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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-99-37-PT

Date: 8 November 2001

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge Richard May, Presiding**
Judge Patrick Robinson
Judge Mohamed Fassi Fihri

Registrar: **Mr. Hans Holthuis**

Decision of: **8 November 2001**

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

DECISION ON PRELIMINARY MOTIONS

The Office of the Prosecutor:

Ms. Carla Del Ponte
Mr. Dirk Ryneveld
Ms. Cristina Romano
Mr. Milbert Shin
Mr. Daniel Saxon
Ms. Julia Baly
Mr. Daryl A. Mundis

The Accused:

Slobodan Milošević

Amici Curiae:

Mr. Steven Kay
Mr. Branislav Tapušković
Mr. Michaïl Wladimiroff

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I. INTRODUCTION

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is seized of two motions filed by the accused on 9 and 30 August 2001 (together "the Motions").[1] The Office of the Prosecutor ("Prosecution") filed its responses on 16 August and 13 September 2001.[2] On 19 October 2001, the *amici curiae* appointed at the request of the Trial Chamber filed a brief elaborating upon those issues that had been raised by the accused in the Motions,[3] to which the Prosecution responded on 26 October 2001.[4] Both parties and the *amici curiae* were heard by the Trial Chamber on 29 October 2001.

2. On 30 October 2001, the Trial Chamber rendered an oral decision denying the Motions and indicated that a written decision would follow. The Trial Chamber now issues its written reasons for its ruling.

3. This Decision deals with all the arguments, written and oral, raised by the accused, the Prosecution, and the *amici curiae*. Although some of the arguments have been dealt with before in the International Tribunal, the Chamber has considered all of them very carefully. Indeed, any judicial body is bound to take seriously a challenge to the legality of its foundation. The Chamber notes the arguments of the *amici curiae* that the accused, who is defending himself, should be given "the benefit of arguments that are not explicitly raised by him, but which are inherent to the point of his objections and arguments".[5] There is obvious merit in that submission. However,

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[1] The accused initially filed a motion with the Registry dated 9 August 2001. *See Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-PT, Preliminary Protective Motion, 9 Aug. 2001 ("Preliminary Motion"). At the request of the accused, only those arguments set forth in paragraph 8 of the Preliminary Motion have been considered. Thereafter, on 30 August 2001, the accused filed an untitled document which sets forth his arguments relating, primarily, to the illegality of the International Tribunal ("Milošević Motion").

[2] *Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-PT, Prosecution's Response to the "Preliminary Protective Motion" filed 9 August 2001, 16 Aug. 2001 ("Prosecution Response to Preliminary Motion"); Prosecution's Response to the "Presentation on the Illegality of the ICTY" filed by the accused Slobodan Milošević on 30 August 2001, 13 Sept. 2001 ("Prosecution Response to Milošević Motion").

[3] *Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-PT, *Amici Curiae* Brief on Jurisdiction, 19 Oct. 2001 ("*Amici* Brief").

[4] *Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-PT, Prosecution's Response to the "*Amici Curiae* Brief on Jurisdiction" filed 19 October 2001, 26 Oct. 2001 ("Prosecution Response to *Amici*").

[5] *Amici* Brief, para. 6.

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in determining whether a particular submission qualifies as a preliminary motion within the terms of Rule 72 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), the Chamber is bound by the provisions of that Rule and the International Tribunal's jurisprudence in relation to its interpretation.[6]

[6] In this regard, the Chamber has taken into consideration the arguments of the Prosecution that, while an accused who is defending himself may be entitled to wide latitude in construing his arguments under Rule 72, there must be some limit on the issues that an accused may raised in challenging jurisdiction under that Rule. *See* Prosecution Response to *Amici,* para. 3.

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II. DISCUSSION

1. The question of the binding effect of decisions of the Appeals Chamber

4. Notwithstanding the decision of the Appeals Chamber in the *Aleksovski* case[7] that decisions of the Appeals Chamber are binding on Trial Chambers, the *amici curiae* have submitted that "the case law of the Appeals Chamber is not *eo ipso* binding, but rather a matter of guidance for the Trial Chamber." However, although that clearly is not the case,[8] the Chamber considers it right that the issues raised in the motion on which the Appeals Chamber has ruled in the *Tadić Jurisdiction Appeal*[9] should be fully considered, and that it should give its own reasons for its conclusions.

2. Illegal foundation of the International Tribunal

(a) Constitutionality

5. The accused has argued that the International Tribunal is an illegal entity because the Security Council lacked the power to establish it. The *amici curiae* have supported these arguments, and have additionally asked that the arguments of the accused on the constitutionality of the International Tribunal be extended to include those arguments set out in paragraphs 27, 32, 41, 43, 44 and 55 of the *Tadić Jurisdiction Appeal*. The Chamber accedes to that request. The basis of the challenge to the constitutionality of the International Tribunal is that the Security Council is not empowered under Chapter VII of the Charter of the United Nations to establish an international criminal court.

