International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

ENGLISH
Original : FRENCH

APPEALS CHAMBER

Before Judges:
Claude Jorda, Presiding
Lal Chand Vohrah
Mohamed Shahabuddeen
Rafael Nieto-Navia
Fausto Pocar

Registry: Agwu U. Okali

Decision of: 31 May 2000

Laurent Semanza
(Appellant)
vs.
THE PROSECUTOR
(Respondent)

Case No. ICTR-97-20-A

DECISION

Counsel for the Appellant :
Mr. Charles Taku

Counsel for the Prosecution :
Ms Carla Del Ponte
Ms Holo Makwaia
Mr. Bernard Muna
Mr. Frédéric Ossogo
Mr. David Spencer
Mr. Mohamed Othman

I. Introduction

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (respectively, "the Appeals Chamber" and "the Tribunal") has before it an interlocutory Appeal lodged on 12 October 1999 (the "Appeal")[1] by Laurent Semanza (the "Appellant") against the "Decision on the 'Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful'" (the "impugned Decision").[2] The Appeals Chamber must also rule on the "Prosecutor's Request to Supplement the Record on Appeal" (the "Prosecutor's Request").[3]

2. The impugned Decision was delivered by Trial Chamber III on 6 October 1999. In that Decision, the Trial Chamber denied the "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful" (the "Motion to Set Aside as Unlawful").[4] Citing the similarity between the instant case and the interlocutory Appeal as well as the Application for Review in *Jean-Bosco Barayagwiza v. The Prosecutor*[5], the Prosecutor's Request seeks leave to present additional evidence before the Appeals Chamber.

3. Both Parties have adduced the similarity between *Semanza* and *Barayagwiza*.[6] The Chamber recognizes that the two cases are indeed similar in terms of both fact and procedure. However, the similarity between the two cases does not necessarily imply that the legal findings will be the same. The Appeals Chamber would like to recall the specific features of the instant case relative to the *Barayagwiza* case and states that it has considered the issues raised in the instant case on the basis of the specific arguments and grounds submitted to it by the Parties.

II. PROCEDURAL BACKGROUND[7]

4. On or about 26 March 1996, the authorities in Cameroon arrested the Appellant pursuant to an international arrest warrant issued by the Parquet général (Office of the Public Prosecutor) of the Republic of Rwanda.

5. On 15 April 1996, the Prosecutor submitted a request for provisional measures in respect of the Appellant and 11 others under Rule 40 of the Tribunal's Rules of Procedure and Evidence (the "Rules").

6. On 6 May 1996, the Prosecutor made a request based on Rule 40 of the Rules for the authorities in Cameroon to extend detention by three weeks for all the suspects, including the Appellant.

7. On 17 May 1996, the Prosecutor informed the authorities in Cameroon of its intention to proceed against only four suspects, not including the Appellant.

8. On 21 February 1997, the Court of Appeal for the Centre Province in Yaounde, Cameroon (the "Yaounde Court of Appeal") dismissed the extradition request by Rwanda as inadmissible and ordered the Appellant's release. That same day, the Prosecutor filed a further request for the Appellant to be arrested and placed in provisional detention, pursuant to a second motion based on Rule 40.

9. On 24 February 1997, the Prosecutor applied to the Tribunal for a Transfer and Provisional Detention Order under Rule 40 *bis*. The application was heard on 3 March 1997 at an *ex parte* hearing before Judge Aspegren, who issued an Order that same day, which order was filed on 4 March 1997. The documents were served on the authorities in Cameroon on 6 March 1997 and the Appellant received a copy thereof on 10 March 1997.

10. While awaiting transfer to the Tribunal, on 29 September 1997 the Appellant filed a writ of *habeas corpus* with the Trial Chamber challenging the lawfulness of his detention in Cameroon.

11. On 16 October 1997, the Prosecutor submitted an indictment against the Appellant. The review hearing was held on 17 October 1997 and on 23 October 1997 the indictment was confirmed by Judge Aspegren.

12. The Appellant was transferred to the Tribunal's Detention Facility on 19 November 1997.

13. On 16 February 1998, the Appellant made his initial appearance before the Tribunal and pleaded not guilty to the seven counts in the 23 October 1997 indictment against him.

14. On 31 May 1998, the Prosecutor filed a motion under Rule 50 seeking leave to amend the indictment in order to add a new count. By oral Decision of 18 June 1999, Trial Chamber II granted the Prosecutor's motion. A written Decision was subsequently filed, on 2 September 1999.

15. On 24 June 1999, pursuant to Rule 50 (B), the Appellant made a second initial appearance on the basis of the amended indictment and pleaded not guilty to all counts.

16. The same day, after the Appellant had made his plea, the Prosecutor sought leave to correct errors in the English and French translations of the amended indictment. The Trial Chamber granted the Prosecutor's motion and the Prosecutor filed a second amended indictment on 2 July 1999.

17. On 16 August 1999, Counsel for the Appellant filed the Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful.

18. Trial Chamber III heard both Parties on 23 September 1999 and on 6 October 1999 delivered its Decision dismissing the said Motion.

19. On 12 October 1999, the Appellant appealed against the Decision of 6 October 1999.

20. On 9 November 1999, the Prosecutor filed the "Prosecutor's Request to Supplement the Record on Appeal".

III. APPLICABLE PROVISIONS

A. The Statute

Article 9: *Non bis in idem*

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

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

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

Article 19: Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda. […]

Article 20: Rights of the Accused

[…]4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

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

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

(c) To be tried without undue delay; […]

B. The Rules

Rule 40 *bis*: Transfer and Provisional Detention of Suspects

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

Rule 62: Initial Appearance of Accused

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

(ii) Objections based on defects in the form of the indictment;

(iii) Applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82 (B);

(iv) Objections based on the denial of request for assignment of counsel.

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

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

Rule 115: Additional Evidence

(A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of the hearing.

(B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.

IV. THE PROSECUTOR'S REQUEST TO SUPPLEMENT THE RECORD ON APPEAL

21. Before considering the interlocutory Appeal, the Appeals Chamber must rule on the Prosecutor's Request to Supplement the Record on Appeal.

A. Procedural Background

22. On 9 November 1999, the Prosecutor filed a Request[8] seeking leave for both Parties to present additional evidence in the light of the findings in the Appeals Chamber Decision rendered on 3 November 1999 in the case of *Jean-Bosco Barayagwiza v. The Prosecutor* (the "*Barayagwiza* Decision").[9] On 11 November 1999, the Appellant filed a response[10] to the Prosecutor's Request.

23. In a Scheduling Order[11] delivered on 8 December 1999, the Appeals Chamber ordered the Prosecutor to file, within seven days, a brief specifying the additional evidence which it wished to present before the Appeals Chamber under Rule 115. The same Order granted the Appellant leave to respond to that brief within seven days of receipt. The Appeals Chamber stated that it would then rule on the question of additional evidence.

24. On 15 December 1999, the Prosecutor filed a Brief[12] containing the additional evidence, in accordance with the Scheduling Order. The Appellant responded,[13] through his Lead Counsel, on 21 December 1999. On 22 December 1999, his co-Counsel

filed a separate Brief in response,[14] which also addressed the issue of admissibility of the additional evidence.

25. On 14 January 2000, the Appeals Chamber ruled[15] on the Prosecutor's Request, in accordance with the Scheduling Order. The Order granted the Prosecutor leave to proceed on the basis of the additional evidence cited in its Brief while allowing the Appellant to challenge that admissibility and probative value of said evidence. At a hearing held in Arusha on 16 February 2000, the Appeals Chamber heard the Parties on the issue of admissibility of the additional evidence.

B. Arguments of the Parties

26. On 15 December 1999, the Prosecutor filed 14 documents[16] which she viewed as components of the additional evidence needed for the Appeals Chamber to rule on the lawfulness of the Appellant's arrest and detention. On 21 January 2000, the Prosecutor completed the Record on Appeal by annexing thereto a further 7 documents.[17]

27. The Prosecutor takes the view that the *Semanza* case, which is in many respects identical to the *Barayagwiza* case, "is not sufficiently ripe for a decision".[18] The *Barayagwiza* Decision of 3 November 1999, in her view, set forth new jurisprudence which "was either undecided or unsettled"[19] prior to that Decision and which the Parties could not have known at the hearing on the Motion to Set Aside as Unlawful. In her view, that situation therefore created a need to supplement the Record on Appeal, which, she believed, would be enriched by fresh legal arguments based on and in the light of the findings set forth in the *Barayagwiza* Decision.

28. On the basis of Rule 115 (A), the Prosecutor argues that the evidence in question was not available to Trial Chamber III during the proceedings and "submits that the question of whether the evidence was available at the trial must be determined on a case-by-case basis, considering the circumstances that existed at the time of the trial at issue".[20]

29. The Prosecutor submits that two factors should be taken into consideration, the first of which is the relevance of the evidence to the trial: thus, according to the Prosecutor, "one reason for evidence to be deemed not available is that it is not relevant to the issues of fact raised in the motion presented to the Trial Chamber".[21] In the instant case, the Prosecutor submits that the Prosecution could not have presented evidence which it deemed irrelevant both to the Appellant's Motion before the Trial Chamber and to the impugned Decision.

30. The second factor which must be considered, in the Prosecutor's view, is the relevance of the evidence under the applicable law: the Prosecutor argues that "No party can be expected to offer evidence that is not relevant under the applicable law, and no party can be expected to introduce evidence in anticipation of a new interpretation of the law that may change the applicable law in the future. Therefore, another reason for evidence to be deemed not available is that it is not relevant under the law that is known

to apply to the matter before the Trial Chamber at the time of trial".[22] In the instant case, the Prosecutor's view is that the new evidence was rendered unavailable inasmuch as it related to points of law which the Chamber had not considered; those points of law were raised only after the *Barayagwiza* Decision had been delivered.

31. The Prosecutor submits that the interests of justice also require the Appeals Chamber to take into account all the evidence presented by the Prosecution. In the Prosecutor's view,[23] the interests of justice should be viewed principally in the light of the reasons for establishing the International Criminal Tribunal for Rwanda set out in the United Nations Security Council resolution 955 (1994).

32. The Appellant, on the other hand, contends that the Prosecutor has failed to prove that the Prosecution did not have the evidence presented in its Brief at its disposal at the time of the trial. In the Appellant's view, "this application is but a frantic attempt to anticipate issues and/or reopen the debate on the jurisprudence of *Jean-Bosco Barayagwiza*".[24] The Appellant argues that the evidence was available as, in his view, it related to issues raised at the hearing before Trial Chamber III of his preliminary motion challenging the lawfulness of his arrest. The Appellant adds that some documents are in relation to unfounded arguments[25] and that he was not mentioned therein either by name or status.[26] In addition, according to the Appellant, part of the evidence had not been disclosed to him in spite of the Prosecutor's obligations under the Rules.[27] Consequently, the Appellant rejects the Prosecutor's arguments in respect of the availability of the evidence. In his view, the Prosecutor did possess the evidence but simply failed to make use of it.[28] The Prosecutor had never requested the Tribunal to extend the time-limit to enable her to obtain those items of evidence, nor did she make use of the opportunities available to her under the Statute and the Rules.[29]

33. On a more fundamental level, the Appellant does not accept the Prosecutor's arguments as to the interpretation of Rule 115, maintaining that "whereas the confusion between the unavailability of evidence and the need to adduce or not said evidence in fulfilment of its mission by an organ of the Tribunal, cannot be considered as sufficient explanation for the availability or not of said evidence, whose proven unavailability would result in its admissibility at appeal".[30] In the Appellant's view, the interests of justice should therefore oblige the Appeals Chamber to refuse to admit the evidence presented by the Prosecutor, who, "just as for any other organ of the Tribunal, or any party, […] is bound by the rights and privileges stipulated in the Statute and Rules".[31]

C. Discussion

34. Rule 115 sets forth the basic criteria for presenting additional evidence. Under the Rule, two criteria must be met: the additional evidence must not have been available at the trial, and said evidence would be presented if the interests of justice so require.

35. Just as the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held in its *Tadić* Decision[32] of 15 October 1998, this Appeals Chamber holds that generally, admission of additional evidence must be restrictive and

confined to narrowly defined limits. In the *Tadić* Decision, ICTY Appeals Chamber held that "there is some limitation to any additional evidentiary material sought to be presented to the Appeals Chamber; otherwise, the unrestricted admission of such material would amount to a fresh trial. Further, additional evidence should not be admitted lightly at the appellate stage, considering that Rule 119 [Request for Review] provides a remedy in circumstances in which new facts are discovered after the trial".[33]

36. Any analysis of the criteria stipulated by Rule 115 for presentation of additional evidence must therefore be rigorous. The Appeals Chamber will first discuss the two criteria, their significance and the principles that underlie their application. It will then apply those principles to the instant case.

1. Criteria for the admissibility of additional evidence

(a) Unavailability of evidence

37. To be admissible under Rule 115, evidence must not have been available to the moving Party at the time of the trial. In the aforementioned *Tadić* Decision, ICTY Appeals Chamber considered the principles for interpreting the unavailability criterion. This Appeals Chamber will recall the substance of the general principles for interpreting this criterion which were considered in the *Tadić* Decision and will therefore also adopt the following conclusions:

- The reasons adduced to justify the unavailability of evidence are of capital importance in decisions on the admissibility of additional evidence. If the moving Party does not put forward valid reasons as to why the evidence was not available, said evidence is deemed to have been available and is therefore not admitted.[34]

- It is not possible to dissociate consideration of the unavailability criterion from the criterion of diligence of the Party filing a motion under Rule 115. The moving Party must show that it acted with due diligence,[35] implying that it must prove that it used "all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence […] before the Trial Chamber".[36] Otherwise, the evidence will not be deemed unavailable.

(b) The interests of justice

38. Rule 115 states that "The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require". In the *Tadić* Decision, ICTY Appeals Chamber took the opportunity to rule on the significance of this criterion, holding that "[…] the interests of justice require admission only if: (a) the evidence is relevant to a material issue; (b) the evidence is credible; and (c) the evidence is such that it would probably show that the conviction was unsafe".[37]

(c) Principles for applying the two admissibility criteria

39. In the *Tadić* Decision, ICTY Appeals Chamber explains the general principles for applying the two criteria discussed above.

40. Generally speaking, the unavailability criterion must be satisfied before the interests-of-justice criterion is considered.[38] In the view of ICTY Appeals Chamber, the primacy of the unavailability criterion derives from the principle of finality: "if […] evidence is admitted on appeal even though it was available at trial, the principle of finality would lose much of the value which it has in any sensible system of administering justice".[39]

41. However, this principle may exceptionally be rendered less absolute by the need to avoid a miscarriage of justice.[40] In the *Tadić* Decision, ICTY Appeals Chamber held that "[…] the principle would not operate to prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice".[41] ICTY Appeals Chamber nevertheless emphasized the restrictive nature of this possibility.[42] ICTR Appeals Chamber reaffirms that easing the finality principle must remain a most exceptional act.

2. Application to the instant case of the criteria as outlined

42. The Appeals Chamber has considered the 21 documents (Annexes A to T)[43] presented by the Prosecutor. Some of those documents, namely Annexes O to T, which were attached to the Prosecutor's Response of 21 January 2000,[44] were not formally presented by the Prosecutor as additional evidence. The Appeals Chamber will therefore not rule on their admissibility as additional evidence under Rule 115.

43. The Appeals Chamber has considered the 16 other documents presented by the Prosecutor in its 15 December 1999 Brief[45] in the light of the aforementioned *Tadić* Decision and using the evaluation criteria for admitting evidence which are outlined above. The Chamber ruled that the documents did not meet the first admissibility criterion for additional evidence, namely the unavailability criterion: the Prosecutor had failed to prove in what respect they had not been available at trial. The Prosecutor argued that the *Barayagwiza* Decision was a reason for unavailability. The Appeals Chamber must reject that argument: developments in case-law can in no case be the cause or grounds for, or even a factor in the unavailability of evidence. The argument – which was actually made for all the documents presented – is not relevant. The unavailability of said evidence has therefore not been proven.[46]

44. In conformity with the *Tadić* Decision, this finding should in principle imply that all the evidence submitted by the Prosecutor should be dismissed. However, as discussed above, admission of additional evidence which does not fulfil the first admissibility criterion stipulated by Rule 115 is possible on an exceptional basis if and only if admission is necessary in order to prevent a miscarriage of justice.

45. That is certainly the case in the instant matter: by admitting the new facts presented in the *Barayagwiza* case, ICTY Appeals Chamber, in reviewing the Decision,

rectified the miscarriage of justice which had emerged in the light of those facts. The Appeals Chamber is consequently aware that if henceforth it refuses to admit certain items of evidence in the instant case a miscarriage of justice will result. This exceptional situation consequently enables it to admit said evidence, which - as is discussed below - is of particular relevance in analyzing the arguments on the merits of the interlocutory Appeal.

