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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-96-21-T
	Date:	11 November 1996
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BEFORE THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: **Judge Antonio Cassese, President of the International Tribunal**

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **11 November 1996**

PROSECUTOR

v.

ZEJNIL DELALIĆ
ZDRAVKO MUCIĆ also known as "PAVO"
HAZIM DELIĆ
ESAD LANDŽO also known as "ZENGA"

DECISION OF THE PRESIDENT ON THE PROSECUTOR'S MOTION FOR THE PRODUCTION OF NOTES EXCHANGED BETWEEN ZEJNIL DELALIĆ AND ZDRAVKO MUCIĆ

The Office of the Prosecutor:

Mr. Eric Ostberg
Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Rešidović, for Zejnil Delalić
Mr. Bradislav Tapusković, for Zdravko Mucić

I. INTRODUCTION

1. In a Decision rendered in this case on 31 October 1996, *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Decision on the Prosecutor's Motion for the Production of Notes Exchanged between Zejnil Delalić and Zdravko Mucić, No. IT-96-21-T, T. Ch. II, 31 Oct. 1996) ("Decision")* Trial Chamber II remitted to me for determination, as President of the International Tribunal, the issue of whether certain items confiscated from detainees should be either partially or totally disclosed to the Prosecutor of the International Tribunal. The items in question are notes allegedly exchanged by two of the accused in this case, Zejnil Delalić and Zdravko Mucić, while awaiting trial in the United Nations Detention Unit ("Detention Unit") in The Hague.

2. In its *Decision*, the Trial Chamber "direct[ed] the Registrar to provide a certified copy of the confiscated items to the President of the International Tribunal for the purpose of determining whether the material warrants partial or total disclosure to the Prosecutor". After the *Decision* was issued, the Registrar duly transmitted to me, on 1 November 1996, a certified copy of the confiscated items. In addition to this material, I have read and taken into consideration the following documents:

(a) Memorandum dated 15 May 1996, from Mr. Eric Ostberg, Office of the Prosecutor, to Mr. Dominique Marro, Office of the Registrar, entitled "Detention of Mucić and Delalić" (Official Record at Registry Page ("RP") 1120);

(b) Memorandum dated 5 July 1996, from Mr. Dominique Marro, Deputy Registrar, to Ms. Teresa McHenry, Office of the Prosecutor, entitled "Confiscated items of detainees" (RP 1119);

(c) Memorandum dated 17 July 1996, from Mr. Eric Ostberg, Office of the Prosecutor, to Mrs. de Sampayo Garrido-Nijgh, Registrar, entitled "Confiscated items of detainees" (RP 1118);

(d) Memorandum dated 16 August 1996, from Mrs. de Sampayo Garrido-Nijgh, Registrar, to Mr. Eric Ostberg, Office of the Prosecutor, entitled "Confiscated items of Mucić and Delalić" (RP 1117 - 1116);

(e) "Prosecution's Motion for Production of Notes exchanged between Detainees Delalić and Mucić", dated 26 August 1996 and attachments (namely (a) - (d) above) (RP 1130 - 1115) ("*Prosecutor's Motion*");

(f) "Rejoinder of the accused Zejnil Delalić to the Prosecution's Motion for Production of Notes exchanged between Detainees Delalić and Mucić", dated 4 September 1996 (RP 1180 -1174) ("*Rejoinder*");

(g) "Defence Response to the Prosecution Motion for Production of Notes exchanged between Detainee Delalić and Mucić", filed on behalf of Zdravko Mucić, dated 20 September 1996 (RP 1397-1396);

(h) The Trial Chamber's "Order Inviting Registrar to Respond to Prosecution Motion for the Production of Notes exchanged between Detainees Zejnil Delalić and Zdravko Mucić", dated 23 September 1996 (RP 1404 -1403);

(i) "Brief by the Registrar pursuant to an Invitation by Trial Chamber II", dated 25 September 1996 (RP 1407-1406);

(j) The *Decision.*

3. Having considered the above-mentioned documents, I hereby issue my Decision.

II. DISCUSSION

A. Background

4. For the facts and the pleadings in this case, reference should be made to the summary provided in the *Decision* at paras 1 - 15.

B. Decision of the Trial Chamber

5. The Trial Chamber issued its *Decision* on 31 October 1996. The Trial Chamber found that the freedom of detainees to communicate between themselves and with others could only be restricted by order of the Registrar, pursuant to a request made by the Prosecutor under Rule 66 of the Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise detained on the authority of the Tribunal ("Rules of Detention"). The Trial Chamber found that, as a matter of fact, no order under Rule 66 had been issued by the Registrar when, on approximately 14 May 1996, the detainees allegedly attempted to exchange notes. *Decision* at para. 17.