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[7] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 Mar. 2000 (*"Aleksovski Appeal Judgement"*).

[8] In this regard, the Chamber has noted the Prosecution's submissions at paragraph 6 of the Prosecution Response to *Amici* in which it recalled the Appeals Chamber finding in the *Aleksovski* case that "a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on the Trial Chambers." *Aleksovski Appeal Judgement*, para. 113.

[9] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995 (*"Tadić Jurisdiction Appeal"*).

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6. The relevant provision is Article 41 of the Charter, which empowers the Security Council to adopt measures not involving the use of armed force to give effect to its decisions in order to discharge its obligation under Article 39 to maintain or restore international peace and security. Article 41 lists certain measures which may be taken by the Security Council. It is perfectly clear that the list is not exhaustive and that it is open to the Security Council to adopt any measure other than those specifically listed, provided it is a measure to maintain or restore international peace and security.

7. In the Chamber's view, the establishment of the International Tribunal with power to prosecute persons responsible for serious violations of international humanitarian law in the former Yugoslavia, and with the obligation to guarantee fully the rights of the accused, is, in the context of the conflict in the country at that time, pre-eminently a measure to restore international peace and security. Indeed, the role of the International Tribunal in promoting peace and reconciliation in the former Yugoslavia is highlighted in Security Council resolution 827 which established it.[10] The Appeals Chamber in the *Tadić Jurisdiction Appeal* arrived at the same conclusion and concluded that "the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41".[11] Accordingly, the Chamber dismisses this ground.

8. The accused argues that the creation of an ad hoc court targeting one country "corrupts justice and law"; that an ad hoc court "violates the most basic principles of all law" and "that an international court established to prosecute acts in a single nation and primarily, if not entirely, one limited group is pre-programmed to persecute, incapable of equality".[12]

[10] U.N. Doc. S/RES/827 (1993). In this resolution the Security Council determines that the situation in the former Yugoslavia "continues to constitute a threat to international peace and security" and further states that it is convinced that "in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would [...] contribute to the restoration and maintenance of peace".
[11] *Tadić Jurisdiction Appeal*, para. 36.
[12] Milošević Motion, pp. 4 and 5.

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9. Human rights bodies have, on several occasions, pronounced on the legitimacy of ad hoc tribunals.[13] The decisions of these bodies establish that there is nothing inherently illegitimate in the creation of an ad hoc judicial body, and that the important question is whether that body is established by law, in the sense that, as it is stated in the *Tadić Jurisdiction Appeal*, it "should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights".[14]

10. The International Tribunal meets this requirement in that the rights of the accused, comparable to those in the International Covenant on Civil and Political Rights ("ICCPR"), are entrenched in the International Tribunal's Statute, in particular, in Article 21.

11. Accordingly, this ground is dismissed.

(b) Independence

12. The challenge to the constitutionality of the International Tribunal on the basis of a lack of independence has been developed by the *amici curiae* in paragraph 10 of the *Amici* Brief. They contend that the accused is arguing that the International Tribunal lacks independence because of the "apparent lack of independence of the Prosecutor in the decision to issue an indictment against him in the first place".[15] The Prosecution contends that the *amici curiae* have failed to demonstrate a lack of prosecutorial independence. It submits that to be urged by the Security Council in this way no more compromises its independence than when it is periodically urged by non-governmental organizations and other groups to commence investigations into

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[13] *See, e.g.*, paragraph 4 of the General Comment of the Human Rights Committee on Article 14 of the ICCPR where it is stated: "[T]he Covenant does not prohibit [military or special courts which try civilians], nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14", H.R. Comm. 43rd Sess., Supp. No. 40 at para. 4, U.N. Doc. A/43/40 (1988); *Cariboni v Uruguay*, H.R. Comm. 159/83, 39th Sess., Supp. No. 40, U.N. Doc. A/39/40; Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 Mar. 1973, at 1; Inter-Am C.H.R., Annual Report 1973, OEA/Ser. P, AG/doc. 409/174, 5 Mar. 1974 at 2-4 (as cited in the *Tadić Jurisdiction Appeal*, para. 45).
[14] *Tadić Jurisdiction Appeal*, para. 45.
[15] *Amici* Brief, para. 10.

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crimes that fall within the jurisdiction of the International Tribunal. In effect, the Prosecution submits that "encouraging" does not equate to "instructing".[16]

13. Article 16, paragraph 2, of the Statute states:

> The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

14. Quite clearly, if it can be established that the Prosecutor has not acted independently, there would be a breach of that Article, and that would be particularly the case if there was *mala fides* on the part of the Prosecutor in indicting the accused.

