, at 1.)

This attitude of the Nigerian authorities confirms the trend initiated with the Spanish Civil War and referred to above (see paras. 101-102), whereby the central authorities of a State where civil strife has broken out prefer to withhold recognition of belligerency but, at the same time, extend to the conflict the bulk of the body of legal rules concerning conflicts between States.

107. A more recent instance of this tendency can be found in the stand taken in 1988 by the rebels (the FMLN) in El Salvador, when it became clear that the Government was not ready to apply the Additional Protocol II it had previously ratified. The FMLN undertook to respect both common Article 3 and Protocol II:

> "The FMLN shall ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II, take into consideration the needs of the majority of the population, and defend their fundamental freedoms." (FMLN, *La legitimidad de nuestros metodos de lucha,* Secretaria de promocion y proteccion de lo Derechos Humanos del FMLN, El Salvador, 10 Octobre 1988, at 89; unofficial translation.)3

108. In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the formation of the customary rules at issue. The Appeals Chamber will mention in particular the action of the ICRC, two resolutions adopted by the United Nations General Assembly, some declarations made by member States of the European Community (now European Union), as well as Additional Protocol II of 1977 and some military manuals.

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable

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contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously4 adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts," the General Assembly "affirm[ed]"

> "the following principles for observance by all governmental and other authorities responsible for action in armed conflict: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." (G.A. Res. 2444, U.N. GAOR., 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).)

It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law" (U.N. GAOR, 3rd Comm., 23rd Sess., 1634th Mtg., at 2, U.N. Doc. A/C.3/SR.1634 (1968)). This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was "declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law." (See 67 **American Journal of International Law** (1973), at 122, 124.)

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously5 adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); *see also* U.N. GAOR, 25th Sess., 1922nd Mtg., at 3, U.N. Doc. A/PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of resolution 2675).)The resolution stated the following:

> "Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:
>
> 1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

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2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.

3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.

4. Civilian populations as such should not be the object of military operations.

5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.

6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.

7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.

8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application." (G.A. Res. 2675, U.N. GAOR., 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970).)

112. Together, these resolutions played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.

113. That international humanitarian law includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts has also been stated on a number of occasions by groups of States. For instance, with regard to Liberia, the (then) twelve Member States of the European Community, in a declaration of 2 August 1990, stated:

"In particular, the Community and its Member States call upon the parties in the conflict, in conformity with international law and the most basic humanitarian principles, to safeguard from violence the embassies and places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter." (6 European Political Cooperation Documentation Bulletin, at 295 (1990).)

114. A similar, albeit more general, appeal was made by the Security Council in its resolution 788 (in operative paragraph 5 it called upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law") (S.C. Res. 788 (19 November 1992)), an appeal reiterated in resolution 972 (S.C. Res. 972 (13 January 1995)) and in resolution 1001 (S.C. Res. 1001 (30 June 1995)).

Appeals to the parties to a civil war to respect the principles of international humanitarian law were also

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made by the Security Council in the case of Somalia and Georgia. As for Somalia, mention can be made of resolution 794 in which the Security Council in particular condemned, as a breach of international humanitarian law, "the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population") (S.C. Res. 794 (3 December 1992)) and resolution 814 (S.C. Res. 814 (26 March 1993)). As for Georgia, see Resolution 993, (in which the Security Council reaffirmed "the need for the parties to comply with international humanitarian law") (S.C. Res. 993 (12 May 1993)).

115. Similarly, the now fifteen Member States of the European Union recently insisted on respect for international humanitarian law in the civil war in Chechnya. On 17 January 1995 the Presidency of the European Union issued a declaration stating:

> "The European Union is following the continuing fighting in Chechnya with the greatest concern. The promised cease-fires are not having any effect on the ground. Serious violations of human rights and international humanitarian law are continuing. The European Union strongly deplores the large number of victims and the suffering being inflicted on the civilian population." (Council of the European Union - General Secretariat, Press Release 4215/95 (Presse II-G), at 1 (17 January 1995).)

The appeal was reiterated on 23 January 1995, when the European Union made the following declaration:

> "It deplores the serious violations of human rights and international humanitarian law which are still occurring [in Chechnya]. It calls for an immediate cessation of the fighting and for the opening of negotiations to allow a political solution to the conflict to be found. It demands that freedom of access to Chechnya and the proper convoying of humanitarian aid to the population be guaranteed." (Council of the European Union-General Secretariat, Press Release 4385/95 (Presse 24), at 1 (23 January 1995).)

116. It must be stressed that, in the statements and resolutions referred to above, the European Union and the United Nations Security Council did not mention common Article 3 of the Geneva Conventions, but adverted to "international humanitarian law", thus clearly articulating the view that there exists a **corpus** of general principles and norms on internal armed conflict embracing common Article 3 but having a much greater scope.

117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.

This proposition is confirmed by the views expressed by a number of States. Thus, for example, mention can be made of the stand taken in 1987 by El Salvador (a State party to Protocol II). After having been repeatedly invited by the General Assembly to comply with humanitarian law in the civil war raging on its territory (*see*, e.g., G.A. Res. 41/157 (1986)), the Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war (although an objective evaluation prompted some Governments to conclude that all the conditions for such applications were met, (see, e.g., 43 **Annuaire Suisse de Droit International**, (1987) at 185-87). Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol, for it considered that such provisions "developed and supplemented" common Article 3, "which in turn constitute[d] the minimum protection due to every human being at any time and place"(6) (*See Informe de la Fuerza Armata de El Salvador sobre el*

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respeto y la vigencia de las normas del Derecho Internacional Humanitario durante el periodo de Septiembre de 1986 a Agosto de 1987, at 3 (31 August 1987) (forwarded by Ministry of Defence and Security of El Salvador to Special Representative of the United Nations Human Rights Commission (2 October 1987),; (unofficial translation). Similarly, in 1987, Mr. M.J. Matheson, speaking in his capacity as Deputy Legal Adviser of the United States State Department, stated that:

> "[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (Humanitarian Law Conference, Remarks of Michael J. Matheson, (2) **American University Journal of International Law and Policy** (1987) 419, at 430-31).

118. That at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts is also borne out by national military manuals. Thus, for instance, the German Military Manual of 1992 provides that:

> Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." (Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch, August 1992, DSK AV207320065, at para. 211 in fine; unofficial translation.)(7)

119. So far we have pointed to the formation of general rules or principles designed to protect **civilians or civilian objects** from the hostilities or, more generally, to protect **those who do not (or no longer) take active part in hostilities**. We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards **means and methods of warfare**. As the Appeals Chamber has pointed out above (see para. 110), a general principle has evolved limiting the right of the parties to conflicts "to adopt means of injuring the enemy." The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby "[w]eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances." (*Declaration of Minimum Humanitarian Standards, reprinted in, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session,* Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).) It should be noted that this Declaration, emanating from a group of distinguished experts in human rights and humanitarian law, has been indirectly endorsed by the Conference on Security and Cooperation in Europe in its Budapest Document of 1994 (Conference on Security and Cooperation in Europe, Budapest Document 1994: Towards Genuine Partnership in a New Era, para. 34 (1994)) and in 1995 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (*Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session,* Commission on Human Rights, 51st Sess., Agenda Item 19, at 1, U.N. Doc. E/CN.4/1995/L.33 (1995)).

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

120. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts. By way of illustration, we will mention chemical weapons. Recently a number of States

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have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law. On 7 September 1988 the [then] twelve Member States of the European Community made a declaration whereby:

> "The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of these weapons. They call for respect of international humanitarian law, including the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war]." (4 European Political Cooperation Documentation Bulletin, (1988) at 92.)

This statement was reiterated by the Greek representative, on behalf of the Twelve, on many occasions. (See U.N. GAOR, 1st Comm., 43rd Sess., 4th Mtg., at 47, U.N. Doc. A/C.1/43/PV.4 (1988)(statement of 18 October 1988 in the First Committee of the General Assembly); U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtg., at 23, U.N. Doc. A/C.1/43/PV.31 (statement of 9 November 1988 in meeting of First Committee of the General Assembly to the effect inter alia that "The Twelve [. . .] call for respect for the Geneva Protocol of 1925 and other relevant rules of customary international law"); U.N. GAOR, 1st Comm., 43rd Sess., 49th Mtg., at 16, U.N. Doc. A/C.3/43/SR.49 (summary of statement of 22 November 1988 in Third Committee of the General Assembly); *see also Report on European Union [EPC Aspects*], 4 European Political Cooperation Documentation Bulletin (1988), 325, at 330; *Question No 362/88 by Mr. Arbeloa Muru (S-E) Concerning the Poisoning of Opposition Members in Iraq*, 4 European Political Cooperation Documentation Bulletin (1988), 187 (statement of the Presidency in response to a question of a member of the European Parliament).)

121. A firm position to the same effect was taken by the British authorities: in 1988 the Foreign Office stated that the Iraqi use of chemical weapons against the civilian population of the town of Halabja represented "a serious and grave violation of the 1925 Geneva Protocol and international humanitarian law. The U.K. condemns unreservedly this and all other uses of chemical weapons." (59 **British Yearbook of International Law** (1988) at 579; *see also* id. at 579-80.) A similar stand was taken by the German authorities. On 27 October 1988 the German Parliament passed a resolution whereby it "resolutely rejected the view that the use of poison gas was allowed on one's own territory and in clashes akin to civil wars, assertedly because it was not expressly prohibited by the Geneva Protocol of 1925"(8) . (50 **Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht** (1990), at 382-83; unofficial translation.) Subsequently the German representative in the General Assembly expressed Germany's alarm "about reports of the use of chemical weapons against the Kurdish population" and referred to "breaches of the Geneva Protocol of 1925 and other norms of international law." (U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtng., at 16, U.N. Doc. A/C.1/43/PV.31 (1988).)

122. A clear position on the matter was also taken by the United States Government. In a "press guidance" statement issued by the State Department on 9 September 1988 it was stated that:

> Questions have been raised as to whether the prohibition in the 1925 Geneva Protocol against [chemical weapon] use 'in war' applies to [chemical weapon] use in internal conflicts. However, it is clear that such use against the civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements." (United States, Department of State, Press Guidance (9 September 1988).)

On 13 September 1988, Secretary of State George Schultz, in a hearing before the United States Senate Judiciary Committee strongly condemned as "completely unacceptable" the use of chemical weapons by Iraq. (*Hearing on Refugee Consultation with Witness Secretary of State George Shultz,* 100th Cong., 2d Sess., (13 September 1988) (Statement of Secretary of State Shultz).) On 13 October of the same year,

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Ambassador R.W. Murphy, Assistant Secretary for Near Eastern and South Asian Affairs, before the Sub-Committee on Europe and the Middle East of the House of Representatives Foreign Affairs Committee did the same, branding that use as "illegal." (See **Department of State Bulletin** (December 1988) 41, at 43-4.)

123. It is interesting to note that, reportedly, the Iraqi Government "flatly denied the poison gas charges." (New York Times, 16 September 1988, at A 11.) Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. In the aforementioned statement, Ambassador Murphy said:

> "On September 17, Iraq reaffirmed its adherence to international law, including the 1925 Geneva Protocol on chemical weapons as well as other international humanitarian law. We welcomed this statement as a positive step and asked for confirmation that Iraq means by this to renounce the use of chemical weapons inside Iraq as well as against foreign enemies. On October 3, the Iraqi Foreign Minister confirmed this directly to Secretary Schultz." (*Id.* at 44.)

This information had already been provided on 20 September 1988 in a press conference by the State Department spokesman Mr Redman. (See State Department Daily Briefing, 20 September 1988, Transcript ID: 390807, p. 8.) It should also be stressed that a number of countries (Turkey, Saudi Arabia, Egypt, Jordan, Bahrain, Kuwait) as well as the Arab League in a meeting of Foreign Ministers at Tunis on 12 September 1988, strongly disagreed with United States' assertions that Iraq had used chemical weapons against its Kurdish nationals. However, this disagreement did not turn on the legality of the use of chemical weapons; rather, those countries accused the United States of "conducting a smear media campaign against Iraq." (See New York Times, 15 September 1988, at A 13; Washington Post, 20 September 1988, at A 21.)

124. It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals - a matter on which this Chamber obviously cannot and does not express any opinion - there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.

125. State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations. (*See* Pius Nwaoga v. The State, 52 **International Law Reports**, 494, at 496-97 (Nig. S. Ct. 1972).)

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. (On these and other limitations of international humanitarian law governing civil strife, see the important message of the Swiss Federal Council to the Swiss Chambers on the ratification of the two 1977 Additional Protocols (38 **Annuaire Suisse de Droit International** (1982) 137 at 145-49.))

127. Notwithstanding these limitations, it cannot be denied that customary rules have developed to

govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

(iv) **Individual Criminal Responsibility In Internal Armed Conflict**

128. Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such prohibitions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction. It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. (See The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, at 445, 467 (1950).) The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals (id., at 445-47, 467). Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

> [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (*id.*, at 447.)

129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts. As mentioned above, during the Nigerian Civil War, both members of the Federal Army and rebels were brought before Nigerian courts and tried for violations of principles of international humanitarian law (see paras. 106 and 125).

131. Breaches of common Article 3 are clearly, and beyond any doubt, regarded as punishable by the Military Manual of Germany (**Humanitäres Völkerrecht in bewaffneten Konflikten** - Handbuch, August 1992, DSK AV2073200065, at para. 1209)(unofficial translation), which includes among the "grave breaches of international humanitarian law", "criminal offences" against persons protected by common Article 3, such as "wilful killing, mutilation, torture or inhumane treatment including biological experiments, wilfully causing great suffering, serious injury to body or health, taking of hostages", as well as "the fact of impeding a fair and regular trial"(9) . (Interestingly, a previous edition of the German Military Manual did not contain any such provision. See Kriegsvölkerrecht - Allgemeine Bestimmungen des Kriegführungsrechts und Landkriegsrecht, ZDv 15-10, March 1961, para. 12; Kriegsvölkerrecht - Allgemeine Bestimmungen des Humanitätsrechts, ZDv 15/5, August 1959, paras. 15-16, 30-2)

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Furthermore, the "Interim Law of Armed Conflict Manual" of New Zealand, of 1992, provides that "while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for 'war crimes', trials would be held under national criminal law, since no 'war' would be in existence" (New Zealand Defence Force Directorate of Legal Services, DM (1992) at 112, Interim Law of Armed Conflict Manual, para. 1807, 8). The relevant provisions of the manual of the United States (Department of the Army, The Law of Land Warfare, Department of the Army Field Manual, FM 27-10, (1956), at paras. 11 & 499) may also lend themselves to the interpretation that "war crimes", **i.e.,** "every violation of the law of war", include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 (War Office, The Law of War on Land, Being Part III of the Manual of Military Law (1958), at para. 626).

132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. (Socialist Federal Republic of Yugoslavia, Federal Criminal Code, arts. 142-43 (1990).) (It should be noted that by a decree having force of law, of 11 April 1992, the Republic of Bosnia and Herzegovina has adopted that Criminal Code, subject to some amendments.) (2 Official Gazette of the Republic of Bosnia and Herzegovina 98 (11 April 1992)(translation).) Furthermore, on 26 December 1978 a law was passed by the Yugoslav Parliament to implement the two Additional Protocols of 1977 (Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, Medunarodni Ugovori, at 1083 (26 December 1978).) as a result, by virtue of Article 210 of the Yugoslav Constitution, those two Protocols are "directly applicable" by the courts of Yugoslavia. (Constitution of the Socialist Federal Republic of Yugoslavia, art. 210.) Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (***infractions graves***) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" (***[c]onstituent des crimes de droit international***) within the jurisdiction of Belgian criminal courts (Article 7). (*Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions,* Moniteur Belge, (5 August 1993).)

133. Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them. (See S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).)

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the

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notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity. As pointed out above (*see* para. 132) such violations were punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.

136. It is also fitting to point out that the parties to certain of the agreements concerning the conflict in Bosnia-Herzegovina, made under the auspices of the ICRC, clearly undertook to punish those responsible for violations of international humanitarian law. Thus, Article 5, paragraph 2, of the aforementioned Agreement of 22 May 1992 provides that:

> "Each party undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence **and to punish those responsible in accordance with the law in force.**" (Agreement No. 1, art. 5, para. 2 (Emphasis added).)

Furthermore, the Agreement of 1st October 1992 provides in Article 3, paragraph 1, that

> "All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention, as well as in Article 85 of Additional Protocol I, will be unilaterally and unconditionally released." (Agreement No. 2, 1 October 1992, art. 3, para. 1.)

This provision, which is supplemented by Article 4, paragraphs 1 and 2 of the Agreement, implies that all those responsible for offences contrary to the Geneva provisions referred to in that Article must be brought to trial. As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict.

(v) **Conclusion**

137. In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied.

(c) Article 5

138. Article 5 of the Statute confers jurisdiction over crimes against humanity. More specifically, the Article provides:

> "The International Tribunal shall have the power to prosecute persons responsible for the

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following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

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

(i) other inhumane acts."