46. The Appeals Chamber admits Annexes E, F, G, H, I, J, M, N, O *bis* and S.[47] As will be shown in the second part of this Decision, Annexes E, F, G, and H proved critical for the Chamber's consideration of the suspect's right to be informed of the nature of the Prosecutor's charges against him. The remaining documents (Annexes I, J, M, N, O *bis* and S) were similarly relevant in assessing the extent of the Prosecutor's negligence, as alleged by the Appellant, in the course of the proceedings.

47. Turning to Annex K,[48] neither Party disputed the existence or content of an application for a writ of *habeas corpus*. Indeed, the text of the writ had been filed by the Appellant in his preliminary Brief[49] submitted to the Appeals Chamber in support of his Notice of Appeal and by the Prosecutor in the "Prosecutor's Request to Supplement the Record on Appeal".[50] The Appeals Chamber consequently acknowledges that an Application for writ of *habeas corpus* exists without any need to admit the Application as additional evidence under Rule 115.

48. Furthermore, the Appeals Chamber admits Annex F[51] as additional evidence only insofar as it shows the course of proceedings before the Yaoundé Court of Appeal in the case of *Le Ministère public c. Ruzindana Augustin et autres.* Moreover, it is apparent from other evidence[52] whose validity and probative value is not disputed by the Appellant that the Appellant was a subject of those proceedings.

49. The Appeals Chamber rules Annex N[53] admissible solely insofar as the document enables the Chamber to appreciate the political situation in Cameroon when the Appellant was detained. The Appeals Chamber rejects the Appellant's argument that the Annex has no probative value in the instant case because Jean-Bosco Barayagwiza is the Party whose name and status are given. In the view of the Appeals Chamber, the document concerns the Appellant too, for two main reasons. Firstly, the *Barayagwiza* and the *Semanza* cases are similar in many respects, particularly in terms of procedure. The Appellant was detained in Cameroon at the same time as Jean-Bosco Barayagwiza along with other Rwandan citizens and was transferred to the Tribunal's Detention Facility at the same time. The similarity between the two cases has been repeatedly mentioned in the instant case by both Parties.[54] Secondly, the substance of the general problem posed in Annex N, namely the overall political picture in Cameroon when he was arrested, does concern the Appellant.

50. Unlike the evidence cited above, there is no connection between the other documents filed by the Prosecutor (Annexes A, B, C, D and L)[55] and the arguments on the merits of the interlocutory Appeal. Those documents are inadmissible under Rule 115 as they are of no use to the Appeals Chamber in avoiding a miscarriage of justice.

V. THE APPEAL AGAINST THE DECISION REJECTING THE MOTION TO SET ASIDE AS UNLAWFUL

A. Procedural Background

51. On 12 October 1999, the Appellant filed a Notice of Appeal[56] against the impugned Decision and the Prosecutor filed a Response[57] on 28 October 1999. Although not required under Rule 117 (A),[58] on 12 November 1999 the Appellant filed a Preliminary Appellate Brief[59] in Support of the Notice of Appeal, and on 18 November 1999 he filed three Annexes[60] thereto. On 14 January 2000, the Appeals Chamber issued an Order[61] for the Prosecutor to file a Response to the Appellant's Preliminary Appellate Brief by 21 January 2000 at the latest and for the Appellant to submit his Reply to the Prosecutor's Response within seven days of his receipt of the Response in its French version. In compliance with the Order, the Prosecutor filed a Response[62] on 21 January 2000. This was subsequently amended on 9 February 2000.[63] Both Counsel for the Appellant filed separate Replies, on 28 January[64] and 31 January 2000.[65] The Parties' oral arguments were heard in Arusha on 16 February 2000.

52. The principal arguments which the Parties put forward in their written submissions and at the hearing are summarized and briefly discussed below**.**

B. The Arguments

1. The Appellant's arguments

53. Firstly, the Appellant alleges that Trial Chamber III (the "Chamber") made an error of fact by establishing a chronology of events that was unsubstantiated and was wrong to distinguish between his periods in detention[66]. In his view, such distinction is an arbitrary reading of the facts which is not based on any obligation in law.[67]

54. Secondly, the Appellant argues that the Chamber made several errors of fact by finding that he had failed to distinguish between the two periods of detention.[68] The Appellant alleges also that the Chamber erred by placing on him the burden of proving that his rights had been violated during those two periods.[69]

55. Thirdly, the Appellant contends that the Chamber erred by restricting its jurisdiction to the period during which he had been physically in the Tribunal's custody.[70]

56. Fourthly, the Appellant argues that the Chamber erred in law by holding that the belated filing of the indictment was "wrong", yet failing to find that the Appellant's rights and freedoms under Rule 40 *bis* had been violated.[71] To that effect, he alleges that the Chamber erred in law, moreover, by finding that the 30-day deadline in Judge Aspegren's Order of 24 February 1997 was a mere suggestion which was not legally binding on the Prosecutor.[72]

57. Fifthly, the Appellant further argues that the Chamber wrongly ruled that the proceedings undertaken by the Tribunal did not violate the principle of *non bis in idem* in light of the extradition proceedings undertaken in Cameroon.[73]

58. Sixthly, the Appellant maintains that the Chamber erred in law by failing to respond, in the operative part of its Decision, to all the arguments advanced by the Parties both in their written submissions and at the hearing.[74]

59. In conclusion, the Appellant requests the Appeals Chamber to vacate the Trial Chamber III Decision; to find that his fundamental rights were violated and that the principle of equality of arms was not complied with; to vacate the arrest and detention proceedings as unlawful; to order his release; and to rule the Appeal suspensive of proceedings before the Trial Chamber.[75]

2. The Prosecutor's arguments

60. The Prosecutor's leading argument is that the interlocutory appeal is inadmissible,[76] and, alternatively, she rebuts the Appellant's case with the following arguments:

61. Firstly, that in the impugned Decision, the Chamber did not err in its account of the facts; rather, she contends that the Chamber rehearsed the chronology of events exactly.[77]

62. Secondly, that in none of the nine paragraphs in the impugned Decision relating to the Trial Chamber's findings was there any finding whereby the Chamber imposed the burden of proof on the Appellant concerning violations of his rights during his two periods of detention in Cameroon;[78]

63. Thirdly, that the Trial Chamber properly held that no remedy was open to the Accused under the Statute or Rules of the Tribunal for matters predating his transfer to the Tribunal. The Prosecutor takes the view that this is self-evident because the above-mentioned legal instruments contain no provision for reviewing the domestic legislation of States in which arrest and detention take place;[79]

64. Fourthly, that it is evident from the Trial Chamber's reasoning that neither Rule 40 nor Rule 40 *bis* was breached in the instant case;[80]

65. Fifthly, that dismissal of the Prosecution charges is not a remedy which is permitted under international human rights law,[81] and furthermore, that even if such a remedy were compatible with international law, the facts of the instant case would not justify it.[82]

66. The Prosecutor concludes by requesting the Appeals Chamber to dismiss the Appeal; or, failing that, to find it without merit;[83] or, as a further alternative, to

consider the proposals for remedy submitted in the Prosecutor's Response, specifically, compensation and release with safeguards.[84]

C. Admissibility of the Appeal

67. The Appeals Chamber will first discuss the admissibility of the interlocutory Appeal[85] filed on 12 October 1999 by Counsel for the Appellant under Article 24 of the Statute and Rules 72 (B), (D) and (E) and 108 of the Rules of Procedure and Evidence.

68. The Prosecutor argues that the Appeal is inadmissible on the principal ground that Rule 72 does not apply in the instant case. According to the Prosecutor, "not only did the Defence raise no *objection based on lack of jurisdiction* as a *preliminary motion* before Trial Chamber III; moreover, there was no discussion before Trial Chamber III between the Parties based on any *objection based on lack of jurisdiction stricto sensu*".[86] In the Prosecutor's view, the Appellant had raised only questions of whether certain legal acts had been irregular and "had intended to seek legal penalties for what he believed were irregularities in those acts by demanding that they should be voided".[87]

69. According to the Appellant, the cause of the Appeal is "identical"[88] to that of the *Barayagwiza* case and the provisions adduced in support of Barayagwiza's appeal are applicable in the instant case. More specifically, in respect of Rule 72 the Appellant states that the substance of his objection based on lack of jurisdiction is identical[89] to that accepted by the Appeals Chamber in the *Barayagwiza* case. In his view, the "Notice of Appeal raises the following serious questions of law touching on issues over which the International Tribunal would exercise jurisdiction and those over which it would not. It poses the question whether under the Statute and the Rules of Procedure and Evidence as well as international law the International Tribunal has jurisdiction to control and punish prosecutorial misconduct. It poses the question whether the International Tribunal has jurisdiction to protect the rights of accused persons under its custody and whether the Statute, the Rules of Procedure and Evidence confers such jurisdiction".[90] In particular, the Appellant avers that "the objection is not to acts in law whose compliance with the Rules is the only point at issue, but more fundamentally to the actions and conduct of organs of the Tribunal granted their powers by the Rules and obliged to observe those Rules in their exercise of those powers", and "it is this kind of action and conduct that has been denounced by the Appellant as failure to respect fundamental freedoms and as an abuse of law by arbitrarily prolonging detention, without Court supervision and in contempt of the rights of the Defence".[91]

70. The Appeals Chamber notes that the Notice of Appeal was timely filed within the prescribed time-limits and rejects the Prosecutor's arguments that the provisions it cites do not apply. The Chamber further holds that by challenging the lawfulness of his detention, the Appellant has effectively raised the issue of whether the Tribunal has jurisdiction over him *ratione personae* and is thus appealing against a Decision dismissing an objection based on lack of jurisdiction under Rule 72.[92]

71. Accordingly, the Appeals Chamber finds the interlocutory Appeal admissible**.**

D. Discussion

72. Before considering the violations alleged by the Appellant, the Appeals Chamber wishes to comment on one of the grounds of appeal which he has adduced. The Appellant argues that Trial Chamber III wrongly imposed on him the burden of proving that his rights were indeed violated during his two periods of detention in Cameroon.[93] Without pronouncing on the question of who bears the burden of proof, the Appeals Chamber simply notes that the relevant remarks by the Trial Chamber do not refer to the two periods of detention in Cameroon, as the Appellant claims, but to the period of detention after he was transferred to the custody of the Tribunal. The penultimate paragraph of the 6 October 1999 Decision states that:

"The Trial Chamber consequently finds that the Defence has failed to show any violation of the provisions of the Statute and the Rules with regard to Semanza's detention after his transfer to the custody of the Tribunal".[94]

73. This ground of appeal is therefore without merit.

1. The principle of *non bis in idem*

74. Article 9 of the Statute of the Tribunal sets forth the principle of *non bis in idem*. The Appeals Chamber accepts the interpretation of this Article and Article 10 of the Statute of ICTY[95] given by various Trial Chambers of the international criminal Tribunals whereby:

- Article 9 (2) of the Statute sets a limit on the extent to which the Tribunal can prosecute persons who have been tried by a national Court for acts constituting serious violations of international humanitarian law;[96]

- The *non bis in idem* principle applies only where a person has effectively already been tried. The term "tried" implies that proceedings in the national Court constituted a trial[97] for the acts covered by the indictment brought against the Accused by the Tribunal[98] and at the end of which trial a final judgement is rendered.[99]

75. The Appellant alleges that the proceedings before the Tribunal in *The Prosecutor v. Laurent Semanza* violate the principle of *non bis in idem* because proceedings had already been brought against him in Cameroon. The core question for the Appeals Chamber is whether in Cameroon the Appellant was the subject of a trial in the sense of Article 9 (2) of the Statute, that is, whether the trial was for acts constituting serious violations of international humanitarian law and whether a final judgement on those offences was delivered.

76. The Appeals Chamber finds that proceedings were raised against the Appellant in Cameroon following the extradition request from the Parquet général (Public Prosecutor Office) of the Republic of Rwanda. However, in view of the extradition law of

Cameroon[100] and the Decision by the Yaoundé Court of Appeal on the issue,[101] it is apparent that those proceedings concerned only admissibility of the extradition request from the Rwandan Government and was in no wise a trial for acts constituting serious violations of international humanitarian law.[102] It is therefore apparent that the Yaoundé Court of Appeal did not deliver any final judgement on the charges brought against the Appellant before this Tribunal.

77. In view of these findings, the Appeals Chamber concludes that the action against the Appellant in Cameroon did not constitute a trial in the sense of Article 9 (2) of the Statute. Therefore, the proceedings before the Tribunal do not violate the principle of *non bis in idem*.

2. The right of the suspect[103] to be informed promptly of the nature of the charges against him

78. The Appeals Chamber holds that a suspect arrested by the Tribunal has the right to be informed promptly of the reasons for his or her arrest.[104] In accordance with the norms of international human rights law,[105] the Appeals Chamber has also accepted that this right comes into effect from the moment of arrest and detention.[106]

79. In the instant case, the Appellant was detained in Cameroon at the Prosecutor's request during two distinct periods. The first period ran from 15 April 1996, the date of the Prosecutor's first request under Rule 40, to 17 May 1996, when the Prosecutor informed the authorities in Cameroon that he was dropping his case against the Appellant. The second period of detention ran from 21 February 1997, the date of the Prosecutor's second Rule 40 request, to 19 November 1997, when the Appellant was transferred to the Tribunal's Detention Facility.

80. The facts relating to these two periods of detention must be examined in order to determine whether the Prosecutor respected the Appellant's right to be informed promptly of the nature of the charges against him on those two occasions. For each of those periods, the Appeals Chamber must first assess the length of time between the date on which the Appellant's right to be informed came into effect and the date on which he was informed of the nature of the Prosecutor's charges against him. Secondly, the Chamber must decide whether such length of time is consistent with the norms of international human rights law.

(a) First period of detention

81. Regarding the first period of detention, the Appeals Chamber finds that the Appellant's right to be informed promptly of the nature of the International Tribunal's charges against him came into effect on 15 April 1996,[107] when he was remanded in custody by the Prosecutor pursuant to the first request under Rule 40. Based on the earliest available date, it is apparent that the Appellant had been informed of the nature of the crimes for which he was being pursued by the Prosecutor on 3 May 1996, on which date the Yaoundé Court of Appeal deferred judgement on the extradition request[108]

against the Appellant from Rwanda. To support this last finding, certain facts relating to the context of the Appellant's detention in Cameroon should be rehearsed.

82. Like 11 other Rwandan nationals, the Appellant was initially arrested and detained in Cameroon pursuant to an international arrest warrant issued by the Government of Rwanda.[109] On 18 March 1996, Counsel for the Government of Rwanda referred a request to the Minister of Justice of Cameroon (the "Office of the Public Prosecutor") for the extradition of 12 Rwandans[110] detained in Cameroon in implementation of warrants signed by the *Procureur général* (Public Prosecutor) of the Kigali Court of Appeal.[111] The Office of the Public Prosecutor in Cameroon had filed charges in the case of *Le Ministère public c. Ruzindana Augustin et autres*.[112] On 19 April 1996, *inter partes* proceedings involving the Office of the Public Prosecutor of Cameroon and the Rwandan nationals sought by the Public Prosecutor of Rwanda opened before the Yaoundé Court of Appeal.[113] At those hearings, a certain Mr. Ondigui acted as Counsel for eight of the Rwandans, including the Appellant.[114] On 3 May 1996, the Office of the Public Prosecutor of Cameroon requested the Yaoundé Court of Appeal to defer judgement.[115] On 31 May 1996, the Court suspended the extradition proceedings begun on behalf of the Government of Rwanda and adjourned the hearing until 17 January 1997.[116] On 21 February 1997, the Yaoundé Court of Appeal delivered its decision[117] on the Rwandan extradition request.

83. The proceedings before the Yaoundé Court of Appeal are not without interest. Indeed, one of the submissions by the Office of the Public Prosecutor refers to the Prosecutor's application for the Appellant to be placed in provisional detention. The Appeals Chamber deems it appropriate to cite the relevant excerpts from that submission[118] by the Office of the Public Prosecutor in the case of *Le Ministère public c. Ruzindana Augustin et autres* with a view to obtaining a stay of judgement:

"[…] Whereas they all challenged the jurisdiction of the Rwandan courts and preferred rather to appear before the International Criminal Tribunal for Rwanda established in August 1994 with its seat in Arusha, Tanzania;

[…] Whereas by letter dated 15 April 1996, *the aforementioned Prosecutor [the Prosecutor of the Tribunal]* has requested the judicial authorities of Cameroon to place the above-named Rwandans [including the Appellant], under provisional arrest *on charges of serious violations of international humanitarian law and other crimes within the jurisdiction of the aforementioned International Tribunal* […]".[119] (Emphasis added.)