6. The Trial Chamber found, however, that the "method of the attempted communication" was in violation of the Regulations to Govern the Supervision of Visits to and Communications with Detainees ("Communications Regulations"). It held that "if, as suggested by the Registrar, the items exchanged are to be considered as 'correspondence', then they would be correspondence sent in violation of the provisions of Article 6 of the Communications Regulations, which requires all such correspondence to be submitted to the Registrar for review". *Decision* at para. 17. Accordingly, the Trial Chamber considered that the Registrar had the authority to confiscate "any notes found in a common area of the Detention Unit not submitted through the appropriate channels, whether or not the notes constitute a breach of an order under Rule 66". *Id.*at para. 18. Having found that, under the Communications Regulations, the Registrar was entitled to confiscate and to copy the notes, the Trial Chamber found that the Registrar had acted within her authority in withholding the confiscated items from the Prosecution.

7. As to whether the Prosecution, on a motion seeking disclosure of the notes, should be entitled to the relief sought, the Trial Chamber considered, on the basis of Rule 33 of the Rules of Procedure and Evidence ("Rules") and Rule 85 of the Rules of Detention, as well as certain regulations on detention, that in these circumstances the decision of the Registrar was subject to review by the President of the International Tribunal, and accordingly remitted the matter to me for determination.

III. ANALYSIS

A. The Preliminary Question of whether the Issue raised comes within the Purview of the President's Authority

8. In the *Prosecutor's Motion* the Prosecutor requested Trial Chamber II to order the Registrar to provide him with copies of the notes confiscated by the Registrar. Thus the Prosecutor considered that it was for the Trial Chamber to pronounce upon the matter, pursuant to Rules 72(A), 39(iv) and 54 of the Rules. In the *Rejoinder*, counsel for Delalić argued that, on the contrary, the issue raised by the Prosecutor, since it concerned detention, was not within the jurisdiction of the Trial Chamber. *Rejoinder* (RP 1179). The Trial Chamber itself, while not rejecting the *Prosecutor's Motion* as inadmissible, found that it was for the President of the International Tribunal, acting under Rule 33 of the Rules, to decide the issue and consequently remitted the question to me for determination.

9. I find that the Trial Chamber took the correct position with regard to this question. Under Rule 33 of the Rules, the Registrar performs her tasks "under the authority of the President". The matter at issue arose as a result of the Registrar exercising her functions as Head of the Detention Unit. Under the Rules of Detention, written complaints may be made by detainees to the President. It is therefore apparent that, at the request of one of the parties concerned, matters relating to detention or arising therefrom should be submitted to the President for review and final settlement. This is all the more so since, as the Trial Chamber wisely observed:

> "It seems illogical that one party to a dispute of this nature may seek to have it resolved by one authority, i.e., the Trial Chamber, while the other may have recourse to a different authority, i.e., the President of the International Tribunal". *Decision* at para. 31.

10. I therefore hold that I have jurisdiction to decide the question remitted to me by the Trial Chamber and, consequently, may legitimately proceed to consider the question on its merits. Before doing so, I should, however, add a note. Since, as I have just stated, this issue comes within my jurisdiction, strictly speaking I am not bound by the request (*petitum*) of the Trial Chamber, but can pass on all the questions raised by the Prosecutor and the Defence with regard to the notes at issue, including those questions the Trial Chamber may have considered appropriate not to take into account.

B. The Oral Request of the Prosecutor: Was it made under Rule 66 of the Rules of Detention?

11. I take as my starting-point the oral request of the Prosecutor on 8 May 1996, when the accused Zejnil Delalić was transferred to the Detention Unit, that there be no contact nor communication between Zejnil Delalić and his co-accused Zdravko Mucić, who was already detained at the Detention Unit.

12. A basic misunderstanding which appears to me to have arisen at this point on the part of both the Prosecutor and the Registrar is to consider that this oral request amounted to a request under Rule 66 of the Rules of Detention.