As noted by the Secretary-General in his Report on the Statute, crimes against humanity were first recognized in the trials of war criminals following World War II. (Report of the Secretary-General, at para. 47.) The offence was defined in Article 6, paragraph 2(c) of the Nuremberg Charter and subsequently affirmed in the 1948 General Assembly Resolution affirming the Nuremberg principles.

139. Before the Trial Chamber, Counsel for Defence emphasized that both of these formulations of the crime limited it to those acts committed "in the execution of or in connection with any crime against peace or any war crime." He argued that this limitation persists in contemporary international law and constitutes a requirement that crimes against humanity be committed in the context of an international armed conflict (which assertedly was missing in the instant case). According to Counsel for Defence, jurisdiction under Article 5 over crimes against humanity "committed in armed conflict, whether international or internal in character" constitutes an ex post facto law violating the principle of *nullum crimen sine lege.* Although before the Appeals Chamber the Appellant has forgone this argument (*see* Appeal Transcript, 8 September 1995, at 45), in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5.

140. As the Prosecutor observed before the Trial Chamber, the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was carried over to the 1948 General Assembly resolution affirming the Nuremberg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II(1)(c) of Control Council Law No. 10 of 20 December 1945. (Control Council Law No. 10, Control Council for Germany, Official Gazette, 31 January 1946, at p. 50.). The obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict. (Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. 1, 78 U.N.T.S. 277, Article 1 (providing that genocide, "whether committed in time of peace or in time of war, is a crime under international

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law"); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243, arts. 1-2Article . I(1)).

141. It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege.*

142. We conclude, therefore, that Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts. In addition, for the reasons stated above, in Section IV A, (paras. 66-70), we conclude that in this case there was an armed conflict. Therefore, the Appellant's challenge to the jurisdiction of the International Tribunal under Article 5 must be dismissed.

C. May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?

143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting., at 11, 15, 19, U.N. Doc. S/PV.3217 (25 May 1993).).

144. We conclude that, in general, such agreements fall within our jurisdiction under Article 3 of the Statute. As the defendant in this case has not been charged with any violations of any specific agreement, we find it unnecessary to determine whether any specific agreement gives the International Tribunal jurisdiction over the alleged crimes.

145. For the reasons stated above, the third ground of appeal, based on lack of subject-matter jurisdiction, must be dismissed.

V. DISPOSITION

146. For the reasons hereinabove expressed
and
Acting under Article 25 of the Statute and Rules 72, 116 bis and 117 of the Rules of Procedure and Evidence,

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The Appeals Chamber

(1) By 4 votes to 1,

Decides that the International Tribunal is empowered to pronounce upon the plea challenging the legality of the establishment of the International Tribunal.

IN FAVOUR: *President* Cassese, *Judges* Deschênes, Abi-Saab and Sidhwa

AGAINST: *Judge* Li

(2) Unanimously

Decides that the aforementioned plea is dismissed.

(3) Unanimously

Decides that the challenge to the primacy of the International Tribunal over national courts is dismissed.

(4) By 4 votes to 1

Decides that the International Tribunal has subject-matter jurisdiction over the current case.

IN FAVOUR: *President* Cassese, *Judges* Li, Deschênes, Abi-Saab

AGAINST: *Judge* Sidhwa

ACCORDINGLY, THE DECISION OF THE TRIAL CHAMBER OF 10 AUGUST 1995 STANDS REVISED, THE JURISDICTION OF THE INTERNATIONAL TRIBUNAL IS AFFIRMED AND THE APPEAL IS DISMISSED.

Done in English, this text being authoritative.*

(Signed) Antonio Cassese,
President

Judges Li, Abi-Saab and Sidhwa append separate opinions to the Decision of the Appeals Chamber

Judge Deschênes appends a Declaration.

(Initialled) A. C.

Dated this second day of October 1995
The Hague

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The Netherlands

[Seal of the Tribunal]

* French translation to follow

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1 "Trattasi di norme [concernenti i reati contro le leggi e gli usi della guerra] che, per il loro contenuto altamente etico e umanitario, hanno carattere non territoriale, ma universale... Dalla solidarietà delle varie nazioni, intesa a lenire nel miglior modo possibile gli orrori della guerra, scaturisce la necessità di dettare disposizioni che non conoscano barriere, colpendo chi delinque, dovunque esso si trovi....
..[I] reati contro le leggi e gli usi della guerra non possono essere considerati delitti politici, poichè non offendono un interesse politico di uno Stato determinato ovvero un diritto politico di un suo cittadino. Essi invece sono reati di lesa umanità, e, come si è precedentemente dimostrato, le norme relative hanno carattere universale, e non semplicemente territoriale. Tali reati sono, di conseguenza, per il loro oggetto giuridico e per la loro particolare natura, proprio di specie opposta e diversa da quella dei delitti politici. Questi, di norma, interessano solo lo Stato a danno del quale sono stati commessi, quelli invece interessano tutti gli Stati civili, e vanno combattuti e repressi, come sono combattuti e repressi il reato di pirateria, la tratta delle donne e dei minori, la riduzione in schiavitù, dovunque siano stati commessi." (art. 537 e 604 c. p.).
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2 "..[E]n raison de leur nature, les crimes contre l'humanité (...) ne relèvent pas seulement du droit interne français, mais encore d'un ordre répressif international auquel la notion de frontière et les règles extraditionnelles qui en découlent sont fondamentalement étrangères." (6 octobre 1983, 88 Revue Générale de Droit international public, 1984, p. 509.)

3 "El FMLN procura que sus métodos de lucha cumplan con lo estipulado per el art'culo 3 comun a los Convenios de Ginebra y su Protocolo II Adicional, tomen en consideración las necesidades de la mayor'a de la población y esten orientados a defender sus libertades fundamentales."

4 The recorded vote on the resolution was 111 in favour and 0 against. After the vote was taken, however, Gabon represented that it had intended to vote against the resolution. (U.N. GAOR, 23rd Sess., 1748th Mtg., at 7, 12, U.N.Doc. A/PV.1748 (1968)).

5 The recorded vote on the resolution was 109 in favour and 0 against, with 8 members abstaining. (U.N. GAOR, 1922nd Mtg., at 12, U.N.Doc. A/PV.1922 (1970).)

6 "Dentro de esta l'nea de conducta, su mayor preocupación [de la Fuerza Armada] ha sido el mantenerse apegada estrictamente al cumplimiento de las disposiciones contenidas en los Convenios de Ginebra y en El Protocolo II de dichos Convenios, ya que a&uacuten no siendo el mismo aplicable a la situación que confronta actualmente el país, el Gobierno de El Salvador acata y cumple las disposiciones contenidas endicho instrumento, por considerar que ellas constituyen el desarrollo y la complementación del Art. 3, comœn a los Convenios de Ginebra del 12 de agosto de 1949, que a su vez representa la protección mínima que se debe al ser humano encualquier tiempo y lugar."
Back

7 "Ebenso wie ihre Verbündeten beachten Soldaten der Bundeswehr die Regeln des humanitären Völkerrechts bei militärischen Operationen in allen bewaffneten Konflikten, gleichgültig welcher Art."
Back

8 "Der Deutsche Bundestag befürchtet, dass Berichte zutreffend sein könnten, dass die irakischen Streitkräfte auf dem Territorium des Iraks nunmehr im Kampf mit kurdischen Aufständischen Giftgas eingesetzt haben. Er weist mit Entschiedenheit die Auffassung zurück, dass der Einsatz von Giftgas im Innern und bei bürgerkriegsähnlichen Auseinandersetzungen zulässig sei, weil er durch das Genfer Protokoll von 1925 nicht ausdrücklich verboten werde..."
Back

9 "1209. Schwere Verletzungen des humanitären Völkerrechts sind insbesondere; -Straftaten gegen geschützte Personen (Verwundete, Kranke, Sanitätspersonal, Militärgeistliche, Kriegsgefangene, Bewohner besetzter Gebiete, andere

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when taking their statements to be used in the Rule 115 application

52. Both general allegations in this group, that the Respondent manipulated witnesses , are based upon events which took place at the Prijedor police station on 14 March 1998, when the Respondent and Witness D conducted interviews with prospective witnesses there. These may therefore be dealt with together. The interviews followed the binding order made by the Appeals Chamber on 2 February 1998, directed to the Republika Srpska, to facilitate interviews with a number of witnesses.[54]

53. When Witness D and Witness F (an independent interpreter) were travelling with the Respondent and two of his legal colleagues from Banja Luka to Prijedor that morning, the Respondent called an unscheduled halt on the way at a motel called "Peti Neplan". The Respondent said in evidence that he had been asked by the Chief of Police of the Prijedor area at that time, Marko Dzenadija ("Dzenadija"), to meet him there, and that, when he did so, Dzenadija had informed him that he had been unable to find all of the witnesses named in the binding order.

54. Both Witness D and Witness F gave evidence that no reason for the stop was ever given to them at the time, and that they had been left downstairs whilst the Respondent spoke to Dzenadija alone. The Respondent's evidence was that he had not thought it necessary to involve Witness D in their discussion with Dzenadija on what he described as a "technical issue", and that he had also spent some time with the owner of the hotel, who was a client of his, discussing a dispute which the client had with the customs authorities in Belgrade.

55. When the party arrived at the Prijedor police station, there was another lengthy delay whilst the Respondent was absent from the interview room without explanation . Witness A, who was the first to be interviewed, went looking for the Respondent on a number of occasions and informed him that Witness D did not wish to commence the interview without him. The Respondent had suggested that they start without him, but Witness D declined to do so.

56. The Respondent explained in his evidence that a lawyer in the former Yugoslavia is bound by law to warn a witness whose statement is to be taken that he or she is duty bound to tell the truth but need not say anything which will be detrimental to the witness or to the witness's family. He had been doing this in relation to the witnesses gathered at the Prijedor police station during his absence from the interview room. He had also been showing photographs to one of the prospective witnesses for identification purposes, an issue to which reference will be made later.

Witness A

57. Witness A is a former policeman. He made a statement to be submitted in these proceedings that the Respondent had instructed him to look at him whenever he was asked a question by Witness D during the interview and that he would indicate with his head whether he should answer the question or not. The Respondent had informed him that the rest of the witnesses had been given instructions as to what to say . The Respondent had also instructed him to make sure that he did not mention any names. When the interview commenced, the Respondent had nodded his head as to when to say "yes" and when to say "no".

58. Witness A confirmed in his evidence that his statement contained the truth, but he added that it had been the assistant Chief of Police at the Prijedor police station who had given him these instructions, and not the Respondent, although the instructions were still to answer questions according to the indication given to him by the Respondent. At one stage in his evidence, in cross-examination by counsel for Tadic, Witness A re-confirmed his original version that the instructions had been given by the

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Respondent, but then again affirmed his second version in cross -examination by the prosecution. He explained that he may perhaps have been misunderstood by the person taking his statement because there had been a power cut at the time when the statement was being taken. Witness A also said in his evidence that the Respondent personally had not nodded his head to him. He explained his signature on his statement (which contained an affirmation that it had been read by him and was true) by saying that – as it was written in the Cyrillic alphabet, of which he did not have a very good understanding – he had not read every word of it.

59. Witness A revealed during the course of his evidence that, after he had been summoned to appear before the Tribunal to give evidence, he had received anonymous telephone calls advising him to watch out what he was doing because he "could just disappear". He had also been contacted by Dzenadija, the Chief of Police, at the same time to discuss "important matters" with him, although no such discussion had in fact taken place. This had concerned him. He had also been followed. He gave evidence that, prior to coming to the Tribunal that morning, he had spoken to his wife on the telephone, and she had told him that everyone knew he was in The Hague , although (as a protected witness) no one was meant to know his whereabouts.

60. When it was put to Witness A that he had "softened" his evidence against the Respondent because he was frightened of repercussions, he replied:

> I'm going to answer that. As far as Vujin is concerned, no. I have truly been speaking the truth. I cannot look at a man in his eyes and speak falsehoods. I'm not afraid of Mr Vujin; there's no need for me to be afraid of him. I should be concerned when I go back to my native Prijedor, what's going to happen to me over there.

Witness H (who is closely associated with Tadic) gave evidence that Witness A had told him that he was nervous about giving evidence because Dzenadija had approached him and told him to be careful about doing so.

61. It was Witness A who first brought the conduct of the Respondent to the attention of Witness D when he saw him with his interpreter at the end of April 1998 in Prijedor , and had informed him that the statement which he had made at the Prijedor police station had not been truthful. Witness D had asked him if he would make a statement in relation to that conduct, but he had at that stage declined to do so "because of the circumstances prevailing at the time". In October 1998, he made a statement concerning the events of March. He made it clear in his evidence that he had done so voluntarily, that he had no complaint about the way in which his statement had been taken, and that the reference in it to the Respondent having given him instructions was merely a misunderstanding.

62. The Respondent gave evidence denying in general terms having suggested to any witness what he or she should say or influencing the statements which any witness made. He denied having seen Witness A at the Prijedor police station on that occasion , and he suggested that Witness A may have been either deluded as to the purpose of his evidence or offered asylum or something in return for his evidence. No such suggestion had been put to Witness A in cross-examination.

Witness B

63. Witness B had been a guard at the Omarska camp. At some time which is not quite clear – either shortly before or shortly after Tadic was convicted – Witness B had offered to Witness H (who is closely associated with Tadic) that he would give a statement for use in the appeal confirming that Tadic had never been at the Omarska camp, that Mišo Danicic had been at the camp and that in his opinion Danicic

looked like Tadic. (In his evidence, Witness B said that Danicic was "the spitting image " of Tadic.) He was interviewed by the Respondent the next day, but he was asked no questions about Danicic.

64. That was around May 1997. In September of that year, Witness B was again asked by the Respondent to give a statement, one which was to be video-recorded. Before the video-recording commenced, the Respondent instructed him that, if Witness D asked him for any names, he should not give them. He does not say in his statement that he was otherwise given any express instructions to answer the questions of Witness D in accordance with head signals which the Respondent would give him, but he does say that, whenever he was asked a question about Danicic, the Respondent "was shaking his head instructing me to say 'no' ".

65. The recorded interview then commenced, and the Respondent was asking him the questions. Again, he did not ask any questions about Danicic. During a break in the recording, however, Witness D raised the name of Danicic with the Respondent . The recording resumed and the Respondent asked him if he knew Danicic. He was shaking his head at the time he asked the question, but Witness B answered that he did know Danicic, and that Danicic had been at the Omarska camp.

66. When the Rule 115 application to present additional evidence to the Appeals Chamber was filed by the Respondent, only the March statement made by Witness B, where no names are mentioned, was included. The video-recording made in September , where Danicic is identified by Witness B, was not filed.

67. In his evidence before the Appeals Chamber, Witness B confirmed the truth of the statement, but then contradicted part of it. When asked whether the Respondent had done anything with his head when he asked him about Danicic, Witness B replied :

> [...] when I was asked about Mr Danicic, I personally noticed some kind of head-nodding . I don't know whether it was intentional or not. I cannot condemn anyone for it. Perhaps it was just a movement of the head. I said this in my statement. I noticed that Mr Vujin was trying to tell me something, but I didn't know what. So there was this head-nodding or perhaps it was an misunderstanding.

But, when he was asked how he had interpreted the head-nodding, Witness B replied :

> I interpreted this particular matter in the following way: that I should not give the name of Miso Danicic or anything else.

He had nevertheless said that he did know Danicic. Later, he again sought to qualify his statement that the head-nodding was instructing him to deny knowledge of Danicic :

> The nodding of Milan Vujin's head, I would not – once again, I would like to mention that I could not understand that, that something was happening when this shaking of the head went on, for me to give any kind of answer.

He went on to say that he had not known what the purpose of the head-nodding was . He had not been able to understand it. He described the head-nodding as the Respondent sometimes moving his head up and down and sometimes from side to side .

68. Witness B agreed with counsel for Tadic that he had signed every page of his statement only after he was happy with the truthfulness and the accuracy of its contents. To the prosecution, however, he said

that he had not read it word for word. He had just scanned it with his eyes. It had not been read out to him.

69. Witness B maintained his statement that the Respondent had instructed him not to give any names if Witness D asked for them throughout his evidence. There is one aspect of his evidence indicating some confusion on his part in relation to this issue. He said at one stage that the first question he had been asked by the Respondent at the very beginning of the video recording was "Do you know Mišo Danicic ?", but this version is not supported by the evidence of anyone else. The Respondent claimed that it had been Witness D who had asked Witness B about Danicic. Witness B himself confirmed his statement that he was sure that the Respondent would not have asked him about Danicic "if [Witness D] had not mentioned him and insisted on it". According to the evidence, Witness D asked about Danicic only during the break in the video-recording. The question could not therefore have been asked at the very beginning of the video-recording.

70. The Respondent in his evidence denied that he had shaken his head during this interview and, as already stated, he denied in general terms having suggested to any witness what he or she should say or influencing the statements which any witness made.

GY

71. GY was one of the prospective witnesses who were present at the Prijedor police station on 14 March 1998.[55] She arrived there, but was sent home by the Respondent before she had been interviewed by Witness D. It was suggested to the Respondent in cross-examination that he had spoken to her in the absence of Witness D because he had something to hide, and that he wished to press her to stop naming important names or to frighten her off in some way.