84. The Appeals Chamber would like to emphasize the similarity in the manner the Office of the Public Prosecutor framed the submission referred to above and the Prosecutor's request of 15 April 1996 brought under Rule 40. In this document, the Prosecutor requests:

"[…] that the Criminal Authorities of Cameroon arrest the undernoted persons provisionally […] *for serious violations of international humanitarian law and crimes within the jurisdiction of the Tribuna*l". [120] (Emphasis added.)

85. It is clear from the front page of the 21 February 1997 Decision by the Yaoundé Court of Appeal ruling on the extradition request by Rwanda that the proceedings initiated by the Office of the Public Prosecutor against the Appellant were *inter partes*.[121] Consequently, there is no doubt that Mr. Ondigui, who acted as Counsel for the Appellant, had received a copy of the submissions by the Office of the Public Prosecutor, including the one to which the Appeals Chamber has just referred. Considering the principles governing the counsel/client relationship, it is reasonable to infer that the Appellant had been informed in substance of the nature of the crimes for which he was being sought by the Prosecutor of the Tribunal.

86. However, the Appeals Chamber notes that the date recorded on the aforesaid copy of the submission is illegible. In the absence of that information, the Chamber has decided to go by the date on which the verbal request for a stay was granted, namely, 3 May 1996, and concludes that the Appellant was informed on 3 May 1996 at the latest[122] of the nature of the Prosecutor's charges against him.

87. Consequently, 18 days elapsed between the time the Appellant was taken into custody, on 15 April 1996, and the time he was informed of the nature of the charges brought against him by the Prosecutor, on 3 May 1996. In the opinion of the Appeals Chamber, this constitutes a violation, in relation to his first period of detention, of the Appellant's right to be informed promptly of the nature of the charges against him.[123] A fitting remedy for this violation is justified.

(b) Second period of detention in Cameroon

88. The Appeals Chamber holds that with respect to the Appellant's second period of detention in Cameroon, his right to be informed promptly of the nature of the charges against him by the Prosecutor came into effect on 21 February 1997, when he was taken into custody pursuant to the Prosecutor's second Rule 40 request. It is apparent from the evidence in the file that the Appellant was formally informed of the charges laid against him by the Tribunal when the Order issued under Rule 40 *bis* was served on him in Cameroon on 10 March 1997.

89. Nevertheless, the Appeals Chamber has already established that the Appellant was informed in substance of the nature of the Tribunal's charges against him during his first period of detention. There is no doubt, therefore, that from then on the Appellant was aware of the nature of the Prosecutor's charges against him. Consequently, when the Appellant was taken into custody at the Prosecutor's request for the second time, he had known since his first period of detention what the nature of the Prosecutor's charges against him was.

90. The fact remains that the interval which elapsed between the date on which the Appellant's right to be informed came into effect for his second period of detention and the date on which he was informed of the nature of the Prosecutor's charges against him was 18 days. This could be said to constitute a violation of the Appellant's right. However, the Appeals Chamber considers that the violation is less serious since the

Appellant had been informed in substance of the nature of the Prosecutor's charges against him during his first period in detention.

3. The suspect's right to be promptly charged

91. In the *Barayagwiza* Decision, the Appeals Chamber held that the suspect's right to be promptly charged, as set forth in Rule 40 *bis*, becomes effective as soon as a Rule 40 *bis* Order is filed.[124]

92. The Appeals Chamber adopts the findings of ICTY Appeals Chamber in the *Aleksovski* case[125] and recalls that in the interests of legal certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. Applying this principle, the Appeals Chamber has altered the interpretation it gave Rule 40 *bis* in its *Barayagwiza* Decision for the reasons hereinafter given.

93. In the instant case, the Prosecutor called the Appeals Chamber's attention to the legislative history of Rule 40 *bis*.[126] The Appeals Chamber has consequently decided to reconsider the interpretation of Rule 40 *bis* in the light of the Prosecutor's argument, firstly, to identify the starting point for calculating the time-limit for a suspect's provisional detention before the indictment is confirmed and, secondly, to consider the alleged violation of the Appellant's right to be promptly charged.

94. On 15 May 1996, Rule 40 *bis* was adopted under the procedure provided for in Rule 6 (b), to read as follows:

"[…] The provisional detention of the suspect may be ordered for a period not exceeding 30 days *from the signing of the provisional detention order*". (Emphasis added.)

95. Rule 40 *bis* was subsequently amended, on 4 July 1996, to read as follows:

"[…] The provisional detention of the suspect may be ordered for a period not exceeding 30 days *from the day after the transfer of the suspect to the detention unit of the Tribunal*". (Emphasis added.)

96. In the light of the latter text, it is clearly apparent that the clock for the Rule 40 *bis* time-limit starts running only from the day the suspect is transferred to the Tribunal's Detention Facility. Although the interpretation whereby the time-limit is to be calculated from the day the Order is filed is of course in keeping with the spirit and letter of the Rule adopted on 15 May 1996, the Appeals Chamber must take into account the abrogative effect of any legislative amendment. The principal effect of the 4 July 1996 amendment was to break with the interpretation of Rule 40 *bis* in the form in which it emerged from the 15 May 1996 text.

97. It is thus unambiguously clear that the Rule 40 *bis* time-limit runs not from the day the Order is filed but rather from the day the suspect is transferred to the Tribunal's Detention Facility. The 4 July 1996 amendment confirms that interpretation. Furthermore, the Appeals Chamber notes that the first sentence of the current paragraph

(A) of Rule 40 *bis* is in keeping with this finding.[127] Therefore, the Rule 40 *bis* time-limit for confirming the indictment consequently runs from the day the suspect is transferred to the Tribunal's Detention Facility.

98. The Appeals Chamber will now turn its attention to the alleged violation of the Appellant's right to be promptly charged.

99. In the instant case, the Appellant was transferred to the Tribunal's Detention Facility on 19 November 1997.[128] Interestingly, the Prosecutor's first indictment[129] was confirmed by Judge Aspegren on 23 October 1997, before the Appellant had even been transferred to the Tribunal's Detention Facility.

100. The Appeals Chamber concluded *supra* that the time-limit provided for under Rule 40 for confirming the indictment runs from the day the suspect is transferred to the Tribunal's Detention Facility. In the instant case, therefore, it is clear that on 19 November 1997, the starting date for the time-limit computation, the first indictment against the Appellant had already been confirmed. Consequently, the Appellant's right to be promptly charged, in accordance with the true meaning of Rule 40 *bis*, could not have been violated.

101. Moreover, the Appeals Chamber emphasizes that in any event, the Tribunal is not responsible for the time that elapsed before the Appellant was transferred to the Tribunal's Detention Facility. The evidence before the Appeals Chamber shows that Cameroon was not inclined to transfer the Appellant before 21 October 1997. The written report[130] by Judge Mballe of the Supreme Court of Cameroon explains that Rule 40 *bis* was transmitted to the President of the Republic immediately it was received by the authorities in Cameroon on 6 March 1997.[131] As of that date, under the extradition laws of Cameroon[132] the proceedings for transferring the Appellant to the Tribunal became subject to the President's signing a decree. Judge Mballe's report confirms that, once the request had been submitted to the Executive branch, "nothing else could be done than to wait for the Head of State to sign the Presidential Decree".[133]

102. The decree granting leave for the Appellant to be transferred to the Tribunal's Detention Facility was signed on 21 October 1997.[134] A letter from the Registry of the Tribunal shows that the steps taken to transfer the Appellant postdated the signing of the Decree.[135]

103. Judge Mballe explains in his report[136] that the time which elapsed between 6 March 1997 and 21 October 1997 was attributable to political and judicial factors. The Rule 40 *bis* Order was wrongly subjected to Cameroon's extradition procedure.[137] Also, at that time Rwanda was putting pressure on the authorities in Cameroon for the detainees arrested in Cameroon, including the Appellant, to be extradited to Kigali rather than Arusha. Moreover, David Scheffer, United States Ambassador-at-Large for War Crimes Issues, indicates in his affidavit[138] that the pending elections in Cameroon at that time were an additional factor contributing to the delay in signing the decree.

104. In the light of the above evidentiary material, the Appeals Chamber finds, firstly, that Cameroon was not prepared to transfer the Appellant before the 21 October 1997 decree had been signed and, secondly, that the time which elapsed before the said decree was signed was the result of factors unrelated to lack of diligence on the part of the Prosecutor as alleged by the Appellant. The Appeals Chamber finds that the time which elapsed was not attributable to the Prosecutor and consequently that the Tribunal did not violate Rule 40 *bis*.

4. The right of the accused to be brought before a Trial Chamber without delay and to be formally charged

105. Rule 62, which is rooted in Articles 19 and 20 of the Statute, states that the accused shall be brought before a Trial Chamber without delay to be formally charged. However, neither Rule 62 nor the relevant treaties relating to international human rights law provide for a specific period beyond which the time which elapsed before the accused's initial appearance becomes excessive.

106. In the instant case, the first indictment against the Appellant was confirmed on 23 October 1997, when the Appellant became an accused within the meaning of Rule 2.[139] The Appellant was then transferred to the Tribunal's Detention Facility on 19 November 1997 and appeared before Trial Chamber III on 16 February 1998.

107. Under Rule 62, the Appellant's right to be brought before a Trial Chamber without delay and be formally charged came into effect on the date of his transfer to the Tribunal.[140] The Appeals Chamber notes that 89 days elapsed between 19 November 1997, when the accused's right came into effect, and 16 February 1998, when the Appellant made his appearance and was formally charged. A delay of that kind could lead the Appeals Chamber to find that the Appellant's right had been violated. However, it is clear from the evidence before the Appeals Chamber that other circumstances must also be considered in the instant case.

108. The first date set for the Appellant's initial appearance was 3 February 1998.[141] The transcript of the initial appearance hearing on 16 February 1998 shows that it was Counsel for the Appellant who requested postponement of the initial appearance scheduled for 3 February 1998.[142] It is clear that the postponement of the Appellant's initial hearing to 16 February 1998 was at the express request of his Counsel.

109. Furthermore, although the Appellant alleged in his Motion of 16 August 1999[143] that his right to be brought before a Trial Chamber and be formally charged had been violated, on no other occasion than in that Motion has he amplified on this grievance as an independent ground for complaint. At no time before Trial Chamber III did the Appellant allege that there had been a violation arising out of the 89 days which elapsed between his transfer and his initial appearance,[144] nor was it used as a separate ground of appeal in the written submissions in the instant case.[145] Lastly, Counsel for the Appellant did not draw the Appeals Chamber's attention to this particular

violation in setting forth his grounds of appeal during his opening statement at the 16 February 2000 hearing.[146]

110. The Parties to a case are responsible for the strategies they use in conducting it. In the instant matter, the Appeals Chamber recalls that Counsel for the Appellant explicitly requested that the date which the Registry of the Tribunal had set for the Appellant's initial appearance should be postponed to 16 February 1998. By so doing, Counsel for the Appellant consented to having the Appellant's initial appearance not take place within the shortest possible lapse of time and himself contributed to prolonging it.

111. The Appeals Chamber finds that Counsel's request has the import of waiving the Appellant's right to claim violation of his right to be brought before a Trial Chamber without delay and be formally charged.

5. The right to challenge the lawfulness of detention (*habeas corpus*)

112. Neither the Statute nor the Rules of the Tribunal specifically address writs of *habeas corpus*. However, the Appeals Chamber has already pointed out that the possibility for a detained individual to have recourse to an independent judicial authority for review of the lawfulness of his detention is "well established by the Statute and Rules".[147] This is a fundamental right and is enshrined in international human rights law,[148] which also provides that the right of an individual to challenge the lawfulness of his detention implies that "a writ of *habeas corpus* must be heard".[149]

113. The Appeals Chamber wishes to confirm the principle which it laid down in the *Barayagwiza* case: if an accused files a writ of *habeas corpus*, the Tribunal must hear it and rule upon it without delay, as principal instruments of international human rights law prescribe.[150] If such a writ is filed but not heard, the Chamber will find that a fundamental right of the accused has been violated.

114. In the instant case, Counsel for the Appellant filed a writ of *habeas corpus* on 29 September 1997 challenging the lawfulness of the Appellant's detention; the Appellant having been taken into custody in Cameroon pursuant to the Prosecutor's Rule 40 *bis* request. [151] It is clear from the evidence before the Appeals Chamber that this writ of *habeas corpus* was not placed on the cause list by the Registry and was not heard by a Trial Chamber. The Appeals Chamber therefore finds that the Appellant's right to challenge the lawfulness of his detention was violated.

115. To assess the extent of the violation and its consequences in terms of remedy, the Chamber deems it pertinent to take into account all the circumstances surrounding the matter.

116. His 29 September 1997 writ of *habeas corpus* aside, the Appellant challenged the lawfulness of his arrest and detention in Cameroon for a second time in his Motion to Set Aside as Unlawful,[152] which he filed on 16 August 1997 before Trial Chamber III. Interestingly, that Motion contains no reference to the 29 September 1997 writ. The

Appeals Chamber also notes that neither did the Appellant refer to the 29 September 1997 writ in his Notice of Appeal[153] of 12 October 1999.

117. It is apparent that the first allegation which the Appellant raised before the Tribunal concerning the writ of *habeas corpus* is to be found in his 11 November 1999 "Defendant's Reply in Opposition to the Prosecutor's Request to Supplement the Record on Appeal".[154] A second allegation is to be found in the "Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful"[155] of 12 November 1999. In the latter document, the Appellant refers to the writ of *habeas corpus* in the following terms:

"'[…] 'While awaiting transfer, the Appellant filed a writ of *habeas corpus* on 29 September 1997. The Trial Chamber never considered this application' (this quotation taken from the decision in the matter of the Prosecutor vs. Jean- Bosco Barayagwiza, Case No. ICTR 97-19-AR72, para. 8, concerning the writ of *habeas corpus*, perfectly suits the Appellant […]"[156]

118. It is therefore apparent that the Appellant became interested in the fate of his writ of *habeas corpus* only after the Appeals Chamber's 3 November 1999 Decision in the *Barayagwiza* case.[157]

119. Also, Counsel for the Appellant made no representations to the Registry or the Prosecutor to carry the matter he had taken up on the Appellant's behalf through to conclusion. Very evidently, Counsel for the Appellant neglected to follow up the 29 September 1997 writ of *habeas corpus* until the *Barayagwiza* Decision had been delivered. The fact that Counsel for the Appellant elected to challenge the lawfulness of the Appellant's arrest and detention in August 1999 in a second motion confirms this finding.

120. The Appeals Chamber would emphasise that Defence Counsel appearing before the Tribunal have a duty of diligence. This duty is expressly set forth in the Code of Professional Conduct for Defence Counsel (the "Code of Conduct") adopted by the Judges of the Tribunal under Article 14 of the Statute. Article 6 of the Code of Conduct states that:

"Counsel must represent a client diligently in order to protect the client's best interests. Unless the representation is terminated, *Counsel must carry through to conclusion all matters undertaken for a client within the scope of his legal representation.*" (Emphasis added.)

121. In the instant case, the Appeals Chamber finds that Counsel for the Appellant failed in his duty of diligence by not carrying through to conclusion the matter he had undertaken on the Appellant's behalf in his writ of *habeas corpus*. Such failure which has been established by the Appeals Chamber derives also from the fact that Counsel for the Appellant failed to bring the alleged violation to the Tribunal's attention before the *Barayagwiza* Decision was delivered.

122. The Appeals Chamber, having established that the Appellant's right was violated and having clarified the circumstances surrounding that violation, must consider the

consequences of such violation in terms of appropriate remedy. The Appellant claims that a remedy for the violation of his right to challenge the lawfulness of his detention should be given under Rule 5.[158] Paragraph (A) of Rule 5 states that:

"Where an objection on the ground of non-compliance with the Rule or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that *it has caused material prejudice to that party*." (Emphasis added.)

123. The Appeals Chamber is of the opinion that the material prejudice to which Rule 5 refers must be assessed, as must all prejudice, in the light of the circumstances of the case.

124. The Appellant adduced two principal grounds in his 29 September 1997 writ of *habeas corpus*. Firstly, he contends that the Prosecutor was responsible for the continuing increase in the lapse of time before he was transferred to the Tribunal's Detention Facility and, secondly, that he was detained with no formal legal justification.[159] The Appeals Chamber recalls that an indictment was confirmed against the Appellant on 23 October 1997 and that he was transferred to the Tribunal's Detention Facility on 19 November 1997. The results sought by filing the writ of *habeas corpus* were therefore achieved relatively soon after the writ was filed. In such circumstances, the Appeals Chamber finds that while indeed there was prejudice caused, it must be seen in perspective and thus does not take the form of material prejudice alleged by the Appellant.

125. The Appeals Chamber nevertheless finds that any violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy.

126. In that connection, the Appeals Chamber also kept in mind the Tribunal's mandate, particularly in respect of the protection of international public order.

VI. Conclusion

127. It is clear from the above analysis that the Appellant suffered a violation, under the recognized norms of international human rights law, of his right to be informed promptly of the nature of the charges against him.