13. First, there is no mention in the Prosecution's memorandum to the Registry of 15 May 1996, written *after* and with knowledge of the detainees' attempts to communicate with each other, of Rule 66, nor does it mention on which of the specifically enumerated reasons in Rule 66 the request relied. Since a Rule 66 request may only be granted if one of the reasons mentioned in the Rule apply, namely only if the Prosecutor

> has reasonable grounds for believing that such contact [between a detainee and any other person] is for the purposes of attempting to arrange the escape of the detainee from the detention unit, or could prejudice or otherwise affect the outcome of the proceedings against the detainee or of any other investigation, or that such contact could be harmful to the detainee, or any other person,

and since no such specific reference appears to have been made at the time of the request, there are no grounds for considering the request of the Prosecutor as a request made pursuant to Rule 66 of the Rules of Detention.

14. Rule 66 is, in fact, first mentioned in the Registrar's memorandum of *16 August 1996*, some three months after the oral request. The Registrar states that

> [o]n 8 May 1996, pursuant to Rule 66 of the Rules of Detention, the Office of the Prosecutor made an oral request to the Registry in which it asked that Mucić and Delalić be kept apart as such contacts may prejudice or otherwise affect the outcome of the proceedings.

But in the very next line, the memorandum reads, "The Registry received a *written request to this effect* on 15 May 1996" (emphasis added); in fact, the written request of 15 May 1996, as stated, *makes no mention of either Rule 66 or of the alleged ground for the request.* The Prosecutor first mentioned Rule 66 in his Motion of 26 August 1996 at p. 2, but also refers to the 15 May 1996 memorandum as evidence that this Rule was invoked. I do not need to consider whether the Prosecutor really intended to rely from the outset on Rule 66 or whether he later invoked this Rule following its invocation by the Registrar. To my mind, for the purpose of this Decision, what matters is to establish whether or not the Prosecution's oral request was one validly based on Rule 66. I find that it was not.

15. Furthermore, the Registrar does not appear at the time to have considered the Prosecutor's oral request as a Rule 66 request, since in the event of a Rule 66 request: "The detainee shall immediately be informed of the fact of such request." The Trial Chamber has found that "no order under Rule 66 had been issued by the Registrar when, on approximately 14 May 1996, the detainees reportedly attempted to exchange correspondence". Decision at para. 17. If the detainees had been informed, they would additionally have been enabled to exercise the right, under Rule 66, to "request the President to deny or reverse such a request for prohibition of contact". I therefore consider that no proper Rule 66 order was in place at the time of the alleged contact between the detainees.

16. I hold the view, rather, that the oral request was originally understood by the Registrar to be covered by the normal procedure of *segregating detainees.* In response to the Prosecution's request, the Registrar said that it was "normal procedure to separate detainees and to prevent communication". *Prosecutor's Motion* at p. 3. As the Trial Chamber has pointed out: "A restriction of the freedom to communicate cannot be the result of any 'normal procedure'". Decision at para. 16. What this reveals, however, is that when the Registrar

referred to this "normal procedure", what was meant was the normal procedure of *segregating detainees* under the Rules of Detention (Rules 40 - 44), not any putative normal procedure of imposing restrictions on the detainee's freedom to communicate with persons outside the Detention Unit. The Registrar is entitled, under Rule 40 of the Rules of Detention, on her own initiative, and after seeking medical advice, to institute a "normal procedure" whereby detainees are segregated, i.e., kept in separate accommodation and not permitted to meet or exercise together. The natural assumption is that under such a regime the detainees will not be able to communicate either. However, this is a very different regime from a Rule 66 order "to prohibit contact between a detainee and any other person", which as stated, may only be done upon the reasoned request of the Prosecutor.

17. Admittedly, under the Rules of Detention, segregation can be effected "to avoid any potential conflict within the detention unit, or danger to the detainee in question" (Rule 40) or "for the preservation of security and good order in the detention unit or for the protection of the detainee in question" (Rule 41). On the face of it, these two provisions do not cover segregation for the purpose of avoiding contacts between detainees aimed at obstructing justice by manufacturing testimony or tampering with evidence. Nevertheless, I fail to see why one should not place a liberal interpretation on those provisions so as also to cover the situation just mentioned. Although, of course, the indictees detained in the Detention Unit are, like any accused, "presumed innocent until proved guilty" (Art. 21(3) of the Statute of the International Tribunal ("Statute")), they are not allowed to act contrary to the interests of justice. The Registrar, as well as the Commanding Officer acting under her authority, must not only take care of the "proper running of the detention unit" (Rule 13 of the Rules of Detention; *see also* Rule 37 thereof); they also have the power, and indeed the duty, to take all those measures necessary to prevent, or stop, any obstruction to justice by those in detention. One of these measures may lie in the segregation of a detainee from another particular detainee for the purpose of preventing any communication between them designed to manufacture testimony. The Registrar is fully entitled to order such measures. The Registrar has not only to discharge the specific functions entrusted to her by the Statute and the Rules for the "administration and servicing of the International Tribunal" (Art. 17(1) of the Statute); being one of the main organs of the Tribunal, she must perforce partake of the primary function of the Tribunal, i.e., the administration of justice. This follows from the general spirit of the Statute and the Rules and is borne out, for example, by such provisions as Article 8 of the Communications Regulations which, among other things, provides that the