72. GY had given Witness D a statement on 3 January 1998 for the purposes of Tadic's appeal. It is a detailed statement, refuting the evidence of a number of witnesses upon whom the Trial Chamber had relied in its judgment. She said that she had arrived at the Omarska camp a few days after the beating of the six prisoners there for which Tadic was convicted. She said that she had nevertheless heard of the beating the day it occurred from members of the Omarska police, and she had been told that the persons responsible included Mišo Danicic and Dragan Lukic (both of whom she had known since her younger days) and Milenko Stojnic, but not Duško Tadic. She expressed the view that the witnesses identifying Tadic had mistaken either Danicic or Lukic for him, both of them having "emphatic resemblance, with beards" to Tadic . Moreover, she said, the description given by one of the witnesses (as recorded at par 290 of the Trial Judgment) corresponded with Milenko Stojnic. GY also said in this statement that she had seen Dragan Lukic at Kozarac at the time when the two Muslim policemen were killed. The Respondent was aware of this statement on 14 March when GY came to the Prijedor police station.

73. It was not explained why in those circumstances a fresh statement had to be taken, but the anticipation of Witness D was obviously that GY would repeat these details in that new statement, hence the suggestion that the Respondent was attempting to prevent her from doing so and eventually sent her home so that she could not do so.

74. The Respondent rejected the suggestions made to him in cross-examination. He gave evidence that he had taken GY to another room so that she could identify photographs of Danicic, Ciga "and so on", so that a set of photographs could be assembled to show to the other witnesses to see whether they knew these people and knew about their activities. There was, he said a big pile of photographs to show her and, if this had been done in the interview room where Witness D was waiting, there would not have been time to interview more than two witnesses that day. He had sent a message to Witness D to start

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the other interviews without him. He said that he had told Witness H to take GY home –

> [...] because it was said that she had been locked up by the police. So I told her to go away.

The Respondent said that he did not remember whether he had given this explanation to Witness D at the time. However, Witness A gave evidence of having conveyed the Respondent's message to Witness D, and Witness H (who is closely associated with Tadic) gave evidence that he had heard that the police chief had locked GY up for a while in his office.

75. The Respondent produced a statement which he had taken from GY in 1995:[56]

> All the time during my stay in the Center [the Collection Center Omarska] I have never seen nor heard that Dusko Tadic used to come to the Center.
>
> I know that there was a man who was very much looking like him and that he used to come to the Center. In this moment I may say that the name of that man is Misa , I think Danicic, but at this time there is no need to say anything more, although the events in the Center are well known to me.

When asked why he had not asked GY to give more detail concerning Danicic, instead of merely recording her opinion that there was "no need to say anything more", the Respondent replied:

> I did my work but I could not exert pressure on a witness so that this witness would say more than she wanted to say. She didn't want to make any other statements apart from this very short one.

76. The Respondent also produced a statement which Witness D had taken from GY on 18 March 1998, four days after she had been sent home by the Respondent from the Prijedor police station. In it, she names as having been involved in the crimes for which Tadic has been convicted Dragan Lukic and Mišo Danicic, and she refers as well to "another two witnesses who are living abroad", but does not name them .

77. A statement which the Respondent had taken from GY after receipt of the Scheduling Order which initiated these proceedings was also tendered, in which she relates the events of 14 March. She does not mention being locked up by the police, but she says:

> Suddenly, I heard some commotion and shouting and I went out and I saw that there was a problem created as to where I was. Attorney Vujin was also there and I was told then to go home with [Witness H], and that later on the defense [sic] attorneys will come to take my statement.

She also says:

> I categorically declare that defense [sic] attorney Vujin never advised me what to say, never forced or coerced me as to how I was to testify and what I should or should not say.

There was an objection on behalf of Tadic to the tender of this statement (and others) without calling the witnesses themselves. The Appeals Chamber ruled that the statements would be admitted "subject to their weight being evaluated by the Chamber ".[57] GY was not called by the Respondent to give evidence. He said that he thought it unnecessary to do so.

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Milos Preradovic

78. One of the documents put forward by the Respondent in support of the Rule 115 application to present additional evidence to the Appeals Chamber purports to be a statement given to the Respondent by Miloš Preradovic. The document, which was filed with the Tribunal on 5 February 1998 in connection with the Rule 115 application to present additional evidence, attributes to Preradovic a statement that he had been engaged as a policeman in regular service in the Prijedor municipality during the conflict there and that he knew Tadic by sight, but that he had never been together with Tadic in Kozarac during that conflict. This document asserts that evidence given by witnesses at the trial that he had been together with Tadic at that time was false. The document is in the common form of a typed statement, commencing:

> On the request of Mr Milan Vujin, the Defence Counsel of Duško Tadic, herewith I give the following
>
> STATEMENT

79. A second statement purporting to have been made by Preradovic, dated 27 December 1998, was subsequently filed in support of the application to present additional evidence. It deals mainly with the character and the untruthfulness of Seferovic who identified Tadic as having killed the two Muslim policemen, and adds that Seferovic never kept birds. This contradicted the reason given by Seferovic at the trial for returning to Kozarac while the Serbian paramilitary were still there, to feed his pet pigeons.

80. This second statement, which Preradovic acknowledged in his evidence as his own, also states:

> I never met any of the lawyers of Dusko Tadic. It is true that I received one telephone call from Mr Vujin. It was a very short conversation, he only asked me if we could meet in connection with Dusko's case and nothing more.
>
> Sometime after that, commander Bogoljb [sic] Kos from the station in Prejidor [sic] called me to come to the station because Mr Vujin had left a questionnaire there in connection with Dusko Tadic and if I agreed with the questions I should sign it. There were four or five copies of the same questionnaire. Above my name there was only one question. Did I or did I not see Dusko Tadic in Kozarac during the attack on it. I answered "No" and signed it. Nobody ever asked me what had happened in Kozarac on the May 27, 1992 [...].

81. On 15 February 1999, Preradovic gave a statement to Witness H (who is closely associated with Tadic) in the following terms:

> I never was in contact with Duško's former lawyer, Milan Vujin and the statement which I have now been shown by [Witness H] and which I am supposed to have given to Milan Vujin is not consistent with the statement which I signed in Prijedor Police Station in the presence of the Chief of Police, Bozidar Kos. That statement is completely different in its content and said: did I see Dusko Tadic during the war operations in Kozarac to which I replied only "No" because at that time I was not there in that area. I am confirming that this statement is a clear fraud and that I never gave such a statement. I am ready to confirm this in front of any Court and in front of The Hague Tribunal.[58]

82. In his evidence before the Appeals Chamber, given by video-link, Preradovic confirmed having made the statement to Witness H dated 15 February 1999, and in response to questions from the

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Presiding Judge twice confirmed that its contents were true and correct. He was then asked if he had made the first statement, that filed on 5 February 1998 (which in his later statement to Witness H he had described as "a clear fraud"). He said:

> Well, let me tell you, the statement that [Witness H] gave me seemed different to me from this statement, and I did not receive a copy from [Witness H] either. [...] The first statement that I gave at the SUP was made in several copies.

The reference to "the SUP" is to the Prijedor police station. Preradovic was asked again to look at the statement to the Respondent filed on 5 February 1998 and to say whether it was a statement he had made. He replied:

> I believe that this is the accurate statement, the one I gave at the SUP, but I cannot say 100 per cent – I cannot be 100 per cent sure because I did not get a copy from the SUP.

He said that the statement which he had signed at the Prijedor police station had included the words "On the request of Mr Milan Vujin ..." which appear in the disputed document filed on 5 February 1998.

83. In cross-examination, Preradovic explained that the contents of the statement to the Respondent filed on 5 February 1998 were "the same, almost the same, more or less the same" as the contents of the one he signed at the Prijedor police station , the only difference being that the document which he signed was a questionnaire which required him to answer "yes" or "no", and the statement filed on 5 February 1998 did not include that. He repeated this explanation a number of times. He also said that the statement which he had signed at the Prijedor police station –

> [...] wasn't very legible, and that is why I said that it didn't correspond exactly . Whether it was the photocopy's fault or anything else, I don't know, but they're all more or less of the same content.

When asked, then, why he had described the statement to the Respondent filed on 5 February 1998 as "a clear fraud", Preradovic said:

> Well, let me put it this way: The statement I gave to [Witness H], it is the same – the contents are the same as the other one, except that with [Witness H]'s statement , I seem to think that something was not very clear, either in the copy or something else, and that is why I gave this, and I don't know why I should have given the statement at all.

Simo Kevic

84. Witness A included within his statement to the Tribunal an account of a meeting which he had with one Simo Kevic ten to fifteen days after the statements had been taken at the Prijedor police station on 14 March 1998. Kevic had been one of the witnesses interviewed and, according to Witness A, in a conversation he had with him concerning the events of that day Kevic said:

> Milan Vujin is a real Serb; if he was not there I would have said everything I knew , and everything I saw.

Witness A confirmed the truth of this account in his evidence.

85. The Respondent denied having had any discussion with Kevic at the Prijedor police station. He

produced a statement by Kevic stating that he had been spoken to by the Respondent at the Prijedor police station, and he had been told only that he should tell the truth but that he had no obligation to say anything which may be harmful to him. He had not been coached what to say. He denied having discussed the Respondent with anyone thereafter, or telling anyone that the Respondent had told him what he should say.

86. Kevic was not called as a witness before the Appeals Chamber on behalf of the Respondent, and no request was made on behalf of Tadic that he be called by the Chamber.

(3) Bribing a witness to tell lies to or to withhold the truth from Witness D

87. Witness B has already been referred to. He had been a guard at the Omarska camp and had offered to Witness H (who is closely associated with Tadic) that he would make a statement confirming that Tadic had never been at Omarska camp, that Mišo Danicic had been at the camp and that in his opinion Danicic looked like Tadic . He had been interviewed by the Respondent the following day, but was asked no questions about Danicic. After taking his statement, the Respondent gave him DM100 . This was the equivalent of a month's wages for him. Witness B had not asked for any money. Although in his statement Witness B said that he had not thought that such a payment was proper behaviour, in his evidence he said that he had understood it as "a humanitarian gesture".

88. That was around May 1997.[59] In September of that year, Witness B was again asked by the Respondent to give a statement , one to be video recorded. Witness D was also present. As already mentioned, the Respondent instructed Witness B not to mention any names if Witness D asked him. The Respondent did not at first ask him any questions about Danicic. During a break in the recording, however, Witness D raised with the Respondent the name of Danicic. The recording resumed and the Respondent asked him if he knew Danicic , and (despite the Respondent shaking his head at the time he asked this question) Witness B said that he did and that Danicic had been at the Omarska camp. The Respondent had appeared to be unhappy when he gave his answer, although in his evidence Witness B was prepared only to say that it was "possible" that his identification of Danicic was the cause of that unhappiness. On this occasion, the Respondent gave no money to Witness B.

89. The Respondent said in evidence that, following the first interview, he had talked with Witness B and had ascertained that his son, who was a sportsman, was missing during the conflict current at that time and had left a wife and a young baby. The wife was the daughter of a friend of the Respondent. Witness B had told him that he was unemployed, as was his daughter in law, and that they could not even afford milk for the baby. He had given Witness B the money, saying "Take this . This is for milk for your granddaughter, not for you to drink". It had been given to him not as a reward for not naming names but as "just help to a human being who had these day-to-day problems in his life". He had also advised Witness B to see a colleague of his in connection with seeking compensation for the loss of his son.

90. Witness B had subsequently returned to the Respondent's office, when there was further discussion between them about tracing his son. At the end of that discussion , Witness DH (a lawyer assisting the Respondent) gave Witness B some more money, saying that it was to help him because he had no money and everything was so hard for him.

VI Analysis and findings

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Some general principles

91. The evidence of the witnesses upon which Tadic relies in order to establish that the Respondent is guilty of contempt was strongly criticised by the Respondent and, to a lesser extent, by the prosecution. The submissions of those parties dealt with the evidence of each of those witnesses in isolation, relying upon certain departures in their evidence from the statements which they had given before the hearing to persons representing Tadic and upon certain internal inconsistencies within their evidence. These criticisms give rise to two matters of principle of general application, but of particular application to the present case.

92. The first such matter of principle is that a tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of *all* the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case.[60] The converse also holds true.

93. The second matter of principle of general application is the weight to be given to a statement made by a witness out of court which is inconsistent with his or her evidence in court. Where such out of court statement is merely hearsay, the common law denies it any value as evidence of the truth of what had been said out of court, and restricts its relevance to the issue of the witness's credit.[61] On the other hand, the civil law admits the hearsay material without restriction , provided that it has probative value; the weight to be afforded to it as evidence of the truth of what was said is considered at the end of all the evidence. This Tribunal has, by its Rules, effectively rejected the common law approach. Rule 89(C) provides:

> A Chamber may admit any relevant evidence which it deems to have probative value .

The application of that Rule was considered at the trial of Tadic, in a decision which was not challenged in the appeal.[62] The Appeals Chamber has since held that is now well settled in the practice of the Tribunal that hearsay material having probative value is admissible so as to prove the truth of what was said,[63] acknowledging nevertheless that the weight to be afforded to that material will *usually* be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay material.[64]

Other relevant events

94. In addition to the evidence relating to the events in issue, evidence of events which had occurred before the relevant period, and of other events which occurred during the relevant period, was admitted in order to demonstrate a particular course of conduct or to explain the events in issue which took place within that period . This evidence is a suitable starting point in any analysis of the evidence relating to the events in issue. There are four matters to which specific reference should be made:

(i) the list of prospective witnesses to be interviewed in preparation for the trial which had been prepared by Mr Michaïl Wladimiroff, then lead counsel for Tadic ;
(ii) the concerns expressed by Mr Wladimiroff about the conduct of the Respondent , both at the time and in evidence before the Appeals Chamber;
(iii) the entries made by Tadic in his diary; and
(iv) the claims made by the journalist Brkic.

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(i) The list of prospective witnesses to be interviewed in preparation for the trial which had been prepared by Mr Michaïl Wladimiroff, then lead counsel for Tadic

95. In February 1996, the Respondent was working for the defence team without remuneration on the understanding that, as a local lawyer, he would be able to "open doors" for the defence team and to explain local procedures. At this time, Mr Wladimiroff experienced obstruction in his attempts to speak to prospective witnesses in the Republika Srpska. This obstruction appeared to have been caused by the Chief of Police in the Prijedor area, Mr Simo Drljaca ("Drljaca"). Prospective witnesses were unwilling to speak to Mr Wladimiroff and, when he was able to speak to any witnesses to whom Drljaca had already spoken, their evidence was carefully choreographed and was, Mr Wladimiroff thought untrue. He subsequently also learnt that a lawyer in Prijedor had been warned by the police not to speak to him.

96. In an interview with Drljaca at the Prijedor police station, Mr Wladimiroff discovered that Drljaca had in his possession a copy of the list of potential defence witnesses which Mr Wladimiroff had prepared. It is common ground that Drljaca – who was subsequently indicted by the Prosecutor for genocide, but was killed at the time of his arrest – did everything possible to obstruct the work of both the Prosecutor and those appearing for persons accused by the Prosecutor of war crimes . Drljaca made it clear to Mr Wladimiroff that he was meddling in matters of the past and that he had no right to do so. He did not want Mr Wladimiroff or anyone connected with the Tribunal in the area of Prijedor at all. The Respondent produced evidence of statements made by Drljaca to investigators employed on behalf of Tadic :

> Nobody can order me to allow hearing witnesses in my region. No one witness from my region must make a statement without my agreement.

Drljaca was striking the table with his hand and raising his voice when he said this. According to the statement from the investigators produced in evidence by the Respondent, Drljaca also threatened that "anyone who attempts to work without his approval in collecting data for defence of Tadic will get a bullet in his forehead or will be arrested".

97. According to the evidence of Mr Wladimiroff, when he asked Drljaca where he had obtained the list of potential defence witnesses he was told that he had obtained it from the Respondent. When taxed with this by Mr Wladimiroff, the Respondent explained that he had given Drljaca the list because he thought that it would assist in tracking down the witnesses. At the time when Mr Wladimiroff gave this evidence , he had not been part of the defence team for more than two and a half years.

98. In his own evidence, the Respondent denied giving the list to Drljaca and said that, if Drljaca had said anything to Mr Wladimiroff to the contrary, what he had said was untrue. He also said that the evidence of Mr Wladimiroff that he (the Respondent) had agreed with him that he had given the list to Drljaca was a lie, because there had been no such conversation. He suggested that Mr Wladimiroff may have lied as part of a conspiracy or a strategy on the part of the defence team.[65]

99. At an early stage in his evidence, the Respondent accepted that, by giving the list to Drljaca, he would have made it impossible or difficult to find the witnesses , and he said that at about this time he had written to the Minister of Interior Affairs to ask that Drljaca be replaced. A copy of that letter was produced, and its authenticity was not disputed. He had also spoken to Radovan Karadžic, then the President of the Republika Srpska. Later in his evidence, however, the Respondent disagreed with the proposition that giving the list of potential witnesses to Drljaca would have been a disastrous step for a defending lawyer to take. He said that the only way some witnesses could be reached was through either Drljaca as the Chief of Police or one Dule Jankovic as chief of the police station. When asked why, then, he claimed not to have given the list to Drljaca, the Respondent replied merely that he had not been

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asked to do so.