128. It is clear also that the fact that the Trial Chamber did not hear the *habeas corpus* motion constitutes a violation of the Appellant's right to challenge the lawfulness of his detention. (Judge Shahabuddeen provides a separate and dissenting opinion on this point.)

129. Nevertheless, the remedy sought by the Appellant, namely his release, is disproportionate, in the instant case.

The other violations alleged by the Appellant are found to be without merit.

VII. Disposition

For the foregoing reasons, **THE APPEALS CHAMBER** hereby:

(1) **GRANTS** the Prosecutor's Request in respect of the evidence contained in annexes E, F, G, H, I, J, M, N, O *bis* and S;

(2) **DENIES** the Prosecutor's request to admit the additional evidence contained in annexes A, B, C, D, K and L;

(3) **ALLOWS** the Appeal in respect of the violation of the Appellant's rights to the extent specified above;

(4) **DISMISSES** the Appeal in respect of the Appellant's application for his arrest and detention to be set aside as unlawful;

(5) **DISMISSES** the Appeal in respect of the Appellant's application to be released;

(6) **DECIDES** that for the violation of his rights, the Appellant is entitled to a remedy which shall be given when judgement is rendered by the Trial Chamber, as follows:

(a) If he is found not guilty, the Appellant shall be entitled to financial compensation;

(b) If he is found guilty, the Appellant's sentence shall be reduced to take into account the violation of his rights, pursuant to Article 23 of the Statute.

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

Judge Shahabuddeen appends a Separate Opinion to this Decision.

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

[signed]	[signed]	[signed]
Claude Jorda Presiding Judge	Lal Chand Vohrah	Mohamed Shahabuddeen

[signed]	[signed]

Rafael Nieto-Navia Fausto Pocar

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

[Seal of the Tribunal]

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[1] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Notice of Appeal (Filed under Article 24 of the Statute and Rules 72 (B), (D) and (E) and 108 of the Rules of Procedure and Evidence)", 12 October 1999.

[2] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Decision on the 'Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful'", Trial Chamber III, 6 October 1999.

[3] "Prosecutor's Request to Supplement the Record on Appeal", 9 November 1999.

[4] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 16 August 1999.

[5] Case No. ICTR-97-19-AR72, *Jean-Bosco Barayagwiza v. The Prosecutor*, "Decision", Appeals Chamber, 3 November 1999; Case no. ICTR-97-19-AR72, *Jean-Bosco Barayagwiza v. The Prosecutor*, "Decision (Application by the Prosecutor for Review or Reconsideration)", Appeals Chamber, 31 March 2000.

[6] Case No. ICTR-97-19-AR72, *Jean-Bosco Barayagwiza v. The Prosecutor*, "Decision", Appeals Chamber, 3 November 1999.

[7] Some dates mentioned in this section differ from the dates used by Trial Chamber III in the impugned Decision. The corrections have been made on the basis of evidence submitted by the Parties and accepted by the Appeals Chamber. Where the dates have not been admitted by the Parties and in the absence of written proof, the Appeals Chamber has restored them to the dates which favoured the Accused.

[8] "Prosecutor's Request to Supplement the Record on Appeal", 9 November 1999.

[9] Case No. ICTR-97-19-AR72, *Jean-Bosco Barayagwiza v. The Prosecutor*, "Decision", Appeals Chamber, 3 November 1999.

[10] "Defendant's Reply in Opposition to Prosecutor's Request to Supplement the Record on Appeal", 11 November 1999.

[11] "Decision and Scheduling Order", 8 December 1999.

[12] "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999.

[13] "Respondent/Appellant's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 21 December 1999.

[14] "Response to the Prosecutor's Brief dated 15 November 1999 and Communicated to the Appellant on 16 and 17 November 1999", 22 December 1999.

[15] "Order (Prosecutor's Request to Supplement the Record on Appeal)", 14 January 2000.

[16] "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999, Annexes A to N.

[17] "The Prosecutor's Response to the Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 Rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 21 January 2000, Annexes O to T.

[18] "Prosecutor's Request to Supplement the Record on Appeal", 9 November 1999, para. 13.

[19] *Ibid*., para. 12.

[20] "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999, para. 27.

[21] *Ibid*., para. 29.

[22] *Ibid*., para. 34.

[23] *Ibid*., paras. 57-64.

[24] "Defendant's Reply in Opposition to Prosecutor's Request to Supplement the Record on Appeal", 11 November 1999, para. 11.

[25] "Transcript", 16 February 2000, pp. 75-76.

[26] "Response to the Prosecutor's Brief dated 15 November 1999 and Communicated to the Appellant on 16 and 17 November 1999", 22 December 1999; § IV, fifth para.; "Transcript", 16 February 2000, p. 75.

[27] "Respondent/Appellant's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 21 December 1999 p. 6, final para.

[28] "Defendant's Reply in Opposition to Prosecutor's Request to Supplement the Record on Appeal", 11 November 1999, para. 19; "Transcript", 16 February 2000, pp. 37-38.

[29] "Response to the Prosecutor's Brief dated 15 November 1999 and Communicated to the Appellant on 16 and 17 November 1999", 22 December 1999; § III, seventh to ninth paras.

[30] *Ibid*., p. 11, final para.

[31] *Ibid*., p. 13, § V, para. 5

[32] Case No. IT-94-1-A, *Prosecutor v. Duško Tadić*, "Decision on Appellant's Motion for the Extension of the Time limit and Admission of Additional Evidence", 15 October 1998. At the time the *Tadić* Decision was delivered, the content of Rule 115 of the Rules of Procedure and Evidence of ICTY was identical to that of ICTR Rule 115.

[33] *Ibid*., para. 42.

[34] In the *Tadić* Decision, the Appeals Chamber is definite about this point, holding that "additional evidence is not admissible under Rule 115 in the absence of a reasonable explanation as to why it was not available at trial" (*ibid*., para. 45). On several occasions, the Chamber therefore refused to admit some evidentiary material because their unavailability had not been duly proven.

[35] The principle that the diligence criterion must be included when interpreting Rule 115 derives from the Statute: as the Appeals Chamber explains, "[…] Rule 115 is to be read in the light of the Statute; it is therefore subject to requirements of the Statute which have the effect of imposing a duty to be reasonably diligent. Where evidence is known to [a Party], but he fails through lack of diligence to secure it for the Trial Chamber to consider, he is of his own volition declining to make use of his entitlements under the Statute and of the machinery placed thereunder at his disposal […]" (*ibid*., para 44).

[36] Case No. IT-94-1-A, *Prosecutor v. Duško Tadić*, "Decision on Appellant's Motion for the Extension of the Time limit and Admission of Additional Evidence", 15 October 1998, para. 47.

[37] *Ibid*., para. 71.

[38] Thus, ICTY Appeals Chamber declares that "[…] it is clear from the structure of Rule 115 that the 'interests of justice' do not empower the Appeals Chamber to authorise the presentation of additional evidence if it was available to the moving party at the trial" (*ibid*., para. 35).

[39] *Ibid*.

[40] The *Tadić* Decision states that "[…] the principle of finality must be balanced against the need to avoid a miscarriage of justice; when there could be a miscarriage, the principle of finality will not operate to prevent the admission of additional evidence that was not available at trial, if that evidence would assist in the determination of guilt or innocence" (*ibid*.).

[41] *Ibid*., para. 72.

[42] In the opinion of ICTY Appeals Chamber, this restrictiveness derives from the purpose of the finality principle, which "[…] clearly […] does suggest a limit to the admissibility of additional evidence at the appellate stage" (*ibid*.).

[43] In annex to "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999: "Records of the Arrest of the Accused in Cameroon" (Annex A); "Record of Service in Cameroon" (Annex B); "Records of the *Procès-Verbal d'Interrogatoire* in Cameroon" (Annex C); "Letters of Appointment of Counsel" (Annex D); "Prosecutor's Rule 40 Detention Request of 15 April 1996" (Annex E); "Record of Proceedings before the Court of Appeal of Centre Province of Cameroon" (Annex F); "Submissions of the *Avocats-Généraux*" (Annex G); "Decision of the Court of Appeal of Centre Province of Cameroon of 21 February 1997" (Annex H); "Extradition Law of Cameroon: *Loi № 97/010 du 10 janvier 1997 modifiant certaines dispositions de la Loi № 64/LF/13 du 26 juin 1964 fixant le régime de l'extradition*" (Annex I); "Letter from the Registrar Concerning the Transfer of the Accused" (Annex J); "Accused's Application for Writ of *Habeas Corpus*

(Annex K); "Documents of the Registry Concerning Appointment of Attorney and Initial Appearance" (Annex L); "Report by Judge C. G. Mballe, Judge of the Supreme Court of Cameroon" (Annex M); "Affidavit of Ambassador David J. Scheffer, U. S. State Department" (Annex N). In annex to "Prosecutor's Response to the Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 Rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 21 January 2000: *Lettre du Procureur du Tribunal (TPIR) du 15 octobre 1996* (Annex O); "*Décret № 97/182 du 21 octobre 1997 autorisant le transfert de l'accusé Laurent Semanza*" (Annex O *bis*); "Order for Transfer and Provisional Detention (Rule 40 *bis*)" (Annex P); "Appeals Chamber Decision on the Defence 'Extremely Urgent Motion Seeking a Ruling that Appeals from Orders Ruling on the Trial Chamber's Lack of Jurisdiction and Request for Dismissal of Counts are Suspensive' of 15 November 1999 based on Rule 72 (D)" (Annex Q); two Appeals Chamber Decisions dated 21 January 2000 in *The Prosecutor v. Gratien Kabiligi* (ICTR-97-34-A) and *The Prosecutor v. Aloys Ntabakuze* (ICTR-97-34-A) (Annex R); "*Loi № 64-LF-13 du 26 juin 1964 fixant le régime de l'extradition*" (Annex S); "United States of America Speedy Trial Act (18 USC 3161-3162)" (Annex T).

[44]

[45] In this Brief ("Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999" 15 December 1999, the Prosecutor presented 16 documents, of which 14 (Annexes A to N) were attached to the Brief itself and 2 (Annexes O *bis* and S) were communicated to the Appeals Chamber subsequently in the "Prosecutor's Response to the Preliminary Appellate Brief in Support of the 12 October 1999 Notice of Appeal against the Trial Chamber III Order of 6 October 1999 on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 21 January 1999.

[46] Case No. IT-94-1-A, *Prosecutor v. Duško Tadić*, "Decision on Appellant's Motion for the Extension of the Time limit and Admission of Additional Evidence", 15 October 1998, para. 45.

[47] In annex to "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999: "Prosecutor's Rule 40 Detention Request of 15 April 1996" (Annex E); "Record of Proceedings before the Court of Appeal of Centre Province of Cameroon" (Annex F); "Submissions of the *Avocats-Généraux*" (Annex G); "Decision of the Court of Appeal of Centre Province of Cameroon of 21 February 1997" (Annex H); "Extradition Law of Cameroon*: Loi № 97/010 du 10 janvier 1997 modifiant certaines dispositions de la Loi № 64/LF/13 du 26 juin 1964 fixant le régime de l'extradition*" (Annex I); "Letter from the Registrar Concerning the Transfer of the Accused" (Annex J); "Report by Judge C. G. Mballe, Judge of the Supreme Court of Cameroon" (Annex M); "Affidavit of Ambassador David J. Scheffer, U. S. State Department" (Annex N). In annex to "Prosecutor's Response to the Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 Rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 21 January 2000: "*Décret № 97/182 du 21 octobre 1997 autorisant le transfert de l'accusé Laurent Semanza*" (Annex O bis); "*Loi № 64-LF-13 du 26 juin 1964 fixant le régime de l'extradition au Cameroun*" (Annex S).

[48] "Accused's Application for Writ of *Habeas Corpus*", Annex K, "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999.

[49] "Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 12 November 1999.

[50] "Prosecutor's Request to Supplement the Record on Appeal", 9 November 1999.

[51] "Record of Proceedings before the Court of Appeal of Centre Province of Cameroon", Annex F, "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999.

[52] Specifically, "Submissions of the *Avocats-Généraux* and "Decision of the Court of Appeal of Centre Province of Cameroon of 21 February 1997", Annexes G and H, op. cit *supra*.

[53] "Affidavit of Ambassador David J. Scheffer, U. S. State Department", Annex N, *ibid*.

[54] "Prosecutor's Request to Supplement the Record on Appeal", 9 November 1999, para. 7; "Defendant's Reply in Opposition to Prosecutor's Request to Supplement the Record on Appeal", 11 November 1999, para. 4.

[55] In annex to "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999: "Records of the Arrest of the Accused in Cameroon" (Annex A); "Record of Service in Cameroon" (Annex B); "Records of the *Procès-Verbal d'Interrogatoire* in Cameroon" (Annex C); "Letters of Appointment of Counsel" (Annex D) and "Documents of the Registry Concerning Appointment of Attorney and Initial Appearance" (Annex L).

[56] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Notice of Appeal (Filed under Article 24 of the Statute and Rules 72 (B), (D) and (E) and 108 of the Rules of Procedure and Evidence)", 12 October 1999.

[57] "The Prosecutor's Response to the Notice of Appeal by the Defence from the Decision of 6 October 1999 Rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Semanza as Unlawful", 28 October 1999.

[58] Rule 117 (A): "An appeal under Rule 108 (B) shall be heard expeditiously on the basis of the original record of the Trial Chamber and without the necessity of any brief. […]".

[59] "Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 12 November 1999.

[60] Annexes to op. cit. *supra*, 18 November 1999.

[61] "Order (Prosecutor's Request to Supplement the Record on Appeal)", 14 January 2000.

[62] "Prosecutor's Response to the Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 Rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 21 January 2000.

[63] "Amendment to the Prosecutor's Response to the Preliminary Brief in Support of the 12 October 1999 Notice of Appeal against the Trial Chamber III Order of 6 October 1999 on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 9 February 2000.

[64] "Reply by the Defense to the Prosecutor's Submission in Reply to Appellant's Preliminary Submissions Based on the Appeal Dated 12 October 1999 against the Decision of the III Trial Chamber's Dated the 6th October 1999 Relating to the Motion to Declare Null and Void *ab initio* the Arrest and Detention of Laurent Semanza on the Grounds of Illegality", 28 January 2000 (Mr. Charles A. Taku).

[65] "Brief in Reply to the Response to the Preliminary Brief in Support of the 12 October 1999 Notice of Appeal against the Trial Chamber III Order of 6 October 1999 on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 31 January 2000 (Mr. André Dumont).

[66] "Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 12 November 1999, § III, paras. IV-VI.

[67] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Notice of Appeal (Filed under Article 24 of the Statute and Rules 72 (B), (D) and (E) and 108 of the Rules of Procedure and Evidence)", 12 October 1999, submission, third para.

[68] *Ibid*.; "Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 12 November 1999, § III, paras. IX-XI; "Transcript", 16 February 2000, pp. 18-19.

[69] Op. cit. footnote 66, § III, para. VI.

[70] Op. cit. footnote 67, submission, fourth para. *et seq*.; op. cit. footnote 66, § III, paras. VII-VIII; "Transcript", 16 February 2000, p. 19.

[71] Op. cit. footnote 66, § III, para. XIII; "Transcript", 16 February 2000, p. 184.

[72] Op cit. footnote 67,, eighth para. *et seq*.; op cit. footnote 66, § III, para. XIV; "Transcript", 16 February 2000, p. 184.

[73] "Transcript", 16 February 2000, pp. 117-18 (French text).

[74] Op cit. footnote 66, § III, para. XV.

[75] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Notice of Appeal (Filed under Article 24 of the Statute and Rules 72 (B), (D) and (E) and 108 of the Rules of Procedure and Evidence)", 12 October 1999, submission, end; "Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 12 November 1999, § IV. The Appeals Chamber ruled on the issue of whether the Appeal was suspensive by rejecting the Defence motion in its "Decision on the Defence 'Extremely Urgent Motion Seeking a Ruling that Appeals from Orders Ruling on the Trial Chamber's Lack of Jurisdiction and Request for Dismissal of Counts are Suspensive'", 15 November 1999.

[76] "The Prosecutor's Response to the Notice of Appeal by the Defence from the Decision of 6 October 1999 Rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Semanza as Unlawful", 28 October 1999, paras. 7-9; "Prosecutor's Response to the Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 Rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 21 January 2000, paras 31-55.

[77] Vid. *supra*, second reference, paras. 76-80.

[78] *Ibid*., paras. 81-82.

[79] *Ibid*., paras. 88-94.

[80] *Ibid*., paras 83-93.

[81] The Prosecutor takes the view that the Tribunal's Statute and Rules of Procedure and Evidence do not permit "dismissal with prejudice to the Prosecutor". Furthermore, she states that the legal instruments to which the *Barayagwiza* Decision refers either contain no such remedy (Article 9 of the International Covenant on Civil and Political Rights, and Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) or specifically prohibit it (Article 7 (5) of the American Convention on Human Rights). See *ibid*., paras. 1-11.