Registrar must ensure that the mail of detainees does not "interfere with the *administration of justice*" (emphasis added). It should, however, be underscored that the Registrar fulfils this general function relating to the administration of justice in a "neutral" and independent manner, that is to say, without acting on behalf of either the Prosecutor or the Defence. In the case at issue, she was acting as Head of the Detention Unit. In this capacity she indisputably has the power not only to act "in the interests of safe custody and the well-ordered running of the detention unit" (Rule 37 of the Rules of Detention) but also to see to it that no detainee behaves contrary to the interests of a proper administration of justice.

18. In a footnote to the *Decision*, the Trial Chamber considered the possible applicability of segregation under Rule 40 of the Rules of Detention to the present situation but dismissed it, stating that the Rule "is not intended to restrict the right of detainees to communicate with other persons *or between them*". Decision at p.7 (emphasis added). While it is true that the Rule is not *intended* to prevent detainees from communicating with each other, and they remain free to do so through the proper channels, it is natural to expect that if detainees are, as a matter of fact, segregated, *they will only be able to communicate by exchanging written notes or letters, which will be subject to review by the Registrar in any event* (under Articles 8 and 9 of the Communications Regulations the Registrar may refuse to post a detainee's mail if it gives grounds for believing that "the detainee may be attempting to arrange escape, interfere with or intimidate a witness, *interfere with the administration of justice* or otherwise disturb the security and good order of the detention unit"(emphasis added)). Therefore it was a reasonable response of the Registrar to the Prosecutor's concern that the detainees not communicate with each other to assure him that the detainees would be separated and that there would be "no contact" or improper communication between them.

C. The Unauthorised Contact Between the Detainees

19. The next step in the story is the contact by means of notes between Zejnil Delalić and Zdravko Mucić on 14 May 1996. It bears noting, first of all, that the detainees had not been notified of the Prosecutor's request of 5 May 1996. Was the exchange of notes, therefore, in violation of the rules and regulations of the Detention Unit?

20. In my opinion, it is a misconception to consider that their notes were "mail", within the meaning of the Rules of Detention. Rule 66 only applies as between a detainee and

another person on the outside. Within the economy of the Rules of Detention, it is clear that the section in which Rule 66 is found is, in fact, intended only to refer to communications with persons *outside* the Detention Unit, and not to fellow detainees. Rule 66 is in the section, "Communications and Visits", Rule 60 of which reads:

> Subject to the provisions of Rule 66, detainees shall be entitled, . . . to communicate *with their families and other persons* with whom it is in their legitimate interest to correspond *by letter and by telephone* . . . (emphasis added).

It is clear that these Rules envisaged *outside contacts* only; the simple fact is that the present situation of illicit contacts *between detainees* is not explicitly dealt with by the Rules of Detention.

21. This also holds true for the Regulations on "mail". The Communications Regulations refer to "the right to *send* and *receive* mail", and of "incoming" and "outgoing" mail (Article 6). Again, the Regulations have not explicitly contemplated the situation which has arisen here - the detainee's notes are neither "incoming" nor "outgoing", and so are not subject to the regime which has been cited both by the parties and by the Registrar.

D. The Registrar's right to confiscate the notes

22. It is my considered view that the Registrar did, nevertheless, have the right to confiscate the notes at issue. As I have pointed out in paragraph 17 above, she is entitled to ensure that no act is performed in the Detention Unit designed to obstruct justice. In the exercise of this general power she had separated the two detainees and thereby ensured that any contact or communication between them would be subject to her review. Of course, if the detainees wished to communicate, they were entitled to do so by "mail", i.e., by exchanging written communications through the official channels of the Detention Unit. This "mail" was however to be submitted to the relevant authorities of the Detention Unit for inspection: in this respect the application of Rules 61 and 66 of the Rules of Detention by analogy is warranted, for the following reasons. Rules 60 - 66 are intended to lay down the basic rights of detainees in the area of communications with persons outside the Detention Unit and visits from such persons. At the same time, those Rules specify the restrictions which may lawfully be imposed on such communications and visits by the Registrar or the Commanding Officer. Given the careful balance of rights and restrictions laid down in these

Rules concerning relationships of detainees with the outside world, it would not be unjustified or contrary to the rights of detainees to hold that some of those Rules *mutatis mutandis* should also apply to the relationships of detainees *inter se*. In other words, the *ratio legis* behind Rules 61 and 66 of the Rules of Detention also applies to communications between detainees, whenever such detainees have been separated: whenever this occurs, the situation between detainees is not greatly dissimilar from that between a detainee and the outside world.