100. The Appeals Chamber is satisfied that the evidence of Mr Wladimiroff upon this issue is to be preferred to that of the Respondent. The suggestion that Mr Wladimiroff was part of a "defence conspiracy" overlooks his departure from that team a very long time before. The careful manner in which he gave his evidence was impressive. Notwithstanding the Respondent's denials , and the copy of the letter addressed to the Minister of Interior Affairs which he produced, the Appeals Chamber finds that the Respondent did in fact give Drljaca the list of prospective witnesses prepared by Mr Wladimiroff, and – in the light of his knowledge of Drljaca's behaviour in relation to matters concerned with the Tribunal, and of the availability of another source of assistance to find witnesses (Jankovic) – that the Respondent did so knowing that it was contrary to the interests of Tadic.

101. This finding has some bearing upon the weight to be given to other pieces of evidence concerning the Respondent's conduct contrary to the interests of Tadic, which – taken only by itself, and depending upon its source – would otherwise have been either so insufficiently specific or so unimpressive as to warrant disregarding it.

(ii) The concerns expressed by Mr Wladimiroff about the conduct of the Respondent , both at the time and in evidence before the Appeals Chamber

102. Mr Wladimiroff gave evidence that the work done for him by the Respondent in relation to witness statements was of poor quality, notwithstanding his specific instructions as to the type of statements which he required. He had initially attributed this to incompetence. He said that the Respondent continually interfered during interviews by correcting the witnesses or advising them what to say. It was submitted on behalf of Tadic that an incident recorded in the television documentary played during the hearing was one such incident where the Respondent had instructed a witness how to answer questions. The Appeals Chamber is not satisfied that it was. In that incident, during an exchange between the Respondent and Mr Wladimiroff's interpreter , the Respondent said "I don't care what he wants. I ask what I want to", but this may well have been a dispute as to whether the Respondent could ask *any* questions without the permission of Mr Wladimiroff, rather than the Respondent saying that he wanted to tell the witness what to say. Mr Wladimiroff was unable to recall in his evidence which interpretation was the correct one, and it is not clear from the documentary itself.

103. Mr Wladimiroff had nevertheless made the allegation of interfering with witnesses during interviews in general terms. He described this practice of the Respondent as one of manipulating the witnesses. However, rather than being improper, he thought that the Respondent's conduct had merely been not professional. Although Mr Wladimiroff and his co-counsel eventually attempted to "sideline" the Respondent because of his conduct, he continued to be in unauthorised contact with Tadic during the preparation for trial. Mr Wladimiroff said that he had not wished to confront the Respondent , because he feared that to do so may have prejudiced his access to the area in Bosnia where he was investigating the charges against Tadic.

104. Mr Wladimiroff said that eventually he had been driven to the conclusion that the Respondent was in reality taking care of the interests of the Serb authorities and was not truly interested in defending Tadic except insofar as the interests of Tadic coincided with those of the authorities. The Respondent's concern, he believed, had been to defend the Serb cause and to protect other persons from becoming involved in the Tadic defence. In a documentary concerning the preparations for the Tadic trial recorded for future showing on Dutch television, Mr Wladimiroff said:

> It's becoming ever more awkward because [the Respondent] is not doing what he should be

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> doing, and we are increasingly getting worried about his role. This means that we are wondering whether he should still have a place in this team, because we are increasingly faced with the question of whether this is co-operation or a lack of co-operation or even worse, perhaps he is pursuing goals which we are not pursuing .

These contemporaneous remarks, recorded early in 1996 (that is, before the trial), ensure an acceptance of Mr Wladimiroff's evidence as truthful. The lack of specificity in that evidence would normally have resulted in little weight being given to it . However, the Appeals Chamber's finding that the Respondent had knowingly acted contrary to the interests of Tadic when giving the list of witnesses to Drljaca gives this evidence of Mr Wladimiroff greater weight than it would otherwise have had.

(iii) The entries made by Tadic in his diary

105. Entries made by Tadic in a diary for the period January to April 1996 were admitted into evidence. There was no suggestion made in the cross-examination of Tadic that the entries had not been made contemporaneously with the period to which they purported to relate. Notwithstanding their contemporaneous nature, however , such entries should be treated with considerable reserve. Although these entries do not appear to have been written for other than personal consumption, the situation in which Tadic found himself may well have had a considerable bearing upon his state of mind at that time.

106. Tadic had already been in custody, in one form or another, for two years following his arrest in Germany on 12 February 1994. Many persons in custody, with so much idle time at their disposal, become obsessed with the conduct of their lawyers. The trial was expected to commence early in May 1996, and this was confirmed in February of that year. In January, his counsel had reported to the Trial Chamber the difficulties the defence was experiencing in the conduct of its investigations both within the region of the former Yugoslavia and elsewhere, even after the Dayton Peace Agreement.[66] There is a substantial danger, therefore, that Tadic's understandably stressed state of mind at the time of these entries may have affected the views which he had formed.

107. Taken only by itself, this evidence would have had so little weight as to warrant disregarding it, but there is sufficient corroboration for the accuracy of the relevant entries as to require consideration as to whether at least some weight should be given to it.

108. In January 1996, Tadic recorded the dissatisfaction with the Respondent's behavior which Mr Wladimiroff had expressed to him, and he expressed his own view that, despite what appears to be described as the Respondent's "obvious sabotage", Mr Wladimiroff was "winning the difficult terrain of my defence". He records Drljaca's order preventing any police officer or former police officer testifying without his personal authorisation , and his family's loss of trust in the Respondent. In February, he records the information that the Respondent had given the list of witnesses to Drljaca, and his own dissatisfaction concerning the assignment of the Respondent as counsel for General Đorde Đukic before the Tribunal,[67] and concerning the time being spent by the Respondent on that case rather than on his own. He recorded that he had asked the Respondent whether he had given the list of the witnesses to Drljaca and that, by his reaction, the Respondent was not telling the truth when he denied doing so. In March, Tadic recorded in a detailed way his discussion with Mr Wladimiroff as to whether the Respondent should be excluded from the defence team, and how this would have to be carried out.

109. The more significant passages are recorded in February:

> Formally, [the Respondent] is taking part in my defence, but only to the extent of ensuring that my case does not cause broader consequences which would affect the true participants

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> in the events which took place there in 1992, and especially someone who is in Serbia at the moment.
>
> It is difficult to understand the situation in any different way, when in the least correct way and for almost a year Vujin has avoided taking statements from some of my other witnesses living in Belgrade. All this refusal boils down to the general approach of the authorities there not to recognise the Hague Tribunal. Vujin believes that even his co-operation would in a way represent a recognition of the Tribunal and this is one of the reasons for not interviewing people who live under his nose in Belgrade.

And, later:

> Vujin is convincing in every conversation, but the facts and the reality speak against him. Whatever happens, I will take that decisive step and break off all contacts with counsel Vujin.
>
> My impression is that he has been included in my defence for the sole reason of preventing the events connected with Omarska from being discovered, and the easiest way to do so is to prolong and obstruct the investigation and the questioning of witnesses and the accused from Omarska.
>
> The issue is at the moment completely clear or else he would have left my case himself because he became the lead counsel of General Đukic. Bearing in mind the busy period certainly ahead of him in next few [illegible] of the Đukic case, the real reasons for him wanting to stay in my defence team is to deny any assistance to other counsels and me.

110. As most of what Tadic has recorded is based on what he had been told by Mr Wladimiroff, this material does not constitute independent evidence of the Respondent's conduct, although it does constitute corroboration of the contemporaneous statements by Mr Wladimiroff as to his state of mind at that time. Insofar as it expresses Tadic's own state of mind in relation to the conduct of the Respondent, the evidence still suffers from the fact that Tadic was at that time soon to face trial with difficulties still affecting the preparation of his case. The Appeals Chamber does not, therefore, place any weight upon these entries in Tadic's diary.

(iv) The claims made by the journalist Brkic

111. In an article published some four years ago, Milovan Brkic ("Brkic"), a Yugoslav journalist, accused the Serbian legal profession (with certain named exceptions) of working on behalf of "the regime" in order to ensure that persons accused before this Tribunal did not expose those connected with the State leadership to any risk of prosecution, regardless of the needs of their own defence. The Respondent was named as one of those lawyers who co-operated with the State Security Service in this way.

112. When called as a witness, Brkic made it clear that he had no independent knowledge of such conduct on the part of the Respondent. He said that he had obtained his information from persons within the State Security Service. They had shown him documents in proof of the allegations he made, including a "programme of activity " to select a group of attorneys who would appear for persons accused before the Tribunal, who would control those accused by threatening that their families in Yugoslavia would be persecuted if they implicated others, and who, if necessary, would force their clients to commit suicide. His particular source of information , he said, occupied a "high position". He

trusted this person, and information he had previously obtained from him had not turned out to be false.

113. Brkic said that he was told by the State Secret Service official in the high position that Tadic had already spoken to investigators with the Office of the Prosecutor and had implicated "quite a few" persons from the Republika Srpska in grave crimes against humanity, and that these people had subsequently been arrested. Brkic had not sought other details of the information he had been given because, he explained , he would have lost the confidence of this official. His editor, however, had asked for some proof of the allegations before the article was published and, after a confidentiality agreement had been signed, Brkic was given some notes by the official to show to his editor. Those notes had since been returned. He had not paid the official for the information. He described him, in effect, as a whistle-blower.

114. Brkic described his own motivation in publishing the article as that of a journalist who wished to inform the Serbian public how its political leadership was endeavoring to obstruct this Tribunal in a way which did not befit it. He believed that the article was true. Although he claimed in his statement to have "concrete proof" that the Respondent had undermined the defence of Tadic, he said in evidence that , since writing that statement, circumstances had changed and that, if he were now to reveal the sources of his information, he would have "signed their death sentence ". When invited to identify his sources in writing during a closed session, he replied:

> If that paper is accessible to Mr Vujin, then I would be signing the death sentence for those people, the people whose names I can write down. If you think you can bear them on your conscience, then I will do so, I mean, the Tribunal.
>
> I hope that the Honourable Tribunal will bear in mind the fact of the country that I live in, and that the key people within that state, within that country, occupying the top posts are accused of the worst crimes committed in the history of humankind , and you're asking me to do something that places me in a very, very difficult situation, to be responsible for the lives of people, for the life of a man.

There was a considerable attack upon the credit of Brkic, and a long (and not always clear) examination of the history of litigation in which he or his newspaper had been parties, including litigation which the Respondent had brought against him. The Appeals Chamber does not believe that it is necessary to determine the issues which arose in that cross-examination. That is because, in judging the weight to be given to this material put forward by Brkic, it is relevant to note that it was , on its face, hearsay upon hearsay. The very existence of his source was in issue , and the witness's non-disclosure of the identity of that source, for whatever reason, means that an acceptance of his assertions necessarily depends solely upon his own word.

115. The other evidence in the present case to which reference has already been made would prevent those allegations by Brkic being completely disregarded as having no weight at all. But, even in the light of that other evidence, his allegations still have very little weight. Such is the seriousness of the allegations now being investigated that the Appeals Chamber is not prepared to take evidence of such little weight into account in this case.

Some general matters

116. There are three other matters raised in argument to which reference should be made before turning to the evidence concerning the events in issue.

117. First, it was submitted on behalf of the Respondent that these allegations would never have been made against him if the Appeals Chamber had not rejected the application made by Tadic pursuant to Rule 115 to present additional evidence in his appeal against conviction. The first suggestion implicit in that submission is that Tadic, together with Witness D who had represented him in that appeal, had manufactured the allegations so that these present proceedings may be used to obtain material which would justify a review of the judgment of either the Trial Chamber or the Appeals Chamber pursuant to Rule 119. The second implicit suggestion is that, in any event, no regard should be had in these proceedings to the material which has been so obtained.

118. The Appeals Chamber accepts that such a possible motive in bringing the allegations to the notice of the Appeals Chamber is a matter to be considered in relation to the credit of both Witness D and Witness E (who was closely associated with him in the quest for additional evidence), although the existence of the motive itself would first have to be established. But the Appeals Chamber does not accept that , in the event that any of the allegations against the Respondent are made out, any such motive which may have led to their disclosure has any relevance to the gravity of the conduct so established. The Appeals Chamber has not, in the end, found it necessary to rely upon the evidence of either of those witnesses in its factual findings in this case.

119. Two specific matters were raised in relation to the credit of the Respondent as a witness. The first is the complaint made by TB concerning the Respondent.[68] The second is the action of the Respondent in contacting a number of persons in disobedience of the Scheduling Order which initiated the Rule 77 proceedings against him.

120. When defending himself against the allegation that he had failed to have witnesses in their statements identify the real perpetrators of the crimes, the Respondent produced a statement of TB prepared by Witness D as an example that Witness D, too , had failed to have the witness record the names of the perpetrators he had given in conference. That led to an issue as to the circumstances in which TB's statement had been made.

121. Witness D gave evidence in reply (based upon his adoption of a statement given by his independent interpreter at the time) that TB had told him that he had been present when the two Muslim policemen were killed, that Tadic had not been there , and that the policemen had been killed by a "closely knit gang, including Dragan Lukic, Momcilo Radanovic, Mišo Danicic and Goran Borovnica", by being shot "near the forge". TB had also told Witness D that he had been present as well at the beatings of the men in the Omarska camp, that Dragan Lukic and Mišo Danicic were responsible for the beatings, the leader being Danicic, and that Lukic had given the order for one of the victim's testicles to be bitten off. Finally, TB had also told Witness D that there was a "striking likeness" in appearance between Tadic on the one hand and Lukic and Danicic on the other hand, and that Lukic was a very dangerous man who had killed a man in Switzerland.

122. Witness D said that TB had been unwilling to make any written statement at all. In the end, he had made a statement only that he had never seen Tadic in the Omarska camp. Witness D went on to say:

> He was quite explicit as to why he didn't want to say anything more, and that was because he said that Mr Vujin worked for the Serbian Secret Service, and that he was very concerned that if he said anything about the events that occurred in the Omarska camp and about individuals responsible for those events, that Mr Vujin would report them back to the powers in Republika Srpska and in Serbia and that would have very grave consequences for him and his family.

Zivilpersonen), wie vorsätzliche Tötung, Verstümmelung, Folterung oder unmenschliche Behandlung einschliesslich biologischer Versuche, vorsätzliche Verursachung grosser Leiden, schwere Beeinträchtingung der körperlichen Integrität oder Gesundheit, Geiselnahme (1 3, 49-51; 2 3, 50, 51; 3 3, 129, 130; 4 3, 146, 147; 5 11 Abs. 2, 85 Abs. 3 Buchst. a)
[. . .]
-Verhinderung eines unparteiischen ordentlichen Gerichtsverfahrens (1 3 Abs. 3 Buchst. d; 3 3 Abs. 1d; 5 85 Abs. 4 Buschst. e)."
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PROSECUTION INDEX OF AUTHORITIES

ANNEX 7.

Prosecution v Tadić, IT-94-1-A-R77, "Judgment on Allegations of Contempt against Prior Counsel, Mila Vujin", App. Ch., 31 January 2000.

IN THE APPEALS CHAMBER

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Before:
Judge Mohamed Shahabuddeen, Presiding
Judge Antonio Cassese
Judge Rafael Nieto-Navia
Judge Florence Ndepele Mwachande Mumba
Judge David Hunt

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Judgment of: 31 January 2000

PROSECUTOR

v

DUSKO TADIC

JUDGMENT ON ALLEGATIONS OF CONTEMPT AGAINST PRIOR COUNSEL, MILAN VUJIN

Counsel for the Respondent

Mr Vladimir Domazet for Milan Vujin

Counsel for the Interested Parties

Mr Upawansa Yapa, Ms Brenda Hollis and Mr Michael Keegan for the Prosecutor
Mr Anthony Abell for Dusko Tadic

I Introduction

1. On 10 February 1999, the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("Tribunal") called upon Mr Milan Vujin, Advocate of Belgrade, to respond to allegations that he had acted "in contempt of the International Tribunal in that he knowingly and wilfully intended thereby to interfere with the administration of justice".[1] This was done in accordance with Rule 77 of the Tribunal's Rules of Procedure and Evidence.

2. Mr Vujin ("Respondent") had acted for Duško Tadic ("Tadic") in different capacities in proceedings in the Tribunal – as non-assigned co-counsel during the pre-trial stage of his prosecution, and as assigned lead counsel in the preparation of his appeal against his conviction and in the hearing of related

proceedings before the Appeals Chamber – until November 1998. He had worked with the defence team during the pre-trial stage for a year without remuneration, and paying his own expenses . The allegations of contempt arose out of the Respondent's conduct as lead counsel on behalf of Tadic in connection with the appeal. They were made in statements annexed to the Scheduling Order, which described the statements as appearing –

> [...] to disclose grave allegations of contempt of the International Tribunal against Mr Milan Vujin, lead counsel for [Tadic] at the time of the events complained of , including:
> (i) telling persons about to give statements to co-counsel for [Tadic] what they should or should not say before they were interviewed by [Witness D], and in effect instructing them to lie to [Witness D];
> (ii) nodding his head to indicate to witnesses, during witness interviews with [Witness D], when to say yes and when to say no;
> (iii) interfering with witnesses in a manner which dissuaded them from telling the truth;
> (iv) knowingly instructing a witness to make false declarations in a statement to the International Tribunal; and
> (v) paying a person giving a statement money when pleased with the information provided , but not paying him when he did not answer as instructed [...].