[82] *Ibid*., paras. 12-37.

[83] *Ibid*., paras 95-96 and final page.

[84] *Ibid*., para. 97, § D and final page.

[85] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Notice of Appeal (Filed under Article 24 of the Statute and Rules 72 (B), (D) and (E) and 108 of the Rules of Procedure and Evidence)", 12 October 1999.

[86] "Prosecutor's Response to the Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 Rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 21 January 2000, para. 54. [New trans.]

[87] *Ibid*., para 48. [New translation.]

[88] "Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 12 November 1999, § I, para. IV. [New translation.]

[89] "Brief in Reply to the Response to the Preliminary Brief in Support of the 12 October 1999 Notice of Appeal against the Trial Chamber III Order of 6 October 1999 on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 31 January 2000, § IV (A), p. 9.

[90] "Reply by the Defense to the Prosecutor's Submission in Reply to Appellant's Preliminary Submissions Based on the Appeal Dated 12 October 1999 against the Decision of the III Trial Chamber Dated the 6th October 1999 Relating to the Motion to Declare Null and Void *ab initio* the Arrest and Detention of Laurent Semanza on the Grounds of Illegality", 28 January 2000, ninth para. [cit.]

[91] Op. cit. footnote 89, § IV (A) sixteenth-seventeenth paras. [Retranslation.]

[92] The Appeals Chamber also accepted as admissible an appeal under Rule 72 by Jean Bosco Barayagwiza challenging the lawfulness of his arrest and detention (Case No. ICTR-97-19-72, *The Prosecutor v. Jean-Bosco Barayagwiza*, "Decision and Scheduling Order", 5 February 1999, penultimate para.

[93] Op. cit. footnote 88, § III, para. VI.

[94] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Decision on the 'Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful'", Trial Chamber III, 6 October 1999, para. 36.

[95] These provisions of the ICTY and ICTR Statutes are identical for all practical purposes. Moreover, the *non bis in idem* principle is set out in paragraph 7 of Article 14 of the International Covenant on Civil and Political Rights in the following terms: "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".

[96] Case No. ICTR-96-7-D, *The Prosecutor v. Thenoeste Bagosora*, "Decision on the Application by the Prosecutor for a Formal Request for Deferral", Trial Chamber I, 17 May 1996, para. 13: "Article 9.2 of the Tribunal's Statute, concerning the principle of *non bis in idem*, sets limits to the subsequent prosecution by the Tribunal of persons who have been tried by a national Court for acts constituting serious violations of international humanitarian law". See also Case No. ICTR-96-5-D, *The Prosecutor v. Musema*, "Decisions on the Formal Request for Deferral Presented by the Prosecutor", Trial Chamber I, 12 March 1996, para. 12.

[97] Case No. IT-94-1-T, *The Prosecutor v. Duško Tadić*, "Decision on the Defence Motion on the Principle of *non bis in idem*", Trial Chamber II, 14 November 1995, paras. 9-11.

[98] "[…] There can be no violation of *non bis in idem*, under any known formulation of that principle, unless the accused has already been tried. Since the accused has not yet been the subject of a judgement on the merits on any of the charges for which he has been indicted, he has not yet been tried for those charges. As a result, the principle of *non bis in idem* does not bar his trial before this Tribunal" (*ibid*., para. 24.)

[99] *Ibid*., para. 22.

[100] "Extradition Law of Cameroon: *Loi № 97/010 du 10 janvier 1997 modifiant certaines dispositions de la Loi № 64/LF/13 du 26 juin 1964 fixant le régime de l'extradition*", Annex I, "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999; "*Loi № 64-LF-13 du 26 juin 1964 fixant le régime de l'extradition*", Annex S, "Prosecutor's Response to the Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 Rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 21 January 2000.

[101] "Decision of the Court of Appeal of Centre Province of Cameroon of 21 February 1997", Annex H to "Prosecutor's Brief", see footnote above.

[102] In this instance, the Yaoundé Court of Appeal ruled against admitting the request for extradition on grounds, *inter alia*, that the request from Rwanda had not come through the diplomatic channel, that the offences named in international arrest warrants did not exist in Cameroon's criminal law, and that there were serious grounds for believing that if extradited the individuals were likely to be tortured. (*ibid.)*

[103] In its consideration of subsections D 2 to D 5 of Part V of this Decision, the Appeals Chamber takes note of the distinction made in the *Barayagwiza* Decision of 3 November 1999 regarding the Appellant's status. Under Rule 2, he remains a "suspect" until an indictment against him is confirmed; thereafter he becomes an "accused". The relevance of such a distinction stems from the fact that guaranteed individual rights, in particular as to the permissible length of pre-trial detention, vary depending on the status of the individual concerned (Case No. ICTR-97-19-AR72, *Jean-Bosco Barayagwiza v. The Prosecutor*, "Decision", Appeals Chamber, 3 November 1999, para. 41).

[104] The Chamber came to an identical conclusion in the *Barayagwiza* case (*ibid*., paras. 79-80). Specifically, the right of an arrested individual to be informed promptly of the nature of the charges against him is respected if the indictment against him is served upon him in rapid order. The right to be charged promptly by means of an indictment, as provided for under Article 20 (4) (a) of the Statute, must nevertheless be distinguished from the right to be informed promptly of the nature of the charges on

account of which the arrested individual is deprived of his liberty. Confirmation and service of the indictment may follow some time after arrest. However, the individual must be informed in substance of the nature of the charges against him at the time of his arrest or shortly thereafter.

[105] See, in particular, Article 9 (2) of the International Covenant on Civil and Political Rights; Article 5 (2)of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 7 (4) of the American Convention on Human Rights.

[106] Op. cit. footnote 103, paras. 81-82. As the Appeals Chamber stresses in these paragraphs of the *Barayagwiza* Decision, there is no requirement for the Tribunal to provide the suspect with a copy of the arrest warrant or any other document setting forth the charges against him during this initial phase of detention. This right only guarantees the arrested suspect that he will be informed of the reasons why he has been deprived of his liberty.

[107] "Prosecutor's Rule 40 Detention Request of 15 April 1996", Annex E, "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999.

[108] "Record of Proceedings before the Court of Appeal of Centre Province of Cameroon", Annex F, op. cit. *supra*.

[109] See, in particular "Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 12 November 1999, § II, and "Prosecutor's Response to the Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 Rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 21 January 2000, § I.

[110] Augustin Ruzindana, Jean-Baptiste Butera, André Ntagerura, Laurent Semanza, Félicien Muberuka, Théoneste Bagosora, Anatole Nsengiyumva, Pasteur Musabe, Ferdinand Nahimana, Telesphore Bizimungu, Michel Bakuzakunde and Jean-Bosco Barayagwiza.

[111] "Submissions of the *Avocats-Généraux*", Annex G, "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999.

[112] *Ibid*.

[113] "Record of Proceedings before the Court of Appeal of Centre Province of Cameroon", Annex F, op. cit. *supra*.

[114] See footnote 111.

[115] See footnote 113.

[116] *Ibid*.

[117] "Decision of the Court of Appeal of Centre Province of Cameroon of 21 February 1997", Annex H, op. cit. *supra*. On that day, the Yaoundé Court of Appeal ruled the extradition request from Rwanda inadmissible and consequently ordered the Appellant's release. By 21 February 1997, four (Théoneste Bagosora, André Ntagerura, Ferdinand Nahimana and Anatole Nsengiyunva).of the 12 Rwandans initially arrested had been transferred to the Tribunal's Detention Facility in Arusha.

[118] See footnote 111.

[119] *Ibid*. [New translation.]

[120] "Prosecutor's Rule 40 Detention Request of 15 April 1996", Annex E, op. cit. *supra*.

[121] See footnote 117. The cover page of the Decision contains the note "*contradictoire*" (*inter partes*).

[122] "Record of Proceedings before the Court of Appeal of Centre Province of Cameroon", Annex F, "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999.

[123] The Appeals Chamber recalls that in its *Barayagwiza* Decision of 3 November 1999 it cited a Decision of the European Court of Human Rights whereby intervals of up to 24 hours between arrest and informing the suspect of charges was lawful. (*X. v. Denmark*, No. 6730/74, 1 Digest 457 (1975), cited in the *Barayagwiza* Decision, para. 84).

[124] Case No. ICTR-97-19-AR72, *Jean-Bosco Barayagwiza v. The Prosecutor*, "Decision", Appeals Chamber, 3 November 1999, paras. 54 and 61.

[125] Case No. IT-95-14/1-A, *The Prosecutor v. Zlatko Aleksovski*, "Decision", Appeals Chamber, 24 March 2000, paras. 107-109: "The Appeals Chamber, therefore, concludes that a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice [para. 107]. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been *given per incuriam*, that is a judicial decision that has been 'wrongly decided, usually because the judge or judges were ill-informed about the applicable law' [para. 108]. It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts" [para. 109].

[126] "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999, para. 39. The Prosecutor's argument is presented as follows: "In addition, the interpretation made of Rules 40 and 40 *bis* in the *Barayagwiza* Decision make relevant the procedural history of Rule 40 *bis*, specifically including its adoption on 15 May 1996 and its amendment, less than two months later, to the present language on 5 July 1996 by the Plenary of the ICTR (sic) [4 July 1996]. Evidence of this procedural history was not relevant, and therefore not available, before the *Barayagwiza* Decision called the interpretation of the rule into question".

[127] The sentence is worded as follows: "In the conduct of an investigation, the Prosecutor may transmit to the registrar, for an order by a Judge assigned pursuant to Rule 28, *a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal*". (Emphasis added.)

[128] "Letter from the Registrar Concerning the Transfer of the Accused", Annex J, op. cit. footnote 126.

[129] The first indictment against the Appellant was confirmed on 23 October 1997. It was subsequently amended on 18 June 1999 and 2 July 1999.

[130] "Report by Judge C. G. Mballe, Judge of the Supreme Court of Cameroon", Annex M, "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999.

[131] "Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 12 November 1999, § II, para. II, tenth-eleventh sub paras.

[132] "In the event of a favourable opinion from the Court as to the extradition request's admissibility in law, the Ministry of Justice shall, if appropriate, submit to the President of the Federal Republic for signature a decree ordering extradition." [New translation.] (Article 24 of *Loi № 64-LF-18 du 26 juin 1964 fixant le régime de l'extradition*, Annex S, op. cit. footnote 130). Judge Mballe confirms in his report (see footnote 130) that "The final act that gives effect to transfer on grounds of extradition is that of the Head of State and this is purely political".

[133] See footnote 130.

[134] "*Décret № 97/182 du 21 octobre 1997 autorisant le transfert de l'accusé Laurent Semanza"*, Annex O *bis*,. "Prosecutor's Response to the Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 Rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 21 January 2000.

[135] "Letter from the Registrar Concerning the Transfer of the Accused", Annex J, op. cit. footnote 130.

[136] See footnote 130.

[137] Article 28 of the Statute makes cooperation with the Tribunal an obligation for all States, in terms which include the following: "States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to: […] (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda". In addition, Rule 58 stipulates that: "The obligations laid down in Article 28 of the Statute shall prevail over any legal impediments to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under national law or extradition treaties of the State concerned".

[138] "Affidavit of Ambassador David J. Scheffer, U. S. State Department", Annex N, "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999.

[139] "[…] Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47; […]" (Rule 2).

[140] Rule 62 states that: "Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber without delay, and shall be formally charged […]".

[141] "Transcript", 16 February 1998 (Trial Chamber II), p. 4.

[142] *Ibid*.; "Transcript", 16 February 2000 (Appeals Chamber), p. 101.

[143] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 16 August 1999, para. 21. "[…] The suspect or the accused […] shall be arraigned before a Judge as soon as possible. […].

[144] "Transcript", 23 September 1999 (Trial Chamber III); Case no. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Decision on the 'Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful'", Trial Chamber III, 6 October 1999.

[145] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Notice of Appeal (Filed under Article 24 of the Statute and Rules 72 (B), (D) and (E) and 108 of the Rules of Procedure and Evidence)", 12 October 1999; "Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 12 November 1999.

[146] "Transcript", 16 February 2000 (Appeals Chamber), pp. 77-84). Counsel for the Appellant addressed this issue at the hearing only in response to questions from the Bench.

[147] Case No. ICTR-97-19-AR72, *Jean-Bosco Barayagwiza v. The Prosecutor*, "Decision", Appeals Chamber, 3 November 1999, para. 88.

[148] *Ibid*., paras. 88-89. See in particular Article 8 of the Universal Declaration of Human Rights; Article 9 (4) of the International Covenant on Civil and Political Rights; Article 5 (4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and Article 7 (6) of the American Convention on Human Rights.

[149] *Ibid*., para. 89.

[150] *Ibid*., para. 88.

[151] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Application for Order of *Habeas Corpus ad Subjiciendum* by Laurent Semanza", 29 September 1997, reproduced under "Accused's Application for Writ of *Habeas Corpus*", Annex K, "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999. Also, "Prosecutor's Rule 40 Detention Request of 15 April 1996", Annex E, *ibid.*

[152] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 16 August 1999.

[153] Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Notice of Appeal (Filed under Article 24 of the Statute and Rules 72 (B), (D) and (E) and 108 of the Rules of Procedure and Evidence)", 12 October 1999.

[154] "Defendant's Reply in Opposition to the Prosecutor's Request to Supplement the Record on Appeal", 11 November 1999, para. 5: "That the Respondent filed a writ of *habeas corpus* before the Trial Chambers on the 29th September 1997 and ever since no action was taken by the Prosecution or the Registry to hear his application".

[155] "Preliminary Appellate Brief in Support of the Notice of Appeal of 12 October 1999 from the Order of 6 October 1999 rendered by Trial Chamber III on the Defence Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful", 12 November 1999.

[156] *Ibid*., § II, para. II, thirteenth sub para.

[157] In the *Barayagwiza* Decision, the Appeals Chamber found that Jean-Bosco Barayagwiza's right to challenge the lawfulness of his detention had been violated because the Trial Chamber had failed to hear his writ of *habeas corpus* (Case No. ICTR-97-19-AR72, *Jean-Bosco Barayagwiza v. The Prosecutor*, "Decision", Appeals Chamber, 3 November 1999, para. 90).

[158] "Reply by the Defense to the Prosecutor's Submission in Reply to Appellant's Preliminary Submissions Based on the Appeal Dated 12 October 1999 against the Decision of the III Trial Chamber's Dated the 6th October 1999 Relating to the Motion to Declare Null and Void *ab initio* the Arrest and Detention of Laurent Semanza on the Grounds of Illegality", 28 January 2000, penultimate para.

[159] In paragraphs 1 and 2 of his writ of *habeus corpus* (Case No. ICTR-97-20-I, *The Prosecutor v. Laurent Semanza*, "Application for Order of *Habeas Corpus ad Subjiciendum* by Laurent Semanza", 29 September 1997, reproduced under "Accused's Application for Writ of *Habeas Corpus*", Annex K, "Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999", 15 December 1999), Counsel for the Appellant applies to the Tribunal for a Trial Chamber to issue: "An order in the nature of *habeas corpus* [do issue] directed to the Prosecutor to have the body of one *Laurent Semanza* produced before the Honourable Tribunal at such time and palce as the Tribunal's President may direct [and] An order that the said Prosecutor do appear in person and by his authorised agents together with the original of any warrant or orders of detention to show cause why *Laurent Semanza* should not be forthwith released."

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DECLARATION OF JUDGE RAFAEL NIETO-NAVIA

1. I append this declaration specifically in relation to the admission of Annex F.[1] The Appeals Chamber has decided to admit this Annex,[2] on the basis that it goes to prove that the Appellant was duly informed of the charges against him, during the first period of detention. I however believe that this annex should not be admitted for the following reasons.

2. It is clear that the Appellant is not mentioned at all in the contents of this annex, i.e., the Record of Proceedings before the Court of Appeal of the Center Province of Cameroon. In describing the matter in the introduction, it refers specifically to the case of "RUZINDANA Augustin et autre", the latter clearly being in singular. In my view, "et autre" must refer to Jean-Bosco Baraygwiza, who is specifically referred to as appearing on this date on his own behalf and who made submissions in person. I can find nothing which could permit the Appeals Chamber to infer from the contents of this Annex that the Appellant was informed on that occasion.