23. Since I have mentioned analogy, and I shall return to this concept below, I deem it appropriate to dwell on it, if only briefly. It is well-known that in many national legal systems analogy, while generally admitted as a means of filling gaps in laws, is excluded for penal legislation, pursuant to the principles *nullum crimen sine lege, nulla poena sine lege*; in some legal systems analogy is also regarded as inapplicable to exceptional or special laws. In international law analogy is indisputably admitted with regard to customary rules. As for treaty law, some caution is called for. Resort to analogy is admissible only if it is not clearly ruled out by States in their intergovernmental transactions concerning specific matters, and subject to respect for the principle of State sovereignty (in inter-State dealings) as well as, more generally, to respect for fundamental human rights. That analogy is applicable in international law has been held both by international courts and by distinguished commentators[1].

24. I hold the view that also in international law analogy is normally inadmissible with regard to substantive rules of criminal law; by contrast, it may be warranted in order to fill possible lacunae in the interpretation and application of international rules of criminal procedure, or of international rules governing penitentiary regimes. The only qualification is that, of course, the analogical reasoning should not lead to results contrary to the intent of the

[1] As for international case-law, see in particular the Advisory Opinion of the International Court of Justice in the Reparation case, I.C.J. Reports 1949, p.182 and, more explicitly, the decision in the Nicaragua (Jurisdiction and Admissibility) case, I.C.J. Reports 1984, p.420, para. 63. See also the decision in the Eastern Extension Telegraph Co. Claim delivered in 1923 by a U.S.-Great Britain Claims Commission, in American and British Claims Arbitration Under Special Agreement Between United States of America and Great Britain, 18 August 1910. Report of F.K. Nielsen, Washington 1926, p. 73, as well as the arbitral award rendered in 1925 by M. Huber in the case of Biens britanniques au Maroc espagnol, in U.N. Reports of International Arbitral Awards, vol.II, pp. 644-645. As for the legal literature, see D. Anzilotti, Cours de droit international, I (traduction G. Gidel), Paris 1929, pp. 115-117; F. Castberg, *La méthodologie du droit international public*, in 43 Recueil des Cours de l'Académie de La Haye, 1933 - I, p.351-354; G. Morelli, *La théorie générale du procès international,* in 61 *Recueil des Cours de l'Académie de La Haye*, 1937-III, pp. 343-347; M. Giuliano, *Il problema dell'analogia nell'ordinamento giuridico internazionale,* in Rivista di diritto internazionale, 1941, p.69 ff; A. Verdross-B.Simma, Universelles Völkerrecht, Theorie und Praxis, 3rd ed., Berlin, pp. 341-342, 595, 687, 731.

law-making body nor should it fall foul of the basic *ratio* behind its stipulations or enactments. Furthermore, analogy is not allowed to result in infringements of fundamental human rights or manifestly unjustified restrictions of such rights.

25. To return to the case at issue. It is apparent that the two detainees did not comply with the Rules of Detention but exchanged notes surreptitiously by hiding them in an area accessible to both, although at separate times. They thus deliberately tried to circumvent any monitoring or scrutiny by the relevant prison authorities.

26. I also consider that the notes are not privileged nor entitled to any special protection. In this connection the Prosecutor has made an apposite point: according to him, the proposition that communications between detainees are not privileged

> is especially true when detainees are not allowed to communicate with each other and surreptitiously exchange notes in an attempt to side-step the restrictions. Furthermore, there can be no legitimate expectation of privacy when a note is written on a magazine provided by the detention unit for the use of all detainees or when a note is left in a common area. The detainees should not be allowed to thwart a restriction under the guise of privacy or privilege. *Prosecutor's Motion* at p. 5.