The Scheduling Order specified that these acts were alleged to have occurred between September 1997 and April 1998.

3. Witness D had been co-counsel for Tadic (with the Respondent) during the preparations for his appeal. He gave evidence in closed session, having been granted protective measures in relation to his identity for reasons unassociated with his position as counsel.

4. The five numbered paragraphs in the Scheduling Order did not purport to be an exclusive definition of the "grave allegations of contempt" to which that Order required the Respondent to respond. From the outset of the hearing, the parties concentrated upon the events which were related in the statements rather than upon the five numbered paragraphs. This Judgment deals with those events in Sections V and VI.

5. The time frame from September 1997 to April 1998 was intended to be based upon the events described in the statements. It is not completely accurate. For example , in one matter in which it was alleged that the Respondent put forward to the Appeals Chamber a case which was known to him to be a false one, the relevant document was in fact filed on 1 May 1998, although it is clear from the statements that the decision to do so is alleged to have been made prior to that date. The Respondent was at all times made aware of the case which he had to meet in relation to that matter . The Appeals Chamber considers the fact that the document was filed on that date was not material in the circumstances.

6. Evidence was also admitted in relation to events which occurred outside that period. However, this was not for the purpose of increasing the content of the allegations against the Respondent; the purpose was merely to demonstrate a particular course of conduct or to explain the events which took place within that period. Also, the Respondent was again at all times made aware of the case which he had to meet.

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II The hearing

7. The allegations of contempt against the Respondent came to the attention of the Appeals Chamber in a somewhat indirect fashion. In support of Tadic's appeal, the Appeals Chamber had granted him an *ex parte* Order to the Republika Srpska to assist those representing him to take statements from potential witnesses. Those witnesses were interviewed by the Respondent and Witness D at the Prijedor police station on 14 March 1998.

8. In October 1998, the prosecution filed a motion alleging (1) that those interviews had been conducted in a way that amounted to intimidation and a violation of fundamental rights, in particular of persons indicted by the Tribunal, and (2) that an interpreter with the Tadic legal team had made telephone calls to a potential witness which the witness had perceived to be threatening. It was also alleged by the prosecution that "Defence Counsel" or their agents had attempted "to shape the statements of potential witnesses".[2] The Appeals Chamber scheduled a closed session hearing of that motion for 9 October, but the prosecution called no witnesses at the hearing in support of its allegations. On 4 November, the Appeals Chamber dismissed the prosecution's complaint upon the basis that the evidence did not support the allegations.[3]

9. Shortly after those allegations were dismissed, Witness D brought to the attention of the Deputy Registrar certain conduct alleged on the part of the Respondent in connection with (a) the interviews at the Prijedor police station in March 1998 and (b) the submission to the Appeals Chamber in May 1998 of the statement of a proposed witness (and indicted person), Mlado Radic. Witness D was requested by the Deputy Registrar to produce any material in support of his allegations; and Witness D did so. On 10 February 1999, the Appeals Chamber issued the Scheduling Order to which reference has already been made, which required the Respondent to respond to the allegations of contempt and which fixed 30 March for an initial hearing . Pursuant to Rule 69 of the Rules of Procedure and Evidence, certain protective measures were put into place for potential witnesses to be called in the case against the Respondent. Both the prosecution and Tadic were granted leave to appear in the contempt proceedings as interested parties. On 24 March, the Appeals Chamber made an order as to the procedure to be followed at the hearing, and this order was made public. The Respondent filed a document formally denying the allegations against him.[4]

10. On 30 March, the Respondent filed a motion seeking an adjournment, explaining that, in view of the NATO attack on the Federal Republic of Yugoslavia (Serbia and Montenegro) which had just commenced, he had been unable to obtain a visa to travel . The hearing was postponed until 26 April. On that date, the hearing commenced in public. The allegations of contempt were read, and the Respondent confirmed his previous written submission denying the allegations. Four witnesses were heard (one part-heard) during the three days before the Respondent was required to return to his country, and the proceedings were adjourned. Throughout the case against the Respondent, the witnesses were called by the Appeals Chamber in accordance with Rule 77, but the burden of proving that case was effectively assumed by counsel appearing for Tadic.

11. Due to scheduling difficulties and the involvement of various judges in other cases, the evidence of the part-heard witness was not completed until a one day hearing on 28 June. The hearing resumed for a two week period commencing on 31 August, immediately following the Tribunal's Summer recess.[5] Eight further witnesses were heard (one by video conference link), completing the case against the Respondent. Six of the witnesses called in that case were assigned pseudonyms, and their evidence was heard in closed session because of concerns of possible retribution if their identity were disclosed in public.[6] The Respondent elected to call his witnesses before giving evidence himself.[7] Four of the Respondent's witnesses were heard during that two week period, and four more were heard in the week

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commencing 11 October. At the request of the Respondent , and with the partial support of the prosecution, the whole of the Respondent's case was heard in closed session.[8] At the request of all parties, the final addresses were also heard in closed session .[9] The hearing concluded on 18 November , when the Appeals Chamber reserved its judgment.

III Contempt

12. Contempt of the Tribunal is dealt with in Rule 77 of the Tribunal's Rules of Procedure and Evidence. That Rule identifies a number of specific situations which are stated to constitute contempt of the Tribunal, but Rule 77(E) provides:

> Nothing in this Rule affects the inherent power of the Tribunal to hold in contempt those who knowingly and wilfully interfere with its administration of justice.

It has not been submitted in this case that, if established, the allegations against the Respondent in the present case would not constitute contempt of the Tribunal in that general sense. There was, however, argument as to whether the various changes made to Rule 77 over the relevant period qualified such an inherent power and increased the extent of the conduct which amounts to contempt, to the prejudice of the Respondent's rights.[10] Reference will be made to that argument later, as it is necessary, first, to consider generally the Tribunal's jurisdiction to deal with contempt.

13. There is no mention in the Tribunal's Statute of its power to deal with contempt . The Tribunal does, however, possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded.[11] As an international criminal court, the Tribunal must therefore possess the inherent power to deal with conduct which interferes with its administration of justice. The content of that inherent power may be discerned by reference to the usual sources of international law.

14. There is no specific customary international law directly applicable to this issue. There is an international analogue available, by way of conventional international law, in the Charter of the International Military Tribunal (an annexure to the 1945 London Agreement)[12] which gave to that tribunal the power to deal summarily with "any contumacy" by "imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges".[13] Although no contempt matter arose before the International Military Tribunal itself , three contempt matters were dealt with by United States Military Tribunals sitting in Nürnberg in accordance with the Allied Control Council Law No 10 (20 December 1945), whereby war crimes trials were heard by the four Allied Powers in their respective zones of occupation in Germany. That Law incorporated the Charter of the International Military Tribunal. The US Military Tribunals interpreted their powers as including the power to punish contempt of court.[14]

15. It is otherwise of assistance to look to the general principles of law common to the major legal systems of the world, as developed and refined (where applicable) in international jurisprudence.[15] Historically, the law of contempt originated as, and has remained, a creature of the common law. The general concept of contempt is said to be unknown to the civil law, but many civil law systems have legislated to provide offences which produce a similar result.

16. In a passage widely accepted as a correct assessment of the purpose and scope of the law of

contempt at common law as developed over the centuries, the Report of the (UK) Committee on Contempt of Court, published in 1974, described it as:

> [...] a means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally.[16]

The rule of law, which lies at the heart of society, is necessary to ensure peace and good order, and that rule is directly dependent upon the ability of courts to enforce their process and to maintain their dignity and respect. To maintain their process and respect, the common law courts have, since the twelfth century, exercised a power to punish for contempt.[17] In order to avoid any misconception, it is perhaps necessary to emphasise that the law of contempt as developed at common law is not designed to buttress the dignity of the judges or to punish mere affronts or insults to a court or tribunal; rather , it is justice itself which is flouted by a contempt of court, not the individual court or judge who is attempting to administer justice.[18]

17. Although the law of contempt has now been partially codified in the United Kingdom ,[19] the power to deal with contempt at common law has essentially remained one which is part of the inherent jurisdiction of the superior courts of record, rather than based upon statute. On the other hand, the analogous control exercised in the civil law systems over conduct which interferes with the administration of justice is based solely upon statute, and the statutory provisions, in general, enact narrow offences dealing with precisely defined conduct where the jurisdiction of the courts has been or would be frustrated by that conduct.[20]

18. A power in the Tribunal to punish conduct which tends to obstruct, prejudice or abuse its administration of justice is a necessity in order to ensure that its exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded. Thus the power to deal with contempt is clearly within its inherent jurisdiction.[21] That is not to say that the Tribunal's powers to deal with contempt or conduct interfering with the administration of justice are in every situation the same as those possessed by domestic courts, because its jurisdiction as an international court must take into account its different setting within the basic structure of the international community.[22]

19. This Tribunal has, since its creation, assumed the right to punish for contempt . The original Rules of Procedure and Evidence, adopted on 11 February 1994, provided by Rule 77 ("Contempt of Court") for a fine or a term of imprisonment where – subject to the provisions of what is now Rule 90(F), which permits a witness to object to making any statement which may tend to incriminate him or her – a witness "refuses or fails contumaciously to answer a question relevant to the issue before a Chamber ". In January 1995, such punishment was also made applicable to a person who attempts to interfere with or intimidate a witness, and any judgment of a Chamber under Rule 77 was made subject to appeal.[23] In July 1997, such punishment was also made applicable to any party, witness or other person participating in proceedings before a Chamber who discloses information relating to the proceedings in violation of an order of the Chamber. Both of these additions expressly identified the relevant conduct as "contempt".

20. In November 1997 – that is, shortly after the relevant period in this case commenced in September 1997 – Rule 77 was recast in a different form. The effect of the alterations was:

(a) to elaborate the references to an interference with or intimidation of a witness to include

a witness who is giving, has given, or is about to give evidence before a Trial Chamber,
(b) to include within the conduct which amounts to contempt the failure of any person without just excuse to comply with an order to attend or to produce documents before a Chamber,
(c) to provide a detailed procedure whereby a person may be called upon to answer an allegation that he or she is in contempt (where the Chamber has good reason to believe that the person may be in contempt),
(d) to provide for counsel to be assigned where the person called upon is indigent , and
(e) to require leave before an appeal could be brought.

It was also expressly stated for the first time that nothing in Rule 77 affects "the inherent power of the Tribunal to hold in contempt those who knowingly and wilfully interfere with its administration of justice".

21. In July 1998, the time within which leave to appeal had to be sought was varied so as to take into account the absence of the party challenging a determination of contempt where that determination had been made orally.

22. In December 1998 – that is, well after the relevant period in this case concluded in April 1998 – the references to interference with or intimidation of a witness were further elaborated so as to include for the first time any person who threatens , intimidates, causes any injury or offers a bribe to, or otherwise interferes with , a witness or a potential witness, and to include within the conduct which amounts to contempt –

(i) threatening, intimidating, offering a bribe to, or otherwise seeking to coerce any person, with the intention of preventing that person from complying with an obligation under an order of a judge or a Chamber, and
(ii) incitement to commit, and any attempt to commit, "any of the acts punishable under this Rule".

The procedure whereby a person may be called upon to answer an allegation of contempt was varied to spell out in more detail the steps to be taken by the Chamber in initiating the proceedings. The maximum punishment was substantially increased, and the right to seek leave to appeal was limited to decisions made by a Trial Chamber.

23. Rule 77, so far as it is relevant, is now in the following terms:

Contempt of the Tribunal

(A) Any person who

(i) being a witness before a Chamber, contumaciously refuses or fails to answer a question,
(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber, or
(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber,

commits a contempt of the Tribunal.

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(B) Any person who threatens, intimidates, causes any injury or offers a bribe to , or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness, commits a contempt of the Tribunal.

(C) Any person who threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber, commits a contempt of the Tribunal.

(D) Incitement to commit, and attempts to commit, any of the acts punishable under this Rule are punishable as contempts of the Tribunal with the same penalties.

(E) Nothing in this Rule affects the inherent power of the Tribunal to hold in contempt those who knowingly and wilfully interfere with its administration of justice.

Sub-rules (F) and (G) deal with procedure, (H) and (I) with penalty and (J) with leave to appeal.

24. Care must be taken not to treat the considerable amount of elaboration which has occurred in relation to Rule 77 over the years as if it has produced a statutory form of offence enacted by the judges of the Tribunal, notwithstanding the form in which Sub-rules (A) to (D) may be expressed. Article 15 of the Tribunal's Statute gives power to the judges to adopt only –

> [...] *rules of procedure and evidence* for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.[24]

That power does not permit rules to be adopted which constitute *new* offences , but it does permit the judges to adopt *rules of procedure and evidence* for the conduct of matters falling within the inherent jurisdiction of the Tribunal as well as matters within its statutory jurisdiction.[25] As stated earlier, the *content* of these inherent powers may be discerned by reference to the usual sources of international law, but not by reference to the wording of the rule.

25. Sub-rules (A) to (D) are statements of what was seen by the judges at Plenary meetings of the Tribunal to reflect the jurisprudence upon those aspects of the law of contempt as are applicable to the Tribunal. Those statements do not displace the underlying law; both the Tribunal and the parties remain bound by that underlying law.[26]

26. In the opinion of the Appeals Chamber:

> (a) the inherent power of the Tribunal as an international criminal court to deal with contempt is for present purposes adequately encompassed by the wording of the reservation inserted in Rule 77 in November 1997 – that the Tribunal has the power "to hold in contempt those who knowingly and wilfully interfere with its administration of justice" – as such conduct would necessarily fall within the general concept of contempt, being "conduct which tends to obstruct, prejudice or abuse the administration of justice";[27] and
> (b) each of the formulations in the current Rules 77(A) to (D), when interpreted in the light of that statement of the Tribunal's inherent power, falls within – but does not limit – that inherent power, as each clearly amounts to knowingly and wilfully interfering with the Tribunal's administration of justice.

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27. It was argued by the Respondent that the nature of the conduct which amounts to contempt had been greatly increased to the prejudice of his rights by the amendments made to Rule 77 both after the commencement of the relevant period in this case and after its conclusion. Those are the amendments made –

> (i) in November 1997, which refer for the first time to the inherent power of the Tribunal to hold in contempt those who knowingly and wilfully interfere with its administration of justice, and
> (ii) in December 1998, which are said to have widened the conduct amounting to contempt to include for the first time any coercion of witnesses by threats, intimidation or bribes.

The Respondent submitted that the Appeals Chamber should accordingly disregard those changes in these proceedings.[28]

28. The Appeals Chamber rejects that argument. The inherent power of the Tribunal to deal with contempt has necessarily existed ever since its creation, and the existence of that power does not depend upon a reference being made to it in the Rules of Procedure and Evidence. As the Appeals Chamber is satisfied that the current formulation of Rules 77(A) to (D) falls within that inherent power, the amendments made in December 1998 did not increase the nature of the conduct which amounts to contempt to the prejudice of the Respondent's rights.[29]

29. As stated earlier, it has not been submitted in this case that the allegations made against the Respondent, if established, would not constitute contempt of the Tribunal in the sense of knowingly and wilfully interfering with its administration of justice. It therefore remains only for the Appeals Chamber to consider whether those allegations have been established against the Respondent.

IV The background to the allegations

30. The allegations of contempt against the Respondent have to be considered against the extensive background of Tadic's trial and the preparations for his appeal. Included in those preparations was an application, made in accordance with Rule 115 of the Tribunal's Rules of Procedure and Evidence, to present additional evidence to the Appeals Chamber in relation to a substantial number of factual issues.[30] It was during the preparation of that application that the conduct of the Respondent amounting to contempt presently being considered by the Appeals Chamber is alleged to have taken place. Although the application to present the additional evidence was ultimately unsuccessful,[31] that fact does not affect the nature of the conduct which has been alleged.

31. One particular issue arising out of the trial is of relevance to many of the allegations of contempt. That concerned the identification of Tadic as being involved in at least two of the incidents which were investigated at the trial and in relation to which the Trial Chamber found against him. The first was the killing of two Muslim policemen at Kozarac; the second was the beating of six prisoners at the Omarska camp as a result of which four of them were alleged to have died.