3. Although the Appeals Chamber states that it admits this Annex as additional evidence "*uniquement dans la mesure où celle-ci lui permet de connaître l'évolution de la procédure*[3]" before the Court of Appeal of Yaoundé in the case of *The Public Prosecutor v. Ruzindana Augustin and others*[4], I believe that in the circumstances, the maxim *in dubio pro reo* should be applied to the extent that no certain conclusions may be drawn based on this Annex. This however does not mean that the Appellant was not duly informed of the charges, as can be seen in paragraph 83 of the Decision and indeed in the preceding paragraphs of the *réquisitoire* which are not cited[5] by the Appeals Chamber but which mention *interrogatoires*, which took place in the presence of Counsel Mr. Ondigui

[1] *Record of Proceedings before the Court of Appeal of Center Province of Cameroon*, attached to the Prosecutor's Brief in Response to the Appeals Chamber's Decision and Scheduling Order of 8 December 1999, filed on 15 December 1999.
[2] Para. 81 *et seq.* of the Decision.
[3] (no English translation available).
[4] Para. 48 of the Decision.
[5] *Supra* note 1, Annex G, Submissions of the Public Prosecutor.

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Benjamin, in March and April 1996.

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

Rafael NIETO-NAVIA

Dated this thirty-first day of May 2000
At the Hague,
The Netherlands.

DECLARATION BY JUDGE LAL CHAND VOHRAH

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1. I would like to state that I agree fully with the final disposition of the Appeals Chamber in the present Decision. This agreement, however, calls for a few observations on my part with regard to remedies available to the Tribunal for procedural due process violations,[1] the effect of the Appellant's waiver of his right to complain about the right to be brought before a Trial Chamber without delay, and the right to have a writ of *habeas corpus* heard. I will take each issue in turn.

I. Remedies for Due Process Violations

2. First, I would like to consider the Tribunal's duty to remedy violations attributable to the Tribunal once the accused arrives at the Tribunal's Detention Unit, distinct from its ability to remedy violations attributable to a state or entity during the time the accused is arrested or detained at the behest of the Tribunal but before being brought within the physical custody of the Tribunal, and to remedy any violations suffered by the accused prior to the time any action was taken on behalf of the Tribunal.

3. As noted in the current Decision, the proceedings in this case are in many respects similar to the *Barayagwiza* case. In the *Barayagwiza Review Decision*,[2] the Appeals Chamber determined that new facts required the course of having to revise the remedial measures that had been ordered by the *Barayagwiza Decision*.[3] Finding extensive and egregious due process violations, the *Barayagwiza Decision* had dismissed the Indictment against the Appellant with prejudice to the Prosecutor and directed that the Appellant be released immediately. Upon Review, the Appeals Chamber altered its prior decision because it found that the evidence adduced in the Review proceedings clearly showed that new facts diminished substantially the blameworthiness of due process violations attributable to the Prosecutor. In addition, it was also found that the new facts reduced the extensiveness of the cumulative violations suffered by the Appellant. Therefore, instead of dismissing the Indictment and releasing the Appellant, in the light of the new evidence, it was deemed that a different remedial measure was required. Whilst explicitly affirming that "all

[1] For fundamental procedural due process guarantees, see e.g., Articles 9 & 14 of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by GA Res. 2200A(XXI) of 16 December 1966, entered into force 23 March 1976; Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, GA Res. 43/173 of 9 December 1988.

[2] Case No. ICTR-97-19-AR72, Jean Bosco Barayagwiza v. The Prosecutor, Decision (Prosecutor's Request for Review or Reconsideration), ICTR App. Ch., 31 March 2000, "*Barayagwiza Review Decision*."

[3] Case No. ICTR-97-19-AR72, Jean Bosco Barayagwiza v. The Prosecutor, Decision, ICTR App. Ch., 3 Nov. 1999, "*Barayagwiza Decision*."

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violations demand a remedy,"[4] the Appeals Chamber pronounced that the appropriate remedy was to have the accused stand trial for the charges against him, and that, if found to be not guilty, he would be entitled to receive financial compensation; if found guilty, he would be entitled to receive a reduced sentence.[5]

4. Similar determinations have been made by the Appeals Chamber in *Semanza* ("*Semanza Appeal Decision*"), as new facts have come to light which indicate that while due process violations were suffered by the Appellant, these violations are of a substantially lesser nature than appeared previously. As a remedy, it adopts the same approach as that taken in the *Barayagwiza Review Decision* and stipulates that the due process violations will be remedied at Judgement time after the trial on the merits, thus entitling the Appellant to financial compensation if found not guilty or to a reduced sentence if found guilty.

5. I would like to take this opportunity to emphasise that the power of the Tribunal to provide redress for violations occurring prior to the time an accused comes within the physical custody of the Tribunal is regrettably minimal. As an *ad hoc* institution, the Tribunal has a limited mandate, to only adjudicate violations falling within its jurisdiction as specified in its Statute. Consequently, many violations, however egregious they may be, simply fall outside the scope of the Tribunal's authority. In addition, its coercive and enforcement powers over states and other entities are also limited.

6. If an accused is arrested or detained by a state at the request or under the authority of the Tribunal, even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible, and this remedy must be proportional to the violations. I take the view that the remedial measures specified by the Appeals Chamber in the *Barayagwiza Review Decision* and this *Semanza Appeal Decision* are the appropriate ones.

7. At this point, I would also like to note my apprehension of certain language employed in the present Decision, which states that the "Appeals Chamber emphasises that, in any case, the Tribunal is not responsible for the period of time which elapsed before the Appellant was transferred to the Detention Facility of the Tribunal."[6] I understand this to mean that Rule 40 *bis* was not violated by the Appellant's right to be charged promptly, after he was transferred to the Tribunal's Detention

[4] *Barayagwiza Review Decision*, at para. 74.
[5] *Barayagwiza Review Decision*, at pg. 28, Disposition.

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Facility. I do not take it to imply nor should it be interpreted as implying, that the Tribunal has no responsibility to an accused before he is transferred to the Detention Facility of the Tribunal when the accused has been arrested or detained at the behest of the Tribunal. This accords with the position taken in the *Barayagwiza Review Decision*, that the cumulative effects of all violations – even those occurring prior to transfer into Tribunal custody – are to be considered in fashioning an appropriate remedy.[7]

II. Waiver of right to be informed of charges without delay

8. In the *Barayagwiza Review Decision*, the Appeals Chamber held that the 18-day period during which the accused was in detention but not informed of the charges against him did violate his right to be informed without delay of the charges against him.[8] Similarly, in the *Semanza Appeal Decision* the Appeals Chamber held that the 18-day delay between the time when the Appellant was placed in custody (in Cameroon) and the time when he was informed of the nature of the charges against him by the ICTR Prosecutor, "constitutes a violation of the right of the Appellant to be informed promptly of the charges brought against him".[9]

9. As to the period between the time the Appellant was transferred into the Tribunal Detention Facility and the time of his first appearance, there was, as noted in the present Decision, an 89-day delay. The Appellant arrived in Tribunal custody on 19 November 1997.[10] His initial appearance was scheduled for 3 February 1998 but his Counsel requested that the initial appearance be delayed until 16 February 1998. Thus, while the Appellant was responsible for delaying his initial appearance before the Tribunal for a 13-day period, a period of 89 days nevertheless elapsed between the time he arrived at the detention unit and the time he actually made his first appearance. I would in the circumstances find that the 76-day delay between the time the Appellant arrived in the Detention Unit and the date he requested a postponement for the appearance seriously violates the rights of the Appellant.[11]

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[6] *Semanza Appeal Decision*, at para. 101.

[7] *Barayagwiza Review Decision*, at para. 71. Responsibility and authority to redress violations occurring at a time when the accused was not detained under Tribunal request or authority would need to be considered on a case by case basis.

[8] *Barayagwiza Review Decision*, at paras. 54-55.

[9] *Semanza Appeal Decision*, at para. 87.

[10] Note however that the *Semanza Decision* states, at para. 13 that Semanza was transferred from Cameroon to the custody of the Tribunal on 11 November 1997, although it appears that 19 November 1997 is the correct date. See Case No. ICTR-97-20-I, The Prosecutor v. Laurent Semanza, Decision on the "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful," T. Ch., 6 Oct. 1999.

[11] There is no indication that the Appellant was responsible for the Tribunal scheduling his initial appearance some two and a half months after the time he was transferred into the Tribunal Detention Facility. Only in the case that the Appellant (or his Counsel) was responsible for a very substantial portion of the delay would there be no violation.

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10. I would like, however, to emphasise that the Appellant has no cause to complain about the additional 13-day delay of his initial appearance because he contributed to that delay when his own Counsel requested the postponement of the originally scheduled date of his initial appearance to a date 13 days later. Contrary to the finding of the Appeals Chamber that when Counsel for the Appellant requested to delay his initial appearance for 13 days, this "request implied waiver of the right of the Appellant to raise the issue of a violation of his right to be brought before a Trial Chamber without delay and be formally charged",[12] I take the view that a waiver of 13 days does not imply a waiver of the extra 76 days. With respect, I find myself unable to agree with the conclusions reached by my learned brothers to the effect that when Counsel for the Appellant requested the initial appearance to be postponed from 3 February 1998 to 16 February 1998, he implicitly waived his right to raise the issue of a violation of his right to be brought promptly before a Trial Chamber to be formally charged. However, I do agree with the disposition decided by the Appeals Chamber as to the appropriate remedy as I do not believe that the violation justifies so disproportionate a remedy as to require the dismissal of charges against him and consequently his release. In the result, I am firmly of the view that the appropriate remedy is the one stipulated in the Decision, i.e. financial compensation if he is acquitted or a reduction in his sentence if he is convicted.

III. *Habeas Corpus*

11. As an urgent remedy for the violation of personal liberty, *habeas corpus* has been described time and again as "the most celebrated writ" in Common Law. Its effectiveness has also long been recognised in the Civil Law system. Indeed, its principles have now been embodied in international instruments.[13] The writ requires a person to be brought promptly before a court in order to determine the lawfulness of his or her detention. There can be no question that once a writ of *habeas corpus* is filed, it must be heard unless it is withdrawn by the party filing it. In the present case, the *habeas corpus* application was filed on 29 September 1997 but it was never heard. It may

[12] *Semanza Appeal Decision*, at para. 111.

[13] For example, Article 9(4) of the International Covenant on Civil and Political Rights stipulates: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." GA Res. 2200A(XXI) of 16 December 1966; Article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." 213 UNTS 221 (1950); Article 7(6) of the American Convention on Human Rights states, in pertinent part: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful." 9 ILM 673 (1970).

be that it was not heard because on 16 October 1997 the Appellant was indicted by the Prosecutor (which Indictment was confirmed on 23 October 1997) and was transferred to the Tribunal's Detention Facility on 19 November 1997, and accordingly, the *habeas* challenge was considered to be moot since the motion requested that an order be issued to the Prosecutor to have him brought before the Tribunal to show cause why he should not be released.[14] It may even be that the *habeas corpus* petition accelerated the issuance of the Indictment and the transfer of the Appellant to the Tribunal. Nevertheless, the *habeas corpus* petition, in my view, should have been formally addressed and disposed of by the Tribunal. I am firmly of the view that ignoring the writ was a violation of the Appellant's rights for which a remedy should be available, as prescribed in the Decision.

12. I am similarly of the view that, while Counsel for the Appellant could have raised earlier the issue that the *habeas* writ had been ignored, he did not act without due diligence as the relief sought by the writ was secured shortly after his filing of the writ, and possibly as a result of the writ. Accordingly, I would not attribute primary responsibility for the violation to Appellant's Counsel. I consider that when any organ of the Tribunal contributes to due process or other human rights violations (including by omission or oversight), the Chambers should be sufficiently flexible to allow the violations to be raised and redressed. Indeed, when an accused is defending himself against charges of genocide, crimes against humanity or war crimes before the Tribunal, he should not also be required to diligently ensure that the Tribunal is not itself contributing to a violation of his rights, as that onus should rest with the Tribunal.

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

Dated this 31st day of May 2000

Judge Lal Chand Vohrah

[14] See Annex K (Notice of Motion, Accused's Application for Writ of Habeas Corpus) of Prosecutor's Brief in response to the Appeals Chamber's decision and scheduling order of 8 December 1999.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

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1. Two years ago, in an argument about the precedential force of its decisions, the International Court of Justice said, "The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases".[1] Given the acknowledged position that that court is not bound in law by its previous decisions, I would understand its statement to mean that, *in practice* - though not in obedience to a *practice* which has the force of law - it would nevertheless follow its previous decisions subject to a power to depart for cause.

2. Granted obvious differences between the International Court of Justice and this Appeals Chamber, it nevertheless seems to me that the statement of the former could apply equally in relation to the latter. Except by way of emphasis, there is little difference between that statement and a recent holding of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") that "in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice" ("ICTY statement").[2]

3. The ICTY statement is now adopted by this Appeals Chamber. I support the adoption on the basis of the following understanding of the legal status of the statement and subject to certain considerations of flexibility which could be taken into account in deciding whether reasons for departure exist in a particular case.

4. In a prefatory way, I would note a need to maintain jurisprudential coherence between the two Tribunals. Each Appeals Chamber is legally distinct from the other; the two bodies can therefore differ from each other. However, it may be recalled that, at the time when this Tribunal was being set up, the Security Council "mandated that certain organisational and institutional links be established between the two Tribunals to ensure a

[1] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, I.C.J. Reports 1998*, p. 275, at p. 292, para. 28.

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unity of legal approach";[3] the members of the two Appeals Chambers are by law the same. In consequence, I shall speak indistinguishably of the two Appeals Chambers for the most part, and more especially as I shall be dealing with the ICTY statement only in so far as it affects them.

5. Another prefatory remark concerns the different effects of the ICTY statement in the particular cases involved. In the case before the Appeals Chamber of the ICTY, there was no departure from the previous decision in question; in the instant case, there is a departure. That is interesting. However, the important thing for present purposes is that the ICTY statement recognises the existence of a limited right of departure. That is the right which is now exercised, and it is to that right that the first part of this opinion is devoted. The second part addresses the alleged failure of the Trial Chamber to hear the appellant's *habeas corpus* motion.

The legal status and the limitations of an obligation of the Appeals Chamber to follow its previous decisions

6. First, then, as to the legal status of the ICTY statement. The problem is this: The Statute is the basis of everything that the Tribunal does. It must therefore be the foundation of any system of precedents which the Tribunal applies. Did the Appeals Chamber of the ICTY interpret its Statute as *requiring* it as a matter of law to follow its previous decisions subject to a limited power of departure? Or, did it interpret its Statute as *enabling* it, if it sees fit, to adopt a practice of following its previous decisions subject to departure on limited grounds? If the former is the case, the Appeals Chamber is powerless to vary the rule of precedent laid down by the Statute; if the latter is the case, it retains power, directly or indirectly, to vary any rule of precedent laid down in a practice which it decides to adopt.

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[2] *Aleksovski*, IT-95-14-/1-A of 24 March 2000, para. 107.
[3] See Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), 13 February 1995, p.3, para.9, and the views of members of the Security Council, referred to in Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (New York, 1998), Vol.1, p.354.

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7. I shall deal first with the question whether the Statute *requires* the Appeals Chamber as a matter of law to follow its previous decisions subject to a limited power of departure. In favour of the view that the Appeals Chamber of the ICTY interpreted its Statute in that way, it may be observed that it extracted the requirement from "a proper construction of the Statute, taking due account of its text and purpose...", that it considered it "necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception", that, in speaking of the *ratio decidendi* of a previous decision, it referred to "the obligation to follow that principle...", and that it rejected a Defence argument "that the doctrine of *stare decisis* or binding precedent is inconsistent with the principle of legality...".[4] Does a proper construction of the Statute support the view that it creates an obligation of law to that effect?

8. In a preliminary way, it seems to me that, whether it drew the right conclusions being another matter, the Appeals Chamber of the ICTY correctly looked to the Statute. Read as whole, although it produces a principle close to *stare decisis*, the decision does not appear to rest on that doctrine, not at any rate in the sense of something floating outside of the Statute. However, as the doctrine is associated with the problem under discussion and as it was mentioned by that Appeals Chamber, a few words may be said on it.

9. Viewed as *res judicata*, the decision of a court in all legal systems binds the parties as to the matters decided;[5] where *stare decisis* applies, as it does in some systems only, the decision, generally speaking in the case of a court of last resort, binds the court itself to follow the *ratio decidendi* of that decision as a matter of law in all future cases subject to a limited right of departure. That is not a meaningless riddle. What it signifies is that, even if the court would in fact have decided a later case differently, it is legally bound to decide in accordance with its previous decision unless its reasons for wishing to

[4] *Aleksovski*, IT-95-14/1-A, 24 March 2000, paras. 107, 109, 110 and 123, respectively.
[5] "[T]he irrebuttable presumption of legal truth that attaches to a judicial decision once it has become final is an institution common to all systems of law and serves as a basis for the binding character of judicial decisions". See *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, *I.C.J. Reports 1991*, p.53, at p.121, para. 7, dissenting opinion of Judges Aguilar Mawdsley and Ranjeva.