E. Whether the Registrar had a duty to disclose the notes to the Prosecutor

27. The next issue which arises for consideration is whether the Registrar, having rightfully confiscated the notes, had a duty to disclose them to the Prosecutor. Under Article 9 of the "Mail" section of the Communications Regulations it is clear from the words, "[t]he Registrar *may* also notify the Prosecutor", that she has the discretion to notify the Prosecutor in the situation where "mail" is involved. I have found that the notes exchanged between the detainees were not "mail" for the purposes of the Regulations, except by analogy. Therefore, and also by analogy, I consider that the Registrar had a discretionary power to notify the Prosecutor of, and, *a fortiori,* to disclose to the Prosecutor, the confiscated notes. Resort to analogy is here justified for the same reasons set out above, in paragraphs 23-24. Whenever detainees have been separated by the Registrar, any communication between such detainees may legitimately be equated with mail sent out by a detainee to a person outside the Detention Unit. It follows that if a communication is not submitted to the Registrar for inspection but is subsequently seized or, if it is instead submitted but found in breach of the

Communications Regulations, the Registrar is entitled to notify the Prosecutor of the breach and the nature of the offending item, as well as disclosing the content of such item. There is no *duty* to disclose to the Prosecutor. The Prosecutor's argument on this point cannot be upheld: while the Prosecutor is "entitled to *seek* all relevant material . . . ", that does not imply a right to *receive* any material which might conceivably be of relevance.

28. On the other hand, given the spirit of the Statute and the general supervisory power of the President of the International Tribunal over the activities of the Registrar pursuant to Rule 33 of the Rules, I consider that the Registrar ought to notify the President in such circumstances.

29. Having found that the notes *may* be disclosed to the Prosecutor, my next question is: what is the test for deciding whether in a specific case the Prosecutor should receive the notes? In their submissions, the Parties have suggested two possible tests: (i) Contempt of Tribunal under Rule 77 of the Rules; (ii) the necessity of obtaining the relevant material for the purposes of an investigation under Rules 39 (iv) and 54 of the Rules. I shall now examine the first test.

F. Contempt of the Tribunal

30. The arguments on this point have been unnecessarily complicated by the issue of Contempt of Tribunal under Rule 77 of the Rules, which has been raised by both organs, first by the Deputy Registrar in his Note of 5 July 1996 and, more extensively, by the Registrar in her Memorandum of 16 August 1996 and then by the Prosecutor, in the *Prosecutor's Motion.* However, I consider that the issue of Contempt of Tribunal has no relevance to this case.

31. The Registrar has, with respect, erred in her reading of the contempt provision in the Communications Regulations. According to her interpretation of Article 12 of these Regulations, the Registrar can *only* hand over confiscated items to the Prosecutor if they concern a possible contempt action. This is plainly a misreading of that provision. As the Prosecutor has stressed, Article 12 is simply a "notice provision". The Prosecutor rightly points out that there is nothing in Article 12 "that restricts the Registrar from producing non-contemptuous material to the Prosecutor". *Prosecutor's Motion* at p. 7. The Prosecutor goes on to give compelling examples of cases where letters by a detainee sent outside the

Detention Unit might amount to material relevant to the prosecution of the detainee, hence to material which the Prosecutor should be allowed to obtain from the Registrar. In short, the Registrar mistakenly restricts to contemptuous material her power to hand over material to the Prosecutor. As pointed out above, whenever the Registrar confiscates material in the Detention Unit, because produced, circulated or communicated in breach of the Rules of Detention or Regulations, it lies in her discretion whether or not to provide such material to the Prosecutor. Of course, the safeguards provided for in Article 12 of the Communications Regulations, on mail (i.e., prior notice and disclosure to counsel for the detainee) should apply by analogy, for they ensure that the detainee's rights are respected.

32. Furthermore, the Registrar incorrectly limits contempt to events occurring only after a case has reached the trial stage. As the Prosecutor appropriately points out, to take such a position "means that one party can interfere with, harass, threaten, or otherwise try to influence the other party's potential witnesses with impunity until the actual trial begins". *Prosecutor's Motion* at p. 8.

33. On the other hand, the Prosecutor seems erroneously to conceive that he has not only the authority, but perhaps even the *exclusive* authority, to investigate and prosecute Contempt of Tribunal. This is far from being the case. Rule 77 does not state that the Prosecutor shall bring charges of contempt; on the contrary, in Sub-rule 77(A), contempt is primarily conceived as occurring in the presence of a Chamber and the Chamber, therefore, in the exercise of its inherent power to control its own proceedings, has the power to react to such contempt. The Judges acting in plenary had the authority to adopt a rule on contempt only by virtue of this inherent power; clearly the Statute does not contain any Article conferring on the Prosecutor the ultimate responsibility for bringing a contempt action.