32. Tadic was charged in Count 1 of the indictment with persecution on political , racial and/or religious grounds, amounting to a crime against humanity.[32] It was alleged under this count that Tadic was actively involved in the attack by Serbian forces upon the village of Kozarac and other villages and hamlets in the surrounding area of what is now part of the Republika Srpska, during which the majority

of the non-Serb population of the area were seized and transferred to detention centres. It was alleged that Tadic also took part in the killing and beating of a number of the seized persons.[33]

33. Although not specifically charged, but nevertheless held to be relevant to the charge, evidence was led that, on the afternoon of 26 May 1992, Tadic and about sixteen other Serb paramilitaries were pointing weapons at six Muslim policemen from Kozarac, who were standing in line in front of the Serbian Orthodox Church with their hands behind their necks. Tadic pulled two of the policemen out of the line and killed them by slitting their throats, also stabbing each one several times .[34] The evidence of Tadic's participation relied upon a sole witness, one Nihad Seferovic,[35] although there was substantial evidence that Tadic had been in the general area over this period.[36] The case put forward by Tadic at the trial was that he was not in Kozarac from 24 to 27 May 1992 , and evidence was led from a number of witnesses who were there during that period and who said that they had not seen him.[37] There was also a challenge to the ability of Seferovic, to view these events in the churchyard clearly.[38] The Trial Chamber found beyond reasonable doubt that Tadic killed the two policemen in front of the Serbian Orthodox church.[39]

34. In his appeal against conviction, Tadic alleged that this finding constituted an error of fact leading to a miscarriage of justice, submitting that the evidence of Seferovic was both –

> (a) unreliable, because he had been introduced to the prosecution by a tainted source , and
> (b) implausible, because, having fled from the area to the mountains for safety during the bombardment of Kozarac by the Serbian paramilitary forces, he claimed to have returned to the village of Kozarac while the Serbian paramilitary were still there in order to feed his pet pigeons, so concerned was he for their welfare, and that he had there seen the killing from the orchard of a house across from the Serbian Orthodox church.[40]

35. The Appeals Chamber has since rejected this ground of appeal, holding that, before it can substitute its own factual findings for those of a Trial Chamber, it must be satisfied that the evidence upon which the Trial Chamber made its findings could not reasonably have been accepted by any reasonable person,[41] and that Tadic had failed to show that the reliability of Seferovic was suspect or that his testimony was inherently implausible.[42]

36. The second incident – beating the six prisoners – was pleaded in Counts 5-11 , in which Tadic was charged with wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body and health, amounting to grave breaches of the Geneva Conventions,[43] murder and cruel treatment, as violations of the laws or customs of war,[44] and murder and inhumane acts, amounting to crimes against humanity.[45] It was alleged that, between 1 June and 31 July 1992, a group of Serbs which included Tadic severely beat numerous prisoners in Omarska camp including the four prisoners who subsequently died.

37. Evidence was led that this beating took place in a hangar at the camp on 18 June 1992, that the perpetrators used metal rods and cables to beat the prisoners , that they punched them as well and that they used knives to inflict wounds. A number of prisoners were forced to take part in these beatings, and one of them was forced to bite off a testicle of another prisoner.[46] Four of those prisoners were never seen again. Tadic was identified as having played an active part in these events by two prisoners who were beaten but survived – one who knew Tadic well and another who identified him from a photo spread in a procedure which the Trial Chamber held to have been reliable.[47] There was substantial

evidence, including evidence from witnesses who knew Tadic well, that he had been in the relevant area of the Omarska camp on the day in question , and evidence from some of those witnesses that he had been on the hangar floor at the relevant time.[48]

38. In addition to challenging the identifications made, the case put forward by Tadic was an alibi, that he had never been to the Omarska camp and that on 18 June 1992 he had been living in Prijedor and was working there at the relevant time as a traffic policeman.[49] The Trial Chamber noted various inconsistencies in the evidence of the prosecution witnesses (including the fact that one of the prisoners who was forced to participate in the beatings did not see Tadic there). It rejected the evidence of alibi, and it was satisfied beyond reasonable doubt that Tadic was actively involved in the beatings , but it was not so satisfied that the four missing prisoners died as a result of those beatings.[50] There was no appeal by Tadic against these findings.

39. In both of these incidents, a substantial issue arose as to the safety of the identification made of Tadic as having being involved in them. One of the major tasks to be undertaken by the Respondent and Witness D (as counsel on behalf of Tadic) in the preparation of his application to present additional evidence in his appeal – and on his express instructions – was to demonstrate that, both at Kozarac and in the Omarska camp, there was a man described as his *Doppelgänger* (or look-alike), or even more than one such man, who may have been mistakenly identified by the witnesses as Tadic. Momcilo Radanovic (also known as "Ciga") was the primary nomination as such a look-alike, but Dragan Lukic and Mišo Danicic were others who were also nominated. Another task was to follow up information which suggested that other persons (and not necessarily look-alikes) were responsible for the acts which the Trial Chamber had found were done by Tadic. Both these issues had been discussed during the preparation for the trial itself, but had been discarded by Jhr Michaïl Wladimiroff (then lead counsel for Tadic) because, as he had appreciated the issues at the time, the existence of the look-alike never passed the level of rumour, the implementation of both suggestions would involve calling hostile witnesses , and in any event he did not want to cause confusion only for the sake of confusion . Since judgment was given by the Trial Chamber, however, a number of people had come forward with information which, it was thought, should assist Tadic in his appeal upon this issue of identification.

V The evidence relating to the events in issue

40. It is convenient to deal with the evidence relating to the events in issue in groups which differ from the descriptions given to them in the five numbered paragraphs of the Scheduling Order which initiated these proceedings against the Respondent . Those numbered paragraphs merely described in general terms particular events related in the statements annexed to the Scheduling Order which were relevant, and did not purport to do so exclusively. Nor did they purport to characterise those events in a way which was necessarily relevant to the law of contempt. From the outset of the hearing, the parties concentrated upon the events themselves which were related in the statements, rather than upon the five numbered paragraphs, and it was clear to everyone that the "grave allegations of contempt", to which the Scheduling Order required the Respondent to respond, were those events set out in the statements annexed to the Scheduling Order.

41. This Judgment will deal with the events related in the statements under the following headings, which the Appeals Chamber believes more appropriately characterise those events:

(1) Putting forward to the Appeals Chamber in support of the Rule 115 application a case which was known to the Respondent to be false –

(a) in relation to the weight to be given to statements made by one Mlado

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Radic , and
(b) in relation to the responsibility of one Goran Borovnica for the killing of the two Muslim policemen.

(2) Manipulating proposed witnesses –

(a) by seeking to avoid any identification by them of persons who may have been responsible for the crimes for which Tadic had been convicted, and
(b) by persuading them to tell lies or to withhold the truth from Witness D (as co-counsel for Tadic) when taking their statements to be used in the Rule 115 application .

(3) Bribing a witness to tell lies to or to withhold the truth from Witness D.

(1)(a) Putting forward to the Appeals Chamber in support of the Rule 115 application a case which was known to the Respondent to be false in relation to the weight to be given to statements made by one Mlado Radic

42. Two statements by Mlado Radic were submitted as part of the Rule 115 application . In the first, Radic stated that, as a policeman on duty as a guard in the administration building of the Omarska interrogation centre, he had seen Dragan Lukic and Mišo Danicic coming to the centre several times, and he recounted an incident in which Lukic had attacked a number of people, wounding a guard who had attempted to stop him. In the second statement, Radic said that he had heard talk of people being beaten up at the centre, but that no one had mentioned Tadic. This material was directed to supporting (a) the evidence of Tadic that he had never been to the Omarska camp, and (b) the possibility that the evidence identifying him as having been there was mistakenly based upon the presence there of a look-alike of Tadic.

43. The first statement purports to have been made on 10 March 1998 at Prijedor. It commences:

> I, Mladjo Radic, to a question of the lawyer Milan Vujin, voluntary [sic] make the following:
>
> STATEMENT

Paragraph 6 commences:

> To a question of the lawyer Milan Vujin if there were any incidents? I state that [...]

The second statement commences:

> On 18th April 1998, at the prison in [The] Hague, when the permission of my lawyer Veljko Guberina and the Court was granted, the lawyer Milan Vujin, the defender of Duško Tadic, visited me, and I make to him the following
>
> STATEMENT
>
> In everything I confirm my statement I made to you on 10th March 1998 [...].

In his submissions relating to these statements, the Respondent said:[51]

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RADIC MLADEN

"Unavailability"

Radic Mladen called Mladjo did not testify until now although on March 10, 1998 immediately prior to his arrest he gave a statement to the Defense counsel of Dusko Tadic because he was himself on the list of the indicted and was not previously available.

Interests of Justice

This witness also had certain duties in the investigation center of Omarska and in his statement of March 10, 1998 given before his arrest and latter [sic] on on [sic] April 18, 1998 after the arrest when he confirmed his previous statement this witness is claiming that he never saw Dusko Tadic in Omarska [...].

44. In fact, the first statement had not been made in Prijedor, nor was it made on 10 March 1998, nor was it made to the Respondent. It had been made at the United Nations Detention Centre, some time after Radic had been arrested on an indictment against him on 9 April 1998, and at the instigation of Tadic. Tadic testified that the Respondent had told him to date the document 10 March 1998 and to indicate that it had been made to him (the Respondent) personally at Prijedor.

45. The Respondent denied that he had said this to Tadic, but he conceded that he knew, when he took the second statement from Radic, that the date on the first statement was false, that it had not been taken before Radic's arrest, and that it had not been taken by himself. He claimed that the words "to a question of the lawyer Milan Vujin" in the first statement, and "my statement I made to you" in the second statement , did not mean that he had personally taken the first of them. It was, he said, a question of interpretation. He said that he had not thought that the date was of any significance, that only the contents of the statement were significant, that those contents had been confirmed by Radic in his second statement and that the Tribunal would not have been misled by the erroneous date. He also said that Tadic had instructed him to file the statements. He accepted that he was wrong to have left the incorrect date, but he said that he had been under pressure of time when filing his submissions, and that he had not intended to mislead the Tribunal. He accepted that he had a duty, as a lawyer, to be truthful in his submissions to the Tribunal. He also asserted that, according to the criminal procedure in Yugoslavia , a lawyer is "duty-bound to follow the defence of the accused". Finally, he accepted that he had put himself forward in his submissions as having adopted two points in the first statement – that it had been made by Radic before his arrest, and that it had been made to him as defence counsel – and that the Tribunal may have considered that adoption by him as being of relevance to the issues before it in the appeal .

(1)(b) Putting forward to the Appeals Chamber in support of the Rule 115 application a case which was known to the Respondent to be false in relation to the responsibility of one Goran Borovnica for the killing of the two Muslim policemen

46. A defence witness at Tadic's trial (Witness W) had given evidence that the person who killed the two Muslim policemen at Kozarac was one Goran Borovnica, not Tadic . There was other evidence at the trial that Borovnica had been present at the time. Evidence was given in the present proceedings that, during the course of preparing the application to present additional evidence to the Appeals Chamber, Witness W had informed the Respondent that his identification of Goran Borovnica at the trial had been false, that in fact it had been one Momcilo ("Ciga") Radanovic who killed the two policemen, and that he had not dared to name Ciga at the trial because Ciga held a high position in the Serb community and

because he had feared for his own safety. He had only been prepared to reveal the truth after the trial because he had been promised asylum in "a third country".

47. According to the evidence in the present proceedings, the Respondent told Witness W that it would be better to stick to the evidence he had given at the trial because Goran Borovnica was now dead, saying that what was important was his evidence that Tadic had not done it, not who did. He also told Witness W to find other evidence which corroborated the evidence which he had given at the trial and which Witness W had already told him was false. The Respondent thereafter repeatedly inquired whether Witness W had obtained such corroboration and, when Witness W said that one Vlado Krckovski could give corroboration, the Respondent had Krckovski called before a military tribunal in the Republika Srpska to give evidence. According to the note of this evidence, the Respondent elicited from Krckovski that he had seen Goran Borovnica kill the two policemen.

48. That note of Krckovski's evidence was put forward as part of the application pursuant to Rule 115 to present additional evidence, in these terms:[52]

> As a participant in the events in Kozarac this witness [Vlado Krckovski] has the knowledge that Dusko Tadic did not take part in the conflict and that he left Kozarac before the conflict. During the conflict he did not see him at all. This witness confirms that the two Muslim policemen were not killed by knife as claimed by Seferovic in the courtyard of the church, but that they were killed, as he had seen himself , by Goran Borovnica firing a gun at them, near the shop called "Zeljezara".

The document in which this description was put forward was signed by the Respondent .

49. The evidence of this event upon which Tadic relies was given by people closely associated with him: his brother Mladen and Witness H.[53]

50. The Respondent in his evidence denied being told that Goran Borovnica had not killed the two policemen. He said that he had not known who was telling the truth , or whether Goran Borovnica or Ciga had killed the two policemen. It was for the court, not him, to determine such issues. He had not sought to have Krckovski identify Goran Borovnica when he gave evidence before the military tribunal. He had asked Krckovski only whether he had been a participant in the events, and what he could say about them. Krckovski had identified Goran Borovnica of his own volition as the person who killed the two policemen. The Respondent had thought that the statement as recorded by the military tribunal was in the interests of his client, Tadic, and that he should use it.

51. The Respondent said that there had been conflict between Witness D and himself as to the inclusion of this document in the Rule 115 application, but he had taken the view that the only information which he had was that Goran Borovnica had killed the two policemen, and that the presence of Goran Borovnica at the scene was confirmed by other evidence at the trial. He was not prepared to put forward the suggestion that another person had killed the two policemen rather than Goran Borovnica unless he had a witness to confirm that the other person had killed them.

(2) Manipulating proposed witnesses –

(a) by seeking to avoid any identification by them of persons who may have been responsible for the crimes for which Tadic had been convicted, and

(b) by persuading them to tell lies or to withhold the truth from Witness D (as co-counsel for Tadic)

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Witness D subsequently qualified the reference to the Respondent working for the Secret Service. Rather, TB had said only that he was himself under surveillance at the time when he made his statement.

123. The statement given by the interpreter – which she said she had based upon her own clear recollection, although she had refreshed her memory from notes made by Witness D at the time – was somewhat more detailed as to the terms of TB's complaint concerning the Respondent. She stated that TB had said that he was unwilling to make a written statement because:

> [...] he was afraid for his own personal safety if he did so and for that of his wife and two children. He said that his home was constantly watched by neighbours of his who have been indicted for crimes in the Omarska camp and that his telephone is "tapped". He knew this because, after speaking to [Witness E] on the telephone during October 1997, he had received a warning against talking to Duško Tadic's lawyers or indeed anyone else about the events occurring at Omarska in May to August 1992. This could only have happened if that telephone call was listened into. Hence his wish to talk to [Witness D] at the Hotel Bosna, rather than his home address .

124. This evidence by Witness D as to TB's state of mind is direct evidence of that state of mind, not hearsay. The interpreter did not give evidence, and the quoted part of her statement was not adopted by Witness D, so that it is only hearsay. But, even upon the basis that there is direct evidence of TB's state of mind, there is no basis in the evidence for assuming that it was formed as a result of any direct knowledge rather than hearsay and rumour. The absence of TB as a witness has denied both the Respondent and the Appeals Chamber the opportunity for investigating that issue. The Appeals Chamber is not satisfied that this evidence should be taken into account on the issue of the Respondent's credit as a witness.

125. The second matter relating to the credit of the Respondent as a witness was his action in contacting a number of persons contrary to the terms of the Scheduling Order of 10 February 1999 which initiated the Rule 77 proceedings against him. The second order was in these terms:

> (2) without prejudice to the Order for protective measures for witnesses "A" and "B" issued by this Chamber today, Mr Milan Vujin, his representatives and agents , shall refrain from contact with any person *identified or referred to* in the documents without the prior approval of this Appeals Chamber, pending determination of this matter [...].[69]

The expression "the documents" is defined earlier in the Order as meaning the ten confidential statements as supplied by counsel for Tadic, redacted in accordance with the Order for Protective Measures, annexed to that Order. (In fact, only nine statements were annexed to it.) One of the nine statements annexed to the Order was that of Witness A, which deals in part with events involving Simo Kevic and GY. Another of the nine statements was that of Witness H who also mentioned Simo Kevic.

126. During his evidence, the Respondent produced (a) a statement of Simo Kevic which he had taken from him on 15 March 1999 as a result, he said, of having read the statement of Witness H, and (b) a statement of GY which he had taken from her on the same date. These were tendered on his behalf and admitted into evidence. When taxed in cross-examination with the terms of the Scheduling Order, the Respondent claimed that had not understood the second order as prohibiting him from having contact with these two people. He stated his understanding of the order as follows :

> I understood that I should not contact the witnesses in the order and in the documents , whereas I had not received a single document.

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> I don't consider a statement to be a document. A document is written evidence of something, whereas a written statement is a written statement. The order must be clear and, had it been clear, it should have stated: "You mustn't contact Witnesses A and B or other witnesses named in some other written statements".
>
> Therefore, my stand is quite clear: I received no document and I was not bound by a single document.

Subsequently, the Respondent suggested that he was not prohibited from contacting GY "because [...] she was not encompassed within the charges", or Simo Kevic because he "was not mentioned in all these documents".

127. The Respondent had introduced his evidence before the Appeals Chamber with details of his extensive experience as a lawyer over a period of some twenty seven years. The Appeals Chamber does not accept that the Respondent genuinely drew any distinction between a document and a statement, or that he honestly misinterpreted the Scheduling Order in either of the not wholly consistent ways he put forward in his evidence. The Appeals Chamber observed the Respondent giving evidence over a substantial period. He demonstrated a marked arrogance in his attitude which suggested that no-one should be permitted to stop him doing what he wanted to do .