15. In this case, there is not a scintilla of evidence advanced either by the accused or by the *amici curiae* to support the contention of any *mala fides* or abuse of power on the part of the Prosecutor in issuing an indictment against the accused. Certainly, the fact that the Security Council urged the Prosecutor to "begin gathering information related to the violence in Kosovo that may fall within its jurisdiction";[17] and that the accused was indicted by the Prosecutor following her investigations cannot vitiate the independence of the Prosecutor. That is no different from a government in a domestic jurisdiction setting a prosecutorial policy. In this regard, Article 18, paragraph 1, of the Statute obliges the Prosecutor to:

> initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

What would impugn her independence is not the initiation of investigations on the basis of information from a particular source, such as the Security Council, but whether, in assessing that information and making her decision as to the indictment of a particular person, she acts on the instructions of any government, any institution or any person. There is no suggestion that the Prosecutor acted upon the instructions of any government, any body, or any person in her decision to indict the accused. Accordingly, this ground is dismissed.

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[16] Prosecution Response to *Amici*, para. 9.
[17] Security Council resolution 1160, S/RES/1160 (1998), para. 17.

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16. Allied to those arguments is the submission of the *amici curiae* that in order to avoid the "criticisms of self determination of validity", the International Tribunal should seek an advisory opinion on the question of its competence from the International Court of Justice. In this regard, the Prosecution argues that the International Tribunal is not competent to request an advisory opinion from the Court. Furthermore, it submits that the Appeals Chamber in the *Tadić Jurisdiction Appeal* held that the International Tribunal was competent to adjudicate issues concerning its own jurisdiction.[18]

17. The Chamber rejects the argument of the *amici curiae* and, in doing so, asserts that it need have no sensitivity concerning its jurisdiction to determine its own competence for, as the Appeals Chamber said in the *Tadić Jurisdiction Appeal*, the jurisdiction of a judicial body to determine its own jurisdiction "is a necessary component in the exercise of the judicial function".[19] Accordingly, the Chamber finds no merit in that submission.

3. Fair trial and protection of human rights

(a) Allegation of bias

18. The *amici curiae* contend that the accused, in arguing that the International Tribunal is either incapable of providing him with a fair trial or of protection of his fundamental human rights, is "implicitly asserting bias".[20] In any event, the accused himself has argued in relation to the International Tribunal that "the very psychology of the enterprise is persecutorial. Few judges appointed to serve on a Tribunal created under such circumstances will feel free to acquit any but the most marginal, or clearly mistaken accused, or to create an appearance of objectivity."[21]

19. The Chamber construes this argument as an allegation of bias on the part of the International Tribunal, and hence on the part of the Chamber itself. Although not falling within the ambit of Rule 72, the Chamber must consider an argument that the accused will not receive a fair trial on the ground that its members are biased. In the

[18] Prosecution Response to *Amici*, paras 21 and 22.
[19] *Tadić Jurisdiction Appeal*, para. 18.
[20] *Amici* Brief, pp. 7-8.
[21] Milošević Motion, pp. 6 and 7.

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Furundžija Appeal Judgement, the Appeals Chamber held, in relation to a ground of appeal alleging bias, that the Appellant

> could have raised the matter, if he considered it relevant, before the Trial Chamber, either pre-trial or during trial. On this basis, the Appeals Chamber could find that the Appellant has waived his right to raise the matter now and could dismiss this ground of appeal.[22]

20. The only basis advanced by the accused for the allegation of bias is that mentioned above.[23]

21. In *Furundžija,* the Appeals Chamber held that there were three ways in which bias on the part of a Judge could be established. First by proof of actual bias. Secondly, if the Judge has some interest, material or otherwise, in the matter being litigated. Thirdly, if a reasonable observer, properly informed, would reasonably apprehend bias.[24]

22. In the circumstances of this case it is only the third criterion that would be relevant: nothing has been advanced, either by the accused or by the *amici curiae*, on the basis of which a reasonable observer, properly informed, would reasonably apprehend bias on the part of the Chamber. This ground is, therefore, dismissed.

(b) Alleged violation of the accused's right to privacy and freedom of expression

23. The *amici curiae* contend that a ban on any communication between the accused and the media violates his right to privacy and his freedom of expression. They also contend that, without a proper showing of grounds, this can easily be understood to be an expression of lack of independence of the International Tribunal.[25] The Prosecution contends that the accused's arguments in this respect are not jurisdictional in nature as they relate to the Rules of Detention[26] concerning communication matters.[27]

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[22] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija Appeal Judgement*"), para. 174.
[23] *See supra,* paragraph