34. It is apparent from Sub-rule 77(C), read in conjunction with Sub-rule 77(A), that the power to sentence someone for contempt lies within the province of the Chamber. The Prosecutor may investigate and bring to the Chamber's attention such interference with or intimidation of a witness as may come within the terms of Sub-rule 77(A) but, equally, so may the Defence or the Chamber, *proprio motu*, and it remains the prerogative of the Chambers whether or not to convict someone of contempt[2]. It is simply not true, therefore, as

[2] It bears pointing out that both prosecution witnesses and persons in the Office of the Prosecutor are also subject to the rule on contempt; the former if he "refuses or fails contumaciously to answer a question relevant to the issue before a Chamber", the latter if he "attempts to interfere with or intimidate a witness".

the Prosecutor claims in his pleadings, that the Prosecutor "is ultimately responsible for bringing a contempt action in court" (point IV of *Prosecutor's Motion*, RP 1123). Even when the Prosecutor brings a contempt action before the Chamber, his authority to do so derives from the inherent powers of the Chambers, not from any independent, prosecutorial authority[3].

35. The Prosecutor is also not entirely convincing when he argues that Zejnil Delalić and Zdravko Mucić should be treated as "witnesses" within the meaning of Rule 77, and therefore each is liable to prosecution for contempt for trying to "interfere" with the other. There is a fundamental difference between being an accused, who might testify as a witness if he so chooses, and a witness, as two arguments will show. First, if one reads Rule 90 of the Rules, "Testimony of Witnesses", there are provisions which are completely inapplicable to the accused and incompatible with his rights. Sub-rule 90(D) provides that a witness must not be present while another witness is testifying; the accused is in fact present in court for the testimony of *all witnesses*. Sub-rule 90(E) provides that a witness can be compelled to answer a question which may tend to incriminate him; the accused is under no such constraint: under Article 21(4)(g) of the Statute, it is a fundamental right of the accused that he is "not to be compelled to testify against himself or to confess guilt". Second, the Rules have separate definitions for the accused as opposed to witnesses and separate substantive provisions. It is therefore clear that an accused cannot be considered for all purposes as a witness.

36. Obviously an accused *may* appear as a witness for himself (*see* Sub-rule 85(C)). If detainees are trying to interfere with each other *qua* witnesses (for instance if an accused appears as a witness on behalf of another accused, after concocting evidence such as an alibi), then an issue of contempt may arise. As I noted above, under Article 8 of the Communications Regulations, the Registrar may be called upon to decide that a detainee is trying to "interfere with or intimidate a witness, [or] interfere with the administration of justice . . .". Thus I consider that, given her role as Head of the Detention Unit, the Registrar has authority to bring such a matter to the attention of a Trial Chamber under Rule 77 of the Rules.

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[3] This may be contrasted with national systems where a prosecutor may indeed enjoy a statute-based power to prosecute contempt of court. But at the International Tribunal, the Prosecutor's powers derive from the Statute, and the Statute only confers on the Prosecutor the authority to prosecute "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991" (Article 16(1)).

G. The test of whether in a specific case the Registrar must disclose confiscated material to the Prosecutor:

37. Having ruled out the relevance of Contempt of Tribunal to this case, I turn to the test which must be applied in determining whether I, as President of the International Tribunal, should order partial or total disclosure of the confiscated notes to the Prosecutor. The only possible basis for the Prosecutor's application is that the confiscated material is relevant to his investigation of a serious violation of international humanitarian law. Since the Prosecutor makes the application, the burden is on him to show that he is entitled to it. It is worth noting that the Prosecutor simply asserts " . . . it appears likely that the offending materials contain evidence which is relevant to the current proceedings" (*Prosecutor's Motion* at p. 5), and that he intends to ensure "that the accused would not be presented with the opportunity to obstruct justice, such as manufacturing testimony that would . . . exculpate one or both". *Id. at* p.1. The Prosecutor does not provide any specific ground for his assertion. However, it must be admitted that without seeing the notes it is difficult for the Prosecutor to provide a more solid foundation for the request.