128. The Appeals Chamber is satisfied that the Respondent's conduct in contacting these two witnesses was an arrogant action done in deliberate disregard of the prohibition against doing so in the Scheduling Order. The Respondent has not, of course, been charged with contempt in relation to such conduct, and the Appeals Chamber does not view this conduct in the context of it being a contempt.[70] But it does regard the untruthful attempts which the Respondent made to explain his conduct as directly relevant to his credit as a witness.

129. Another matter which the Appeals Chamber has taken into account as relevant to the credit of the Respondent is his decision to give evidence after all of his own witnesses had given evidence. The Respondent had been told by the Appeals Chamber that, in evaluating his evidence if it were given after that of his own witnesses , it would take into account the fact that he had heard that evidence before giving his own.[71] The explanation given by the counsel for the Respondent that his earlier witnesses could not be heard if the Respondent were called first, which was not confirmed by either the Respondent or anyone else in evidence, is not accepted.

130. At the same time, the Appeals Chamber has also taken into account as relevant to the guilt or innocence of the Respondent the evidence which was given as to his character. Such evidence is relevant because it bears on the questions as to whether the conduct alleged to constitute contempt was deliberate or accidental, and whether it is likely that a person of good character would have acted in the way alleged .

Conclusions

131. The Appeals Chamber now returns to the events in issue, and takes them in the groups as classified at the commencement of Part V of this Judgment ("The evidence relating to the events in issue") for the purposes of expressing its conclusions . The Appeals Chamber accepts that, in order to find the Respondent in contempt of the Tribunal, it must be satisfied beyond reasonable doubt that he conducted himself in the way alleged and that such conduct constitutes contempt of the Tribunal .

(1)(a) Putting forward to the Appeals Chambers in support of the Rule 115 application a case which

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was known to the Respondent to be false in relation to the weight to be given to statements by one Mlado Radic

132. The first of the statements signed by Radic and put forward by the Respondent purported to have been given by Radic in Prijedor, before his arrest, and to the Respondent as a lawyer. In fact, it had been given by Radic in the United Nations Detention Centre in The Hague, after his arrest, and to Tadic as a fellow inmate of the Detention Centre. The Respondent was aware that the statement was false in all these respects. The second of the statements signed by Radic was taken by the Respondent, and in it Radic confirmed that the earlier statement he had given was true despite the Respondent's awareness that it had been false in all those respects.

133. The Appeals Chamber does not accept the Respondent's argument that the first statement should not be interpreted as meaning that he had taken it. The clear and necessary meaning of the statement is that the Respondent did take it, and the Appeals Chamber is satisfied that this is how the Respondent knew that it would be interpreted. He accepted that both that fact and the fact that it had been taken from Radic before his arrest were significant matters in the appeal. His explanation that he believed that the contents of the statement were accurate, even if the date was wrong, is not accepted. As has been seen, in his submission to the Appeals Chamber in support of the Rule 115 application, the Respondent emphasised the importance of the fact that the first statement had been taken from Radic before his arrest .[72] His evidence before the Appeals Chamber that the Tribunal would not have been misled by the erroneous date is not accepted.

134. The Appeals Chamber finds that the Respondent did put forward a case in relation to the Radic statement that he knew to be false in material respects.

(1)(b) Putting forward to the Appeals Chamber in support of the Rule 115 application a case which was known to the Respondent to be false in relation to the responsibility of one Goran Borovnica for the killing of the two Muslim policemen

135. In the submission which the Respondent made to the Appeals Chamber in the Rule 115 application in relation to Witness W's statement, he emphasised the importance of the fact that Witness W had himself seen one Goran Borovnica kill the two Muslim policemen, and not Tadic.

136. The Appeals Chamber is satisfied that, at that time, the Respondent knew that Witness W had asserted that his evidence at the trial naming Goran Borovnica as the killer was false, and that he was now asserting that it was Momcilo ("Ciga") Radanovic who had killed the two policemen. The Appeals Chamber does not accept the Respondent's denial that he had been told by Witness W that his evidence at the trial had been false. It prefers the evidence of Mladen Tadic and Witness H , despite their close association with Tadic and the motive which that association could give them to lie. Once it is accepted that the Respondent was prepared to put forward one part of the case which he knew to be false, it is easier to conclude that he did so on this occasion also. The Respondent accepted that there had been conflict between Witness D and himself in relation to his decision to put forward this part of the case. That fact, too, supports a finding that he knew that this part of the case was false as well. So does the evidence which the Respondent gave that he did not know whether it was Goran Borovnica or Ciga who had killed the two policemen. This was not a situation in which the Tribunal could determine where the truth lay, as he suggested. The Respondent, by submitting as the only evidence on the point a statement which he knew had been repudiated by the very person who made it, denied to the Tribunal any opportunity to make any determination as to where the truth lay.

137. It was argued by the Respondent that he could not put forward any suggestion that another person

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had killed the two policemen rather than Goran Borovnica unless he had a witness to confirm that the other person had killed them. This was argued by him on a number of occasions throughout his evidence. It should be stated that this was not the real issue. The prosecution bore the onus of proving beyond reasonable doubt that it was Tadic who killed the two policemen and who beat the six men at the Omarska camp. In order to defend Tadic, it was never necessary to prove that it was in fact another person who actually did these things. It was sufficient to show that there was a reasonable possibility that the witness or witnesses upon whom the prosecution relied had been mistaken in their identification of Tadic as the person who did them. In the circumstances of this case, such a possibility would have been raised by showing that there was at the scene a person who looked sufficiently like Tadic that he could have been mistaken for him, whether or not the look-alike could be shown to have actually done these things himself. His presence there could raise a reasonable doubt as to the accuracy of the identification made . The Appeals Chamber is satisfied that the Respondent, as the experienced criminal lawyer he claimed to be, knew that this was the real issue.

138. The Appeals Chamber finds that the Respondent did put forward a case in relation to Witness W's statement which he knew to be false.

(2) Manipulating proposed witnesses

139. Although the relevant evidence is recorded earlier in this Judgment without separating that which relates to the Respondent's instruction not to name names from that which related to the instruction to answer questions as indicated by the Respondent's head signals, the Appeals Chamber intends to make separate findings in relation to these two allegations of manipulating proposed witnesses.

(2)(a) The instruction to name names

140. It is necessary here to refer to a further piece of evidence which is relevant . In January 1999, the Respondent was interviewed by a Yugoslav newspaper, *The Daily Telegraph*, concerning his departure from the Tadic defence team. According to the newspaper, the Respondent had said that he had refused to continue acting for Tadic because –

> [...] there were demands made of me with which I could not professionally comply. For example, he asked me to disclose the perpetrators of specific crimes.

In his evidence, the Respondent agreed that he had said something to that effect . When asked why, the Respondent replied:

> Because it is not defence counsel's job to reveal the names of perpetrators of crimes , and it is not to give their names but to defend them, and it is up to the police to find the names of the perpetrators.

141. The Respondent went on to assert that in any event not a single witness had ever said that another person had in fact done what Tadic had been charged with. That assertion is not accepted by the Appeals Chamber, as the event involving Witness W has already shown it to be false. But the issue which the Respondent claims never to have been established by a single witness is, once again, not the real one, for the reasons explained in paragraph 137.

142. Witness B said in his statement that the Respondent instructed him that, if Witness D asked him for any names, he should not give them. He maintained that assertion throughout his evidence, and it is consistent with the Respondent's attitude , as expressed in his evidence, that it is not defence counsel's

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job to name names . The fact that the Respondent filed the first interview he conducted with Witness B (when no names were mentioned) but not the subsequent video-recorded interview (when the name of Danicic was mentioned) supports the intention of the Respondent to avoid names being named. The Appeals Chamber accepts that this instruction was given to Witness B by the Respondent.

143. Witness A also said in his statement that the Respondent had instructed him to make sure that he did not mention names. In his evidence, however, Witness A said that this had been a misunderstanding in his statement, and that the instructions had in fact been given to him by the assistant Chief of Police at the Prijedor police station, not by the Respondent. The instructions were nevertheless to answer questions according to the indication given to him by the Respondent.

144. Witness A had been interfered with between the time he gave his statement and the time he gave his evidence, as described in paragraph 59. The evidence does not permit the Appeals Chamber to identify who was responsible for that interference other than the Police Chief to whom Witness A referred. But that is not the issue here. It is obvious that Witness A was fearful of retaliation in relation to the evidence which he was to give concerning the Respondent, whether or not the Respondent was responsible for the threats he received. In those circumstances, a departure from his statement of the nature which occurred is an understandable one – even though, when examined, the new version still implicates the Respondent as a party to the instruction given.

145. A tribunal of fact is always permitted to accept part and reject part of the same witness's evidence. The Appeals Chamber is conscious that it is a substantial step to take to accept the statement given by a witness in preference to his or her sworn evidence, especially when the witness seeks to repudiate the relevant part of the statement. However, once it is accepted that the Respondent did not believe that it was his job to name names, and that he gave a similar instruction to Witness B, it is easier to conclude that he gave one to Witness A also, as Witness A asserted in his statement. The fact that it had been Witness A who sought out Witness D in April 1998 to give him the information concerning his original statement , and who again sought out Witness D in October 1998 to make a formal statement, suggests that he had something more to say than merely that the assistant Police Chief had given him instructions.

146. The Appeals Chamber accepts that the Respondent gave Witness A the instruction not to name names.

147. The evidence as to the Respondent's conduct concerning GY at the Prijedor police station is highly suggestive of an attempt by the Respondent to prevent her identifying names to Witness D as she had, somewhat tentatively, done so in the statement which she had given to the Respondent earlier. There is, however, other evidence in the case which supports the Respondent's explanation for his conduct. The fact that Witness D already knew of her earlier statement, and was able to obtain a detailed statement from her four days later, gives rise to a reasonable doubt that the Respondent had acted with the suggested motive of preventing her from making a statement. The Appeals Chamber does not accept that such a motive has been established.

148. The evidence relating to the original statement made by Miloš Preradovic is , at best, confused. If Preradovic thought that the document which he was shown by Witness H differed from that which he signed only because it omits a question which required him to answer "yes" or "no" and because it may have been a faulty photocopy, it is difficult (if not impossible) to understand why he would have asserted in his written complaint that the document shown to him was a "clear fraud" and "completely different in its content". The Appeals Chamber strongly suspects that Preradovic, too, was interfered with between making that complaint and giving evidence , but the evidence does not permit it to make such a finding or to identify who was responsible for the interference. The Appeals Chamber makes no findings in relation to Preradovic.

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149. The evidence relating to Simo Kevic is inconclusive. No-one sought to call him to give evidence before the Appeals Chamber, and none of the material is sufficiently reliable to establish anything against the Respondent. The Appeals Chamber makes no findings in relation to Kevic.

150. The general allegations of manipulation of witnesses by seeking to prevent names being named, recorded in Part V Section (2)(a) of this Judgment, have nevertheless been made out.

(2)(b) The instruction to answer questions according to the Respondent's head signals

151. Witness B did not suggest at any time that he had been given such instructions , although in his statement he did say that he had interpreted the Respondent as instructing him by way of a head signal to answer a particular question about Danicic by saying "no". In his evidence, he first departed from his statement to the extent that, although he noticed some kind of head-nodding, he did not know whether it was intended or not. Then he said that he had noticed that the Respondent was trying to tell him something, but he did not know what. Next, he said that he interpreted the evidence as an instruction not to give the name of Danicic or anyone else. Finally, he returned to where he started in his evidence, that he had not understood the head-nodding as giving him any instruction.

152. The allegation by Witness B in relation to this particular instruction has always been limited, and his evidence concerning it was far less impressive than it was in relation to the instruction to name no names. The Appeals Chamber has already accepted that Witness B was instructed by the Respondent to name no names , but it is not satisfied that the instructions to Witness B went any further than that so as to include a general instruction to answer questions in accordance with head signals given by the Respondent.

153. Witness A specifically said in his statement that he had been given such a general instruction as well as an instruction to name no names. As already mentioned , in his evidence Witness A said that this had been a misunderstanding in his statement , and that the instructions had in fact been given to him by the assistant Chief of Police at the Prijedor police station, not by the Respondent. Witness A had the same reason to depart from his statement upon this issue as has already been discussed in relation to the instruction not to name names, but the circumstances in favour of accepting what he said in his statement in preference to what he said in his evidence are not as strong. There is no evidence from the Respondent, as there was in relation to the instructions not to name names, which supports the truth of the allegation made. Of less importance, but nevertheless still relevant , Witness A asserted in his evidence that the Respondent had not in fact given any head signals during the interview. The only evidence that the instruction was given is to be found, therefore, in the statement which Witness A made. The Appeals Chamber is not satisfied that the instructions to answer questions in accordance with his head signals was given to Witness A by the Respondent.

154. The allegations recorded in Part V Section (2)(b) of this Judgment have therefore not been made out.

(3) Bribing a witness to tell lies or to withhold the truth from Witness D.

155. This allegation is based upon the statement made by Witness B, that he had been paid DM 100 (the equivalent of one month's wages) by the Respondent after an interview in which he had made no mention of Danicic as having been a look-alike of Tadic and as having been at the Omarska camp, but that he had not been paid any money after a subsequent video-recorded interview in which he had named Danicic. Witness B said in his statement that he had not thought the payment was proper behavior , but in his evidence he said that he had understood it as a humanitarian gesture .

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156. The Respondent said in his evidence that the payment following the first interview had been to help the witness because of the difficult financial and emotional circumstances he was in at the time. A second payment had been made to the witness some time after the second interview, but in circumstances unassociated with any interview .

157. The Appeals Chamber accepts the submissions made on behalf of Tadic that:

> (a) it is unwise for any lawyer to give gifts to a prospective witness, for whatever reason, because such a gift can so easily be misinterpreted – either by the witness or by others,
> (b) Witness B's change in attitude to the propriety of the payment is highly suggestive of interference with him during the period between giving the statement and giving evidence, and
> (c) the Respondent's inclusion in the Rule 115 application to present additional evidence to the Appeals Chamber of the first interview (in which Mišo Danicic is *not* named), but not the later video-recorded interview (in which Mišo Danicic *is* named), supports the proposition that he was unhappy with Witness B for having named him.

158. However, the Appeals Chamber believes that the second payment made to Witness B, by the Respondent's colleague Witness DH in circumstances unassociated with any evidence given or not given by Witness B, gives rise to a reasonable doubt that the first payment was intended as a bribe to Witness B to remain silent as to the identity of the real perpetrators of the crimes of which Tadic had been convicted .

159. No finding of contempt is made in relation to this allegation.

Summary

160. The Appeals Chamber has thus found:

> (1) that the Respondent put forward to it in support of the Rule 115 application a case which was known to him to be false in relation to the weight to be given to statements made by Mlado Radic and in relation to the responsibility of Goran Borovnica for the killing of the two Muslim policemen, and
> (2) that the Respondent manipulated Witnesses A and B by seeking to avoid any identification by them in statements of their evidence of persons who may have been responsible for the crimes for which Tadic had been convicted.

The Appeals Chamber is satisfied beyond reasonable doubt that this conduct constituted contempt of the Tribunal.

VII Observation on taking statements from witnesses

161. Some time was spent during the hearing in an examination of the methods by which the Respondent took statements or otherwise obtained evidence from prospective witnesses. Extensive reference has already been made to the statements taken at the Prijedor police station on 14 March 1998, and brief reference has been made to a witness being called before a military tribunal in the Republika Srpska to give evidence.

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162. There was substantial criticism of the Respondent for having organised the resuscitation of an old prosecution for desertion against Tadic in the Banja Luka military tribunal so that witnesses could be called before that tribunal to make statements. In response to that criticism, the Respondent asserted:

> In our law, counsel may not contact any of the witnesses at any stage of the proceedings ; we are not allowed to do so.

And, again:

> I must say at this point, and remind one and all, that our legal system is such that lawyers are prohibited contact with witnesses, and that we are very wary and were very wary when we talked to them and in respect to the witnesses in this case .

He went on to identify three ways in which statements were permitted to be taken :

> (i) by "lawyers personally via the investigating judge of the military court",
> (ii) by "lawyers via an order to the Republika Srpska", which took place in a police station with a police typist, and
> (iii) by policemen at the request of a lawyer.[73]

163. The Appeals Chamber has not been placed in a position where it can determine just what the law on this point is in the former Yugoslavia. The material which the Respondent supplied to the Chamber as supporting what he had said does not demonstrate the existence of any law prohibiting lawyers from obtaining statements from witnesses directly and without intervention by the court or the police, but the material he supplied may be incomplete. However, whatever the law may be in the various parts of the former Yugoslavia, it must clearly be understood by counsel appearing in matters before this Tribunal that they are bound by the law of the Tribunal to act freely when seeking out witnesses. They are bound by the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, which (by Article 19) prevails where there is any inconsistency between it and any other code which counsel may be bound to honour. International law does not recognise any prohibition upon counsel such as asserted by the Respondent to exist in the former Yugoslavia , and States could not effectively legislate to frustrate the proper workings of the Tribunal in that way.