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decide differently fall within the prescribed limitation. The ICTY statement does not advance a claim to this seemingly extraordinary power based on that doctrine, and it would not be proper to be influenced by ideas deriving from the doctrine; at any rate, there is no foundation for such a claim in a new international jurisdiction that is not a simple offspring of another jurisdiction which binds a court of last resort to follow its previous decisions as a matter of law. Nor can such a claim be founded on the general consideration that the Tribunal was established on the adversarial model. The ICTY statement does not rely on that circumstance, and rightly so: that circumstance is too slender to support the *vinculum juris* needed to extend the reasoning of one case to another and to make it legally applicable to the latter.

10. Thus, *stare decisis* being put aside, the question is whether an obligation of law for the Appeals Chamber to follow its previous decisions can be based independently on the provisions of the Statute. Here it has to be borne in mind that the obligation in question, if it exists, is not an ordinary substantive rule; it is in the nature of a super-norm directing the Appeals Chamber how it should select the rule of substantive case-law to be applied in a particular matter. According to a recognised authority (speaking of *stare decisis*), rules of that kind "dwell at a higher level than ordinary rules of substantive case-law whose authenticity they control".[6] Thus, if the Statute lays down such a super-norm, it may be expected to do so with a measure of explicitness befitting the importance of the requirement. If that was done, the need for judicial interpretation would be diminished,[7] though not altogether removed.[8] But, at all events, that was not done. The Appeals Chamber of the ICTY acknowledges that there "is no provision in the Statute of the Tribunal that deals expressly with the question of the binding force of decisions of the

[6] Cross and Harris, *Precedent in English Law*, 4th edn. (Oxford, 1991), p.105. That statement is not affected by arguments concerning the constitutionality of the English Practice Statement of 1966.

[7] See, for example, *Acquisition of Polish Nationality, 1923, P.C.I.J., Series B, No. 7*, p.20, as regards the duty of the Court to apply "as it stands" a "clause which leaves little to be desired in the nature of clearness".

[8] On the ground, *inter alia*, that it involves a *petitio principii*, there has been, as is well known, much criticism of Vattel's aphorism that the "first general maxim of interpretation is that it is not permissible to interpret that which does not need interpretation" (*Le Droit des Gens*, Vol. 2, Ch. 17, para. 262, cited by M. Basdevant in his argument in *S.S. "Wimbledon", P.C.I.J., Series C, No.3*, Vol. 1, p.197). Even seemingly plain words may need interpretation.

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Appeals Chamber".[9] A principle to that effect is sought to be extrapolated from the provisions of the Statute. The authority for saying that there is such a principle is really the decision of the Appeals Chamber which makes that interpretation of the Statute.

11. Thus, the argument arrives at a position of some circularity. A decision of the Appeals Chamber interprets the Statute as meaning that the Chamber is legally obliged to follow its previous decisions subject to a limited power of departure. The interpretation of the Statute so made is meaningless unless the decision by which it is made has itself – and in its entirety - to be followed as a matter of law. But whether it has to be followed as a matter of law depends on the very interpretation of the Statute which it makes. What the circularity suggests is that it is the decision itself which is seeking to exert power over the Appeals Chamber in making later decisions. It is not apparent to me that a decision of the Appeals Chamber can of its own authority do that. An *a priori* basis of some kind would be needed. There is none. In the absence of a source external to itself, the decision is drawing on itself for its authority. That, it may be thought, is like an attempt to define *idem per idem.*

12. In the result, a decision of the Appeals Chamber interpreting the Statute to mean that it is obliged in law to follow its previous decisions subject to a limited power of departure does not, because it cannot, deprive that Chamber of competence to reverse the interpretation given in that decision itself. If the Appeals Chamber can do that in a later decision, it is difficult to see what the earlier decision achieves. There is no basis for saying that, unless the departure falls within the exceptions visualised by the earlier decision, the interpretation given in that earlier decision cannot be reversed. The issue relates not to the scope of the exceptions to the obligation to follow previous decisions, but to the obligation itself. The limitations imposed by the earlier decision cannot prevent the Appeals Chamber from later setting aside the very holding which fixed the limitations. One cannot give himself a lift by tugging at his own bootstraps.

[9] *Aleksovski, supra*, para. 99. By contrast, art. 21(2) of the Statute of the International Criminal Court states that the "Court may apply principles and rules as interpreted in its previous decisions". So, that Statute spoke expressly, even though what it said scarcely needed to be said.

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13. In any case, it is submitted that nothing in the Statute can be interpreted as creating an obligation in law to follow previous decisions subject to a limited power of departure. The Appeals Chamber of the ICTY refers to the provisions of the Statute relating to a right of appeal and to a right to a fair hearing.[10] However new a right of appeal may be in international criminal adjudication, it is in keeping with, and indeed inspired by, currently accepted international norms relating to a right of appeal in criminal matters. Those norms do not establish that a system which provides for a right of appeal is to be understood as thereby also providing that the *ratio decidendi* of a decision of a court of last resort has to be followed as a matter of law by the same court in later decisions subject to a limited power of departure; some systems which provide for a right of appeal do not know of that consequence. As to the right to a fair hearing, this applies to all kinds of judicial proceedings, even though it tends to be more elaborately institutionalised in criminal than in civil cases.[11] Yet there are places in which that right does not support an inference that a court of last resort is under an obligation to follow its previous decisions, whether in civil or in criminal cases. With respect, it seems to me that the limits of permissible implication are reached by an argument that the statutory provisions in question evidence the existence of such an obligation. No doubt, the provisions of the Statute may be interpreted as *enabling* the Appeals Chamber, if it sees fit, to adopt a practice of following its previous decisions subject to a limited power of departure; they do not go far enough to be interpreted as *requiring* it to act in that way as a matter of existing statutory compulsion.

14. The question is thus reached whether the ICTY statement should be construed as an announcement of a practice which the Appeals Chamber has decided to adopt. In considering this question, the formulation of the ICTY statement may be noted. The word "should", which occurs twice in the course of the same sentence in that statement, can indicate an obligation or duty; but it can also indicate an expectation or probability.[12] It seems possible that a meaning cognate with the latter was intended when regard is had to the circumstance that, in the key provisions of that statement as set out in paragraph

[10] *Aleksovski, supra,* paras. 99-111.
[11] See, generally, *Dombo Beheer B.V.*, ECHR, A. 274, p. 19, para. 32, Judgment of 27 October 1993.
[12] See *Webster's New Dictionary and Thesaurus, Concise Edition* (New York, 1990), p.505.

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107 of the ICTY judgment (to which paragraph that judgment repeatedly refers), there is no reference to previous decisions of the Appeals Chamber being "binding" on it. It is useful to compare the wording of the corresponding statement in paragraph 113 of the ICTY judgment, in which the Appeals Chamber stated that "a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers ...". The striking deliberateness in the use of different language in these centrally important statements is not, in my view, off-set by other passages in the judgment. It is a fair inference that the idea of the *ratio decidendi* of decisions of the Appeals Chamber being "binding" was reserved for the category of Trial Chambers only (a category with which I am not dealing, one way or another).

15. These matters suggest an affirmative answer to the question whether the ICTY statement should be viewed as an announcement of a practice in the sense of a future line of judicial conduct. As experience elsewhere suggests, such a practice can vary in the course of development, more especially since it involves an element of judicial policy; it ripens only with time and application. Time need not be drawn out, but the circumstance that time may yet not be available (the Tribunal being a temporary body), would not justify a final and unquestionable position being ushered in *uno flatu* by judicial rescript. Care has to be taken in making comparisons with permanent international judicial bodies in which a practice of following previous decisions could develop over time: the literature shows that permanence, including an expectation of it, is a significant factor in that development. The interim position here may be better described by referring to what the Appeals Chamber would *in practice* do, as distinguished from there being a *practice* as known to lawyers.

16. In short, *stare decisis* apart, an assertion by a court of last resort that, in making later decisions, it is under an obligation to follow its previous decisions subject to a limited right of departure does not succeed unless, in those later cases, it chooses of its own volition to act conformably to the asserted obligation. Hence, however robustly the court may feel able to declare such an obligation, there is risk that the declaration will peter out unheard if the same court were for any reason subsequently to hold that no such obligation exists. I do not think that the Appeals Chamber should so hold; but it can, and this is what is important to a determination of the legal status of such a pronouncement.

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17. To conclude this branch, I would interpret such a pronouncement not as asserting that the Statute itself lays down a requirement for the Appeals Chamber to follow its previous decisions subject to a limited power of departure, but as asserting that the Statute empowers the Appeals Chamber to adopt a practice to that end and that such a practice has now been adopted. On that basis, I agree with the pronouncement.

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18. Now for some considerations which may be taken into account in determining whether reasons for departure exist in any particular case.

19. First, the need for consistency, stability and predictability, which underlie national systems based on some form of precedential authority, may mean that in some circumstances (not all), even if the court unanimously considers that its earlier view was clearly not correct, it may judge that there are strong reasons for declining to interfere: the defeat of settled expectations built up on an assumption of continuance of the previous holding may well tip the scales in favour of non-interference. This possibility seems to be within the terms of the ICTY statement, which, as I understand it, means that, even if it is clear that the earlier decision was wrong, this would not suffice to justify a reversal unless a reversal was also in the interests of justice: cogency is required both in relation to the alleged error and in relation to the interests of justice

20. This possible shortfall in cogency, leading to reluctance to reverse an admittedly incorrect decision, has to be adjusted in the case of the Tribunal if it is to carry out its tasks. These include several things, but it is proposed to concentrate on the Tribunal's fundamental duty to apply pertinent elements of customary international law. If an incorrect statement of customary international law is applied, what is applied is not customary international law but a contradiction of it. It is not logical to suppose that a duty to apply customary international law can be regarded as embracing a duty to apply something that is at variance with it. If the Tribunal does that, it is violating its mandate.

21. The violation is not redeemed by argument that the continued application of the contradiction may nevertheless be in keeping with the certainty which the administration of the criminal law requires. It is difficult to oppose an argument that customary

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international law imports the requirement of municipal law for certainty in the administration of criminal law; but I would think that the requirement of certainty might be regarded as satisfied at the point at which the process of importation of the requirement would be purchased at the price of applying something which contradicted customary international law.

22. Second, there is the consideration that if an admitted error remains uncorrected because the Appeals Chamber feels that it should follow its previous decision which created the error, there may not be any means of putting matters right. This would be so in respect of an erroneous statement by the Appeals Chamber as to what is customary international law (as distinguished from matters concerned with the establishment or organisation or jurisdiction of the Tribunal). In relation to the Appeals Chamber, there is no institution corresponding to a domestic legislature which has general competence to amend a statement by the courts as to what is the law. It is recognized that the availability of such a corrective mechanism is an operative factor in systems based on some form of precedential authority.

23. If the Security Council could amend a statement of the Appeals Chamber as to what is customary international law, it would be right to consider whether it could be realistically expected to intervene whenever it was necessary to make a correction. But the question does not arise because, as it appears to me, the Security Council has no competence to act. Article 5 of the ICTY Statute, concerning crimes against humanity, refers to certain acts as such crimes "when committed in armed conflict". In inserting this requirement, the Security Council might seem to have been modifying customary international law, under which there is no such requirement. But the modification was more apparent than real: the object was to define the jurisdiction of the ICTY, the seeming modification of the accepted elements of customary international law being merely convenient machinery for accomplishing the jurisdictional objective.[13] In effect, that Tribunal was to have jurisdiction not over all crimes against humanity, but only over a certain category of them. The Security Council can of course contribute to the

[13] See and consider *Tadić*, IT-94-1-A, 15 July 1999, paras. 249, 287 and 296, and *Blaškić*, IT-95-14-T, 3 March 2000, para. 66.

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formation of customary international law, but, if it amended a statement of the Appeals Chamber as to what that law is, the very idea of the judicial function would be compromised. Nor does the rule-making function of the judges reach so far.

24. Customary international law could of course change in accordance with the processes by which it evolves. But, barring that, it appears to me that only the Appeals Chamber may amend a statement by it as to what is customary international law. Consequently, if the Appeals Chamber is satisfied that a previous decision by it on the subject was erroneous, something can be said for the view that it is under a duty to the international community to correct its error.

25. Third, in estimating the extent to which the Appeals Chamber should be prepared to act, it may be borne in mind that, so far as international law is concerned, the operation of the desiderata of consistency, stability and predictability does not stop at the frontiers of the Tribunal. Methods of attaining these objectives within the Tribunal are important. The interesting question[14] which they leave unanswered is how to secure those objectives in relation to other international judicial bodies[15] which administer international law, more particularly amongst those within the United Nations system to which the Tribunal belongs.[16] The Appeals Chamber cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern; to act on that blinkered view is to wield power divorced from responsibility. Unlike the position in some domestic systems, there is no central judicial authority which can impose order over the entire field so as to secure unity in the overall development of the law.

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[14] As to the problem, see Gilbert Guillaume, *The Future of International Judicial Institutions* (The Lord Wilberforce Lecture), ICLQ 44 (1995) 848, at 862, referring to "the danger of divergences resulting from the proliferation of tribunals, courts, and quasi-judicial bodies". The matter is also of interest to statesmen: President Chirac referred to it in his address to the International Court of Justice on 29 February 2000. Aspects of the matter are being studied by, *inter alia*, the Project on International Courts and Tribunals (PICT).

[15] Observable elements of autonomy in the various pieces of the existing international adjudication machinery ground criticism of the idea that there is an "international judicial *system*". In my respectful view, however, if nothing turns on the particular point, the term is intelligible and useful.

[16] On a broader question concerning the need, in certain areas, to ensure coherence as between the United Nations system and domestic judiciaries, see *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, I.C.J. Reports*, 29 April 1999, p.14, separate opinion of Vice-President Weeramantry.

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26. It is right to bear in mind the broad import of Judge Anzillotti's statement 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 ...". [17] It is helpful also to recall a more recent statement to similar effect of Judge Abi-Saab that the "principle of 'normative economy' or '*economie des notions*' being a categorical logical imperative for any legal system, a legal system cannot withstand the existence within its confines of two concepts or rules that fulfil essentially the same function or bear divergently on any one situation, however slight the divergence may be". [18] Thus, the contents of international law have to be constant; they cannot include different but equally valid rules on the same point.

27. The singleness of the nature of international law is not sufficient to found a legal duty of one international judicial body to follow the decisions of another. That would depend on more than the circumstance that they are both administering the same system of law; it would depend on a certain hierarchical relationship between them, which is absent. But would there also be a leap in logic in saying that the fact that their mandates require them to apply the same law means that they could only intelligently fulfil their mandates by taking account of the decisions of each other before declaring what is that law? Test it this way: suppose that an international judicial body were to say that it would not take account of the decisions of other such bodies and that it would proceed on the basis that it would only consider its own previous decisions. Would that be correct? I think not. An international judicial body which does that is simply misconceiving the meaning of its autonomy: it is autonomous in applying the law, but in finding what is the law it has to take account of pronouncements of other international judicial bodies as to what is the law. The weight it attaches to such other pronouncements, or its traditional

[17] *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, dissenting. Mr. Elihu Lauterpacht, Q.C., thought that Judge Anzilotti's view could be challenged but he did not pursue the point. See *1973 I.C.J. Pleadings, Nuclear Tests (Australia v France),* Vol. 1, p.238.
[18] *Tadić,* (1994-1995) 1 ICTY JR 529.

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practice in not always making explicit reference to them,[19] is another matter; but the fact that it may separately pronounce on what are the contents of international law does not relieve it of the need, in doing so, to take account of the desirability of achieving coherence within the same system.[20] In my opinion, the necessity to respond to that need is a duty; it is a legal duty flowing from the nature of the mandate of the particular international judicial body; and it has to be discharged in good faith.[21]

28. Accordingly, there is a legal duty to take account of the need for coherence in the whole field (including relevant elements of the jurisprudence of post-World War II military tribunals) in judging whether there are cogent reasons for the Appeals Chamber to depart from its previous decision, and in particular whether there would be public mischief in leaving an erroneous statement of the law uncorrected.

29. The fourth point concerns a more specific application of the third. Granted that the Appeals Chamber is not bound in law by decisions of the International Court of Justice ("ICJ"), it may be thought that, in so far as the Tribunal has a duty to apply customary international law, the desideratum of coherence suggests that that duty includes a responsibility to show deference to the views of the ICJ as to what is customary international law, more particularly as the subject is understood within the United Nations system of which both bodies form part. In this respect, it is a mistake to dwell on the familiar, if valid, distinction that the Tribunal is dealing with the criminal responsibility of individuals whereas the ICJ is concerned with the responsibility of states.

[19] It is believed that the practice of the International Court of Justice is now showing more flexibility on this point.

[20] I do not believe this is in conflict with Article 38 of the Statute of the ICJ, which, subject to some argument as to exhaustiveness, is generally taken as a working definition of international law.

[21] The principle of good faith is usually applied in international law to state obligations, but it is of broader application, being "[o]ne of the basic principles governing the creation and performance of legal obligations", even though it is not in itself a source of obligation where none would otherwise exist. See *Nuclear Tests, I.C.J. Reports 1974*, p. 268, para. 46. And see, generally, Elisabeth Zoller, *La Bonne Foi en droit international public* (Paris, 1977), p. 190, stating: "On admet, d'une manière générale, que les organes de l'organisation [internationale] doivent exercer leurs compétences de bonne foi". At pp.192 - 193, that writer refers to the *Fasla* case before the United Nations Administrative Tribunal.

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30. The ICJ itself appreciates that it is not "a court of criminal appeal".[22] However, from the circumstance that the ICJ does not adjudicate on individual criminal responsibility, it does not follow that it may not need to deal with some aspects of the criminal law in order to fix the responsibility of states. Thus, under Article IX of the Genocide Convention 1948, it has jurisdiction over "disputes between Contracting Parties relating to the interpretation, application or fulfilment" of the convention. In exercise of that jurisdiction, it may have to decide a dispute between states as to whether the convention applies to particular acts. In this respect, it may be noted that Judge *ad hoc* Lauterpacht spoke of a claim of genocide as involving "the establishment of a pattern or accumulation of *individual crimes*".[23]

31. Further, the building blocks of customary international law have to be the same whatever the particular edifice being constructed: it cannot mean one thing for the ICJ and another for the Tribunal. Thus, in the *Nuclear Weapons* case, the ICJ summarised what were the "cardinal principles contained in the texts constituting the fabric of humanitarian law...", the texts in question being largely a statement of customary international law.[24] Surely, that would apply equally in relation to the Tribunal? It is difficult to see how the latter could credibly adopt a different position under any circumstances. A duty to follow previous decisions is not a reason for taking leave of the fundamental mission of the Tribunal to apply customary international law.[25]

32. Now, where would the Tribunal find reliable statements as to the contents of customary international law? From several places, no doubt. But an important one, it may be thought, is the ICJ. In this respect, it is not altogether irrelevant to note that, whereas the Tribunal was established by a principal organ of the United Nations, the ICJ is itself a principal organ of that Organisation and, indeed, its "principal judicial organ"

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[22] *La Grand Case (Germany v. United States of America), I.C.J. Reports 1999*, p.15, para. 25.
[23] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), I.C.J Reports 1997*, 243 at 284, para. 19, emphasis added. See also *ibid.*, p. 282, paras. 12 and 13.
[24] *I.C.J. Reports 1996 (I)*, p. 257, para. 78. In para. 79, the ICJ noted that most of the textual rules constituted "intransgressible principles of international customary law".
[25] See Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), presented 3 May 1993, paras. 29 and 33 – 34.

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as provided by the supreme law of both judicial bodies.[26] In President Basdevant's words, the ICJ is "the world's leading judicial organisation".[27] Other learned jurists have spoken similarly of it. The lawgiver might reasonably be supposed to have envisaged that the Tribunal would in consequence show deference to, if not take the law from, decisions of the ICJ as to what was customary international law and depart from them only in the clearest and most compelling cases. Subject to such narrow exceptions, when there is a conflict in holdings the Appeals Chamber should accordingly be prepared to bring its previous decisions into conformity with those of the ICJ. If not, the consequences may be noted. The point referred to below does not bear on the work of this Tribunal, but it illustrates the issues now under discussion.

33. A decision of the Appeals Chamber of the ICTY, rendered on 15 July 1999, determined that the law as stated by the ICJ on an important point of customary international law was "not persuasive" and was "unconvincing"[28] and went on to declare that the law was to the contrary of what it was thought that the ICJ had said it was. In a later case, that Appeals Chamber further laid it down that this contrary statement of the law had to be followed by it notwithstanding the asserted difference.[29] So, on the showing of that Appeals Chamber, there are now, on a major matter of customary international law, two different positions in the international legal field and more particularly within the common United Nations establishment to which the ICTY and the ICJ equally belong. "Law", said Judge Jessup, "is constantly balancing conflicting interests".[30] Yet, in so far as the ICTY statement was formulated in a way designed to balance certainty against flexibility, this feature of the statement did not prevent that unhappy conflict from arising within the same family of institutions.

34. Avoidance of so unsatisfactory a situation suggests that care is required in determining that there is in the first instance any real difference requiring a choice to be made. It may be that the whole of a decision is not relevant, but only a part; this has to be

[26] Charter of the United Nations, Article 92.
[27] *Annuaire de l'Institut de Droit international*, 45 (1954 - II), p. 62.
[28] *Tadić*, IT-94-1-A, 15 July 1999, paras. 115 and 116.
[29] *Aleksovski*, IT-95-14/1-A of 24 March 2000, para. 92ff.

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identified with the precision required to isolate the *ratio decidendi*, a concept rightly stressed in *Aleksovski*[31] and recognised as important in this field of debate. In this respect, that case referred to *Nicaragua*[32]. Much in the latter shows that proof of specific instructions is required to establish that a state was responsible for delictual acts in the shape of breaches of international humanitarian law committed by a local entity in another state. For reasons elsewhere sought to be given,[33] it is not correct to impute to the ICJ the improbability of supposing, and I do not think that the case can reasonably be read as meaning, that specific instructions have as a matter of law to be proved in order to show that a state was using force against another state through a local entity, as distinguished from showing that it was committing particular breaches of international humanitarian law through the local entity. A showing of the former action – an action which could be done without also doing the latter - was all that had to be made in order to make good the requisite point in certain cases before the ICTY, namely, that there was an armed conflict between states for purposes of the application of relevant provisions of the Geneva Conventions. The Appeals Chamber of the ICTY being likewise of the view that proof of specific instructions was not required for those purposes, on this particular point the two decisions were congruent. Consequently, inviting though the exercise might have been, it was not necessary to consider whether or not proof of specific instructions was required to establish responsibility for delictual acts, which was the inquiry which led the Appeals Chamber to hold that there was a difference in views.

35. Hence, on the actual point in issue, there is difficulty in appreciating how there could be a conflict between the holding of the Appeals Chamber of the ICTY and that of the ICJ, or how a question of choice between the two holdings arose, so as to necessitate a pronouncement on the duty of that Appeals Chamber to follow its previous decisions; it should have been sufficient to note that there was really no difference on the matter of relevance. In the particular circumstances, the pronouncement of that Appeals Chamber

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[30] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 206, para. 81, separate opinion.
[31] *Supra*, note 2.
[32] *I.C.J.Reports 1986*, p. 14.
[33] *Tadić*, IT-94-1-A of 15 July 1999, separate opinion.

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on its duty to follow its previous decisions operated as a formula for automatically perpetuating the view that the ICJ fell into error on a significant and substantial part of customary international law and for requiring an allegedly contrary holding of that Appeals Chamber to be followed instead.

36. In passing, it may be observed that, in respect of circumstances similar to, if not identical with, those involved in the ICTY cases mentioned above, the ICJ recognises that it may well have to decide "the question whether Yugoslavia took part - directly or indirectly - in the conflict at issue ...".[34] If and when it comes to decide whether Yugoslavia took part in the conflict "indirectly", there would be interest in seeing whether it makes proof of specific instructions the test of its decision. Meanwhile, it may be noted that Yugoslavia had been saying that the conflict was "a 'civil war' or 'internal conflict' exclusively". Interestingly, however, Judge *ad hoc* Kreća considered that that was "only partly correct". In his view, after Bosnia and Herzegovina became independent, "the civil war became ... an international armed conflict ....".[35] That conclusion was not based on direct participation; it presumably rested on indirect participation through a local party to the previous "civil war". Yet nothing suggests that reliance was placed on specific instructions.

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37. If the foregoing considerations are taken into account, a desirable degree of flexibility, not incompatible with the reasonable demands of certainty, can be achieved in deciding whether there is sufficient reason for a departure. Caution is of course needed in having recourse to those considerations. It is correct, and not less so because it is also obvious, that the stability of the law should not be jeopardised by the mere circumstance that a recomposed bench of the Appeals Chamber happens to consist of members who personally disagree with the previous decision. As it was said in an oft-cited remark, "doubtful issues have to be resolved and the law knows no better way of resolving them

[34] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, I.C.J.Reports 1996 (II)*, p. 615, para. 31.
[35] *Ibid.*, pp. 764-765, para. 100.

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than by the considered majority opinion of the ultimate tribunal".[36] On the other hand, there may be an equal need for prudence in considering whether a departure is the result of so unacceptable an approach. A bench, free of that infirmity, is not without guidance in navigating between two conflicting decisions. If, after looking carefully at the reasons they give, it is able to say that there were no cogent reasons for the departure made in the later decision, it will simply prefer the first.[37] It will not be right, however, for it to take that course without pausing to reflect on whether the above-mentioned considerations, if they are involved, are capable of sustaining reasoned analysis.

38. It is in the ways set out above that I would understand the ICTY statement. I agree that, for the reasons given in today's decision, the change now undertaken in this case is within the power of departure which that statement recognises. This conclusion is reinforced by the considerations of flexibility mentioned above, but is not dependent on them.

The habeas corpus *motion*

39. I pass now to the appellant's *habeas corpus* motion. The issue is whether his rights were violated by failure to hear the motion. The problem which I have is that no such issue was presented to the Trial Chamber. For the Appeals Chamber now to pronounce on that issue would be to assume that the issue was before the Trial Chamber and that the latter failed to deal with it.

40. In its discussion of this subject, today's decision rests on the *Barayagwiza* case. Parenthetically, it may be observed that that case referred *inter alia* to the question of delay before initial appearance, an issue in this case also. In that case, the Appeals Chamber varied its previous decision that the period of delay was 96 days, finding on the

[36] *Fitzleet Estates Ltd. v. Cherry (Inspector of Taxes)*, [1977] 3 All ER 996 at 999, HL, *per* Lord Wilberforce. Similar views on the misuse of bench changes have been expressed in other jurisdictions. See *United States of America v. Rabinowitz* (1950) 339 US 56 (86), *per* Frankfurter J., and *Bengal Immunity v. State of Bihar* (1955) 2 SCR 603 (810), *per* Venkatarama Iyer J.

[37] It is believed that this coincides with the position taken by the Appeals Chamber in paragraph 134 of *Aleksovski*. The same approach may help in deciding which of two opposite decisions of the ICTY Appeals Chamber is to be followed on the question whether crimes against humanity are more serious than war crimes. See *Tadić*, IT-94-1-A and IT-94-1-A *bis*, 26 January 2000, para.69, and *Erdemović*,

basis of new facts that this period had to be reduced to one of 20 days,[38] and regarding this substantially shorter delay as not being sufficient to justify an order for release. I agree with today's decision that, in the light of additional evidence, such an order would not be justified in this case also in respect of the appellant's complaint of pre-initial appearance delay.

41. More pertinently, *Barayagwiza* also adjudicated on a question of the non-hearing of a *habeas corpus* motion. Although I was not able to support the decision of 3 November 1999 on the point, I recognise that the decision has to be followed, and that it has to be followed on the basis of the majority reasoning. But the decision has to be followed only if it is applicable; I do not think it is. In that case the question whether there was before the Appeals Chamber an issue concerning the non-hearing of the *habeas corpus* motion was foreclosed by the fact that on 3 June 1999 the Appeals Chamber issued a scheduling order calling on the parties to address, *inter alia*, the following point: "The disposition of the writ of *habeas corpus* that the Appellant asserts that he filed on 2 October 1997". That element is absent in this case: on the record, the Appeals Chamber has not up to now taken a decision foreclosing the question whether such an issue is properly before it. I respectfully consider that the *Barayagwiza* decision is not applicable on the particular point.

42. The position taken by the appellant in the course of the proceedings in this case is explained in today's decision. That explanation shows that the first time that the appellant mentioned the subject of *habeas corpus* was on 11 November 1999. That was 36 days after the Trial Chamber gave its decision on 6 October 1999 and 30 days after his notice of appeal was filed on 12 October 1999. He mentioned the matter when he did only after certain observations on the subject were meanwhile made in the decision in *Barayagwiza*, which was given on 3 November 1999 - that is to say, 28 days after the decision of the Trial Chamber in this case. Going further back, it is to be noticed that the appellant's motion originating the proceedings before the Trial Chamber was filed on

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IT-96-22-A, 7 October 1997. Each decision was by a majority of four. On other occasions two other judges had also taken the same position as that taken in the later of the two decisions mentioned.

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16 August 1999, i.e., some 23 months after his *habeas corpus* motion had been filed on 29 September 1997. The time-lag apart, the 22 paragraphs of the former made no reference to the latter. The arguments before the Trial Chamber dealt with two motions, the first one seeking dismissal of a count of the indictment for "lack of evidence", and the second challenging the legality of the detention for failure to file an indictment within a certain time. Neither of those two motions referred to a complaint that the appellant's *habeas corpus* motion was not heard.[39] Nor was any such complaint recalled in the decision of the Trial Chamber or in the appellant's notice of appeal (which did mention certain other issues). The words "*habeas corpus*" nowhere appeared; nor was that subject indirectly referred to. There was no statement of failure to hear such a motion. The matter never fell to be investigated by the Trial Chamber and the Appeals Chamber does not have the benefit of the views of that Chamber on it – especially on matters of fact which could be involved.

43. The main complaints in the *habeas corpus* motion were that the appellant was being incarcerated in Cameroon, that he was not being transferred to the Tribunal's detention unit in Arusha, and that he had received no indictment.[40] It is a fact that after the incarceration in Cameroon ended with his transfer to Arusha and the indictment was served, he fell silent on the matter. The reason for the silence is that, as is noted in paragraph 124 of the decision, the objectives of the *habeas corpus* motion were satisfied relatively quickly after the motion was filed. In my view, as a consequence, the appellant then decided to abandon the motion. With respect, I do not see how one can speak of the bringing of the second motion as confirming negligence in pursuing the first, as suggested in paragraph 119 of the decision. If the appellant thought that his negligence in pursuing the first motion required him to bring the second, this must be because he took the view that his negligence amounted to abandonment of the first; otherwise, he simply should have sought a hearing of the first. It is clear that he took no steps to get it heard; he certainly did not protest at the time about non-hearing. What the bringing of the

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[38] ICTR-97-19-AR72 of 31 March 2000, para. 62.
[39] See transcript, Trial Chamber, 23 September 1999, pp. 11 and 37.
[40] See para. 2 of the affidavit of Mr. Khamina, 26 September 1997, in support of the *habeas corpus* motion.

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second motion confirmed was not negligence in pursuing the first (i.e., the *habeas corpus* motion), but the fact that the appellant had decided no longer to pursue it.

44. If, as the decision implies, the *habeas corpus* motion has not been abandoned, it will have to be decided. The appellant has not asked for it to be decided Nor, as the *dispositif* shows, has the Appeals Chamber now decided it, not at any rate explicitly: nothing in the decision purports to dispose of the contents of the motion. So, who will decide it? When? Or, will it continue to call for a hearing? Does the obvious difficulty of answering these questions mean that the motion is no longer actively on the record? If it is no longer actively on the record, this must be because the appellant himself abandoned it. If indeed he did abandon it, he did so not because it was not being heard, but because he no longer wished it to be heard.

45. In effect, in first mentioning the matter on 11 November 1999 – some 25 months after the filing of the *habeas corpus* motion - the appellant was only moving by hindsight to take advantage of the observations which had meanwhile been made in *Barayagwiza*. That could not change the message of his consistent previous silence. The message conveyed by that silence was that he was making no complaint about non-hearing of that motion: *cum tacet clamat*.

46. There is not any need to explore the general question of the circumstances in which, and the extent to which, the Appeals Chamber may allow a new point to be raised. In the particular circumstances, I am satisfied that the Appeals Chamber cannot pass on the matter without both definitely and incorrectly holding that the Trial Chamber failed to deal with it and so committed an appealable error. The prosecution does not challenge the right to a speedy hearing of a *habeas corpus* motion, and the appellant has not argued that an exercise of the right to bring such a motion cannot be abandoned. Neither below nor on appeal have these issues been opened by either party; arguments on them have not been heard. So too as regards the question whether a breach of a human right, as distinguished from the right to plead it, can itself be waived. These questions, however important, are simply not before the Appeals Chamber.

47. I do of course share the view expressed in paragraph 126 of the decision as to the responsibilities of the Tribunal to contribute to the protection of the international public order. But those responsibilities have to be fulfilled in accordance with the law governing the functions of the organs of the Tribunal. In the circumstances of this case, I do not see how the functions of the Appeals Chamber would authorise it to make a finding on the point in question. The appellant did on the record allege illegality in his detention, and he has been heard fully on that point, both by the Trial Chamber and by the Appeals Chamber. The right of a detained person, whether or not his detention was indeed illegal, to a speedy hearing of his *habeas corpus* motion is another matter. In my opinion, no issue on that point was before the Trial Chamber or is properly before the Appeals Chamber. And it is this which regretfully sets me apart from the majority on this branch of the case.

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

Mohamed Shahabuddeen

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