38. The Prosecutor's Motion before the Trial Chamber is founded on three Rules: Rules 39(iv), 54 and 72. Rule 72 is no help in this regard - it simply gives the Prosecutor the *right* to file preliminary motions, but says nothing about when those motions will be granted. Rule 39(iv) refers to "such orders *as may be necessary* . . .", and Rule 54 refers to "such . . . orders *as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial"* (emphasis added). In the light of these two Rules, I find that the appropriate test is: *is it necessary (not simply useful or helpful) for the purposes of the investigation or for the preparation or conduct of the trial that the Registrar be ordered to produce the notes in question*?

39. The test entails two parts: (a) an order of the International Tribunal must be necessary for the Prosecutor to obtain such material; and (b) the material being sought must be relevant to an investigation or prosecution being conducted by the Prosecutor. As with any search or seizure warrant, the Prosecutor cannot simply conduct a "fishing expedition" through the Registrar's records.

40. Trial Chamber II has already considered the issue of "relevancy" or "materiality" in connection with Rule 66 of the Rules ("Disclosure by the Prosecutor") in this case in its Decision on the Motion by the Accused Zejnil Delalić For the Disclosure of Evidence, in which it examined and approved of United States federal court decisions which indicate that:

> The requested evidence must be "significantly helpful to an understanding of important inculpatory or exculpatory evidence"; it is material if there "is a strong indication that . . .it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.'"

Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Decision on the Motion by the Accused Zejnil Delalić For The Disclosure of Evidence at para. 7 (No. IT-96-21-T, T.Ch. II, 26 Sept. 1996) ("*Decision on Disclosure of Evidence*") *quoting United States v. Jackson*, 850 F. Supp. 1481, 1503 (U.S. Dist. Ct. D. Kan. 1994) *and United States v. Lloyd*, 992 F.2d 348, 351 (U.S. Ct. App. D.C. Cir. 1993). In that same Decision, the Trial Chamber also examined the procedure to be followed by the parties, this time relying on a decision of the English Court of Appeal in *R v. Keane*, 99 CR. App. R. 1, and concluding that "it is the party with possession of the evidence" that is initially responsible for determining the relevance of the evidence it possesses. *Decision on Disclosure of Evidence* at para. 9.

41. In the case before me, I am now the party in possession of the evidence and am responsible for determining its relevance. It seems appropriate for me to do that in accordance with the parameters set out in the Trial Chamber's *Decision on Disclosure of Evidence*. In so doing, however, the fundamental rights of the accused must be borne in mind, since the Statute favours the highest consideration for these rights. In particular, the accused's right to privacy of communication should be taken into account.

H. Application of the Test

42. The *Prosecutor's Motion* clearly meets the first limb of the test. The Registrar has been held to be acting properly in withholding the notes and thus cannot be compelled to disclose them without further order. Turning to the second limb, after reading the notes and having carefully considered the matter, applying the test and parameters set out above, and taking into account also the fundamental rights of the accused, I hold that the notes warrant total disclosure to the Prosecutor.

43. In addition, it seems to me appropriate to uphold the request made in the *Prosecutor's Motion* that the Registrar should also forward to the Prosecutor "a copy of the report on the circumstances" of the exchange of notes. Although the Trial Chamber has not passed on this issue, as stated above (para. 10) I am of the view that I am entitled to adjudicate issues that, while raised by the Parties, have not been considered by the Trial Chamber, for it has not deemed it necessary to do so.

44. I shall add that a certified copy of the notes in question should also be forwarded to counsel for the two detainees. In this regard, I hold the view that the application by analogy of Article 12 of the Communications Regulations is fully warranted. In the case at issue, as much as in the case of outgoing or incoming mail, it is necessary to put the Defence on the same footing as the Prosecution, in keeping with the basic principle of "equality of arms".

45. I hasten to add that this Decision in no way affects the question of the admissibility of the said notes at trial: this is a matter which, of course, will fall to the Trial Chamber to determine if the Prosecutor seeks to adduce the notes, or any part thereof, at trial.

IV. DISPOSITION

FOR THE FOREGOING REASONS,

I, AS PRESIDENT OF THE TRIBUNAL, and

PURSUANT to Rules 33 and 54 of the Rules of Procedure and Evidence,

FIND that the Registrar has acted within her discretion in withholding the confiscated items from the Prosecutor;

DIRECT the Registrar, nevertheless, to provide both to the Prosecutor and to the Defence Counsel for Zejnil Delalić and Zdravko Mucić a certified copy of all the confiscated items, together with a certified copy of the report on the circumstances of the exchange of those items.

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

Antonio Cassese
President

Dated this 11th day of November 1996
At The Hague
The Netherlands

[Seal of the Tribunal]