164. In the present case, the Respondent explained his resort to the military tribunal by his concern that, in an application pursuant to Rule 115 to present additional evidence to the Appeals Chamber, the Chamber would prefer the evidence to be on oath, and therefore would accept statements taken by an official organ of the country in which the witnesses reside. (The Appeals Chamber was informed that affidavits are unknown in the former Yugoslavia.) Such would certainly be an understandable concern. But it should again clearly be understood that counsel appearing before the Tribunal are not *obliged* to have statements taken from prospective witnesses in police stations or in courts or through any other official organs. Indeed, in most cases it would be unwise, and potentially counter-productive, to follow such procedures, because of the intimidating effect they may have on the witnesses themselves , and the perceptions which such procedures may create as to the influence of the State upon statements which are made in that way.

VIII Punishment

165. In early 1998, at the time of the Respondent's acts which the Appeals Chamber has found to

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constitute contempt, the maximum punishment prescribed by Rule 77 of the Tribunal's Rules of Procedure and Evidence was a term of imprisonment not exceeding six months, or a fine of Dfl 20,000, or both.

166. The Appeals Chamber regards the Respondent's contempt as serious. Courts and tribunals necessarily rely very substantially upon the honesty and propriety of counsel in the conduct of litigation. Counsel are permitted important privileges by the law which are justified only upon the basis that they can be trusted not to abuse them.

167. It unfortunately happens that counsel occasionally do abuse those privileges or act dishonestly or improperly. Such cases usually involve conduct on the part of counsel which is intended, for whatever reason, to assist in winning the case for the client whom counsel represents. That is bad enough. In the present case , the Respondent's conduct has been *against* the interests of his client. That is even worse, particularly where the client is in custody and relies so heavily upon his counsel for assistance. The conduct of the Respondent in this case strikes at the very heart of the criminal justice system. The Appeals Chamber has not considered the extent to which the interests of Tadic may in fact have been disadvantaged by the conduct in question. That is a matter which would require substantial investigation , and no such investigation was either suggested or undertaken in these proceedings . The contempt in this case remains a serious one, no matter what disadvantage was or was not in fact caused to Tadic.

168. The contempt requires punishment which serves not only as retribution for what has been done but also as deterrence of others who may be tempted to act in the same way. Before determining what punishment should be imposed, however, it is necessary to consider what other consequences may flow from the finding by the Appeals Chamber that the Respondent is in contempt of the Tribunal, so that those consequences may be taken into account in that determination.

169. The Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal defines professional misconduct as including any violation of the Code and engaging in conduct which involves dishonesty, deceit or misrepresentation or which is prejudicial to the proper administration of justice before the Tribunal .[74] Knowingly making an incorrect statement of a material fact to the Tribunal and offering evidence which counsel knows to be incorrect amount to violations of Article 13 of the Code. The Respondent has been guilty of professional misconduct in all the categories described.

170. The Code does not itself provide for any sanction where counsel is guilty of professional misconduct, although reference is made to Rule 46 ("Misconduct of Counsel ") of the Tribunal's Rules of Procedure and Evidence. However, that Rule (which permits a Chamber to refuse audience to counsel where, in its opinion, the conduct of that counsel obstructs the proper conduct of the proceedings) is not applicable where counsel is no longer appearing as counsel before the Chamber.

171. The Respondent is on the list of assigned counsel kept by the Registrar in accordance with Rule 45. The Registrar has power pursuant to Article 20 of the Directive on Assignment of Defence Counsel to strike any counsel off that list where he or she has been refused audience by a Chamber in accordance with Rule 46, and to notify the professional body to which that counsel belongs of the action taken in relation to his or her conduct. The Respondent's conduct as found by the Appeals Chamber in these proceedings is substantially worse than that which permits the Registrar to strike counsel off the list pursuant to Article 20 of the Directive

172. In the opinion of the Appeals Chamber, the Registrar has power generally to strike the Respondent

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off the list of assigned counsel because of his serious professional misconduct as demonstrated by the Appeals Chamber's findings. A direction will therefore be given to the Registrar to consider striking the Respondent off the list and reporting his conduct as found by the Appeals Chamber to the professional body to which he belongs. The Appeals Chamber proposes to determine the punishment to be imposed upon the Respondent upon the basis that the Registrar in the reasonable exercise of her power would necessarily strike him off the list of assigned counsel and report his conduct to his professional body.

173. The Chamber has anxiously considered whether a term of imprisonment should be imposed, but it has decided that it would be inappropriate in the present case . A substantial fine is nevertheless necessary in this case to achieve the purposes for which punishment is imposed. The Appeals Chamber fixes that fine at Dfl 15, 000.

IX Disposition

174. For the foregoing reasons, the Appeals Chamber unanimously –

(1) finds the Respondent, Milan Vujin, in contempt of the Tribunal;
(2) orders him to pay a fine of Dfl 15,000 to the Registrar of the Tribunal within twenty one days, or within such further time as may be allowed upon application by the Respondent to the Appeals Chamber;
(3) directs the Registrar of the Tribunal to consider striking the Respondent off the list of assigned counsel kept by her pursuant to Rule 45 of the Tribunal's Rules of Procedure and Evidence and reporting his conduct as found by the Appeals Chamber to the professional body to which he belongs;
(4) orders that copies of the following documents (redacted to comply with the relevant Witness Protection Orders) be made public:

(i) the Decision on Prosecution Request for Orders Regarding Defence Harassment and Intimidation of Potential Witnesses, 4 November 1998, together with the respective pleadings of the parties; and
(ii) the Scheduling Order Concerning Allegations Against Prior Counsel, 10 February 1999, but not the statements attached to it; and

(5) orders that the material from the evidence given and in the documents tendered during any closed session of the hearing which has been referred to in the Judgment be made public so far as it has been so referred to.

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

Judge Mohamed Shahabuddeen
Presiding Judge

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

[Seal of the Tribunal]

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1 - Scheduling Order Concerning Allegations Against Prior Counsel, 10 Feb 1999 ("Scheduling Order"), Order (1). That Order was made on a confidential basis. However, an order is made by this Judgment releasing a redacted version of that Scheduling Order as a public document, but not the statements attached to it.
2 - Decision on Prosecution Request for Orders Regarding Defence Harassment and Intimidation of Potential Witnesses, 4 Nov 1998, p 2. An order is made by this Judgment releasing a redacted version of that Decision and the respective pleadings as public documents.
3 - *Ibid*, p 4.
4 - Notice Identifying the Witnesses Concerning Allegations Against Prior Counsel, 26 Feb 1999, p 3.
5 - Because of Judge Wang's illness at that time, he was (by consent) replaced by another judge. The then President assigned Judge Hunt temporarily to the Appeals Chamber for that purpose.
6 - A number of persons who did not give evidence were named in evidence given and in documents tendered during the various closed sessions in the course of the hearing. For the purposes of this Judgment, it has been necessary to refer to some events concerning those persons, and an order is made by the Judgment releasing to the public the material to which reference has been made. Pseudonyms have been assigned to those persons named where there exist concerns of possible similar retribution.
7 - His right to do so was argued at the hearing. The Appeals Chamber ruled that it was a matter for the Respondent to decide when he gave his evidence, but stated that, in evaluating his evidence if it were given after that of his own witnesses, the Appeals Chamber would take into account the fact that he had heard that evidence before giving his own (9 Sept 1999, Transcript pages 1361-1362).
8 - This was a majority decision; Judges Nieto-Navia and Hunt dissented.
9 - This was also a majority decision; Judge Hunt dissented.
10 - Rule 6(D) of the Rules of Procedure and Evidence provides that an amendment made to the Rules shall not operate to prejudice the rights of the accused in any pending case.
11 - *Nuclear Tests Case*, ICJ Reports 1974, pp 259-260, par 23, followed by the Appeals Chamber in *Prosecutor v Blaskic*, Case IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997 ("*Blaskic Subpoena Decision*"), footnote 27 at par 25. See also *Northern Cameroons Case*, ICJ Reports 1963, p 29.
12 - Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945.
13 - Article 18(c).
14 - All references are taken from "Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No 10": *US v Karl Brandt*, 27 June 1947, at 968-970 (where a prosecution witness assaulted one of the accused in court); *US v Joseph Altstoetter*, 17 July 1947, at 974-975, 978, 992 (where defence counsel and a private individual attempted improperly to influence an expert medical witness by making false representations, and mutilated an expert report in an attempt to influence the signatories of the report to join in altering it); and *US v Alfried Krupp von Bohlen und Halbach*, 21 Jan 1948, at 1003, 1005-1006, 1088, 1011 (where defence counsel staged a walk out, and then failed to appear, in protest of a ruling against their clients, but which conduct was ultimately dealt with on a disciplinary basis).
15 - cf *Prosecutor v Blaskic*, Case IT-95-14-PT, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, TC II, 18 July 1997, par 152; *Prosecutor v Furundzija*, Case IT-95-17/1, 10 Dec 1998, Judgment, pars 177-178.
16 - Report of the Committee on Contempt of Court, UK Cmnd 5794 (1974) ("Phillimore Committee Report"), par 1. That passage has been accepted as a correct assessment of the purpose and scope of the law of contempt by the European Court of Human Rights, in *Sunday Times v United Kingdom*, Series A Vol 30 at pars 18 and 55, (1979) 2 EHRR 245 at 256, 274, by the English House of Lords, in *Attorney-General v Times Newspaper Ltd* [1992] 1 AC 191 at 207-209 (per Lord Ackner), and by the Ontario Court of Appeal, in *Regina v Glasner* (1994) 119 DLR (4th) 113 at 128-129. See also *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 106 (High Court of Australia); *Witham v Holloway* (1995) 183 CLR 525 at 533 (per joint judgment), 538-539 (per McHugh J) (High Court of Australia); *US v Dixon & Foster* 509 US 688 (1993) at 694 (Supreme Court of the United States).
17 - *United Nurses of Alberta v Attorney-General for Alberta* (1992) 89 DLR (4th) 609 at 636 (per McLachlin J, for the majority of the Supreme Court of Canada).
18 - *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 449 (per Lord Diplock). This statement has frequently been quoted with approval.
19 - Contempt of Court Act 1981, following in part the recommendations of the Phillimore Committee Report.
20 - For example, the German Penal Code punishes as a principal offender anyone who incites a witness to make a false statement (§§ 26, 153). The Criminal Law of the People's Republic of China punishes anyone who entices a witness to give false testimony (Article 306). The French *Nouveau Code Pénal* punishes those who pressure a witness to give false evidence or to abstain from giving truthful evidence (Article 434-15). More general statutory provisions exist which deal with such things as the control of the hearing (*police de l'audience*), "affronts" (*outrages*), [footnote continued next page] offences committed during the hearings (for example, *delits d'audience*) and the publication of comments tending to exert pressure (*pression*) on the testimony of witnesses or on the decision of any court. The Russian Criminal Code punishes interference in

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any form whatsoever with the activities of the court where the purpose is to obstruct the effectuation of justice (Article 294), and also provides more specific offences such as the falsification of evidence (Article 303).
21 - The Appeals Chamber has already held this to be so, but as an *obiter dictum* only, in the *Blaskic Subpoena Decision*, par 59.
22 - *Blaskic Subpoena Decision*, par 40.
23 - The heading of the rule was corrected to read "Contempt of the Tribunal".
24 - The emphasis has been added.
25 - Rule 91, which deals with false testimony, is another provision in the Rules concerning the conduct of a matter falling within the inherent jurisdiction of the Tribunal.
26 - Rule 96, which deals with evidence in cases of sexual assault, is a similar statement insofar as it deals with the admissibility of evidence of consent by the victim.
27 - See footnote 16.
28 - Transcript pages 14-16, 25. The issue was briefly mentioned again, at Transcript pages 986-987, 1007.
29 - The ruling given on 26 April 1999 during the hearing (at Transcript page 33) expressly left open the issue as to whether the amendments made after the relevant period did indeed introduce a new standard of conduct.
30 - Motion for the Extension of Time Limit, 6 Oct 1997; as elaborated in Appellant's Brief in Relation to Admission of Additional Evidence Under Rule 115, 5 Feb 1998.
31 - Decision on Appellant's Motion for the Extension of Time-Limit and Admission of Additional Evidence, 15 Oct 1998.
32 - Tribunal's Statute, Article 5(h).
33 - Indictment, par 4.1.
34 - *Prosecutor v Tadic*, Case IT-94-1-T, Opinion and Judgment, 7 May 1997 ("Trial Judgment"), par 393.
35 - *Ibid*, at par 393.
36 - *Ibid*, at pars 380-386.
37 - *Ibid*, at pars 394-395.
38 - *Ibid*, at par 393.
39 - *Ibid*, par 397.
40 - Amended Notice of Appeal, 8 Jan 1999, Ground 3; *Prosecutor v Tadic*, Case IT-94-1-A, Judgment, 15 July 1999 ("Appeal Judgment"), pars 57-60.
41 - Appeal Judgment, par 64.
42 - *Ibid*, at par 67.
43 - Tribunal's Statute, Article 2(a), (b) and (c).
44 - *Ibid*, Article 3.
45 - *Ibid*, Article 5(a) and (i).
46 - Trial Judgment, pars 200-206.
47 - *Ibid*, pars 207-208.
48 - *Ibid*, pars 210-225.
49 - *Ibid*, par 229.
50 - *Ibid*, pars 231-241.
51 - Appellant's Brief in Relation to Admission of Additional Evidence on Appeal Under Rule 115 II, filed 1 May 1998, p 21, and signed by the Respondent.
52 - Appellant's Brief in Relation to Admission of Additional Evidence on Appeal Under Rule 115, 4 Feb 1998, pp 31-32.
53 - Witness H was granted protective measures which permitted his identity to remain confidential so far as the public is concerned. His identity was known to the Respondent and to the Appeals Chamber.
54 - Order to Republika Srpska, 2 Feb 1998.
55 - GY is the pseudonym assigned to one of the persons who did not give evidence but who were named in evidence. See footnote 6.
56 - The document is dated "Oct 15, 1992", but the Respondent said that the year was an error.
57 - 14 Oct 1999, Transcript page 2072.
58 - This is the English translation provided to the Appeals Chamber on behalf of Tadic. A translation made by the Tribunal's Conference & Languages Services Section is not markedly different, except that the penultimate sentence reads: "I hereby claim that this statement is a pure forgery and that I never gave such a statement to anybody". The difference between "a clear fraud" and "a pure forgery", in the context, is insubstantial.
59 - No point was taken that this was outside the relevant period.
60 - These propositions are not new. For a discussion of them in the domestic context, see, in Australia: *Chamberlain v The Queen* (1984) 153 CLR 521 at 535 (High Court of Australia); *Regina v Heuston* (1995) 81 A Crim R 387 at 391 (New South Wales Court of Criminal Appeal); in New Zealand: *Thomas v The Queen* [1972] NZLR 34 at 37-38 (New Zealand Court of Appeal); *Police v Pereira* [1977] 1 NZLR 547 at 532-533 (Supreme Court, Auckland); and in Canada: *Regina v Morin* [1988] 2 SCR 345 at 358 (Supreme Court of Canada); *Regina v MacKenzie* [1993] 1 SCR 212 (Supreme Court of Canada).
61 - In Australia, however, the common law has now been modified in certain circumstances to enable such evidence, once admitted in relation to credit, to establish also the truth of what had been said: Evidence Act 1995 (Commonwealth), Section 60.

62 - *Prosecutor v Tadic*, Case IT-94-1-T, Decision on Defence Motion on Hearsay, 5 Aug 1996.
63 - *Prosecutor v Aleksovski*, Case IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 15.
64 - *Ibid*, at par 15. Extensive reference is made to the *Tadic* Decision on Defence Motion on Hearsay.
65 - There was no suggestion made as to how else Drljaca could have obtained possession of the list of witnesses. One witness called by the Respondent, Witness DA (a legal colleague of the Respondent), gave evidence that, in the Summer of 1998, he had been present at the United Nations Detention Unit at The Hague as part of an official delegation from the Government of Republika Srpska when Tadic was interviewed. He said that, so pleased was Tadic with his legal representation at the time, he had turned over to the government representatives "his entire file case". The Appeals Chamber has not concerned itself with the truth of this assertion by Witness DA, although it does observe that his evidence was unsatisfactory in many respects. The assertion itself was never put to Tadic in cross-examination. However, as the incident is alleged to have occurred more than two years after the list of witnesses was seen in the possession of Drljaca, this could not have been the means by which the list came to be in Drljaca's possession.
66 - Trial Judgment, par 22.
67 - Case IT-96-20.
68 - TB is the pseudonym assigned to one of the persons who did not give evidence but who were named in evidence. See footnote 6.
69 - The emphasis has been added.
70 - There was an application made on behalf of Tadic to add to the allegations of contempt the conduct of the Respondent in contacting the witness Miloš Preradovic, but his statement had not been annexed to the Scheduling Order of 10 February 1999. It was not argued that Preradovic had been identified or referred to in any of the statements which were annexed to the Scheduling Order, and the Appeals Chamber refused the application: 9 Sept 1999, Transcript page 1360. There was no similar application in relation to the Respondent's contact with the witnesses GY or Simo Kevic.
71 - 9 Sept 1999, Transcript pages 1361-1362.
72 - The relevant part of the document is quoted at par 43.
73 - At Transcript page 1957, the Respondent began by enumerating what he said were the three ways statements could be taken, and concluded by referring to the four ways (see also Transcript page 2019), but he did not identify the fourth way, at least with any clarity.
74 - Article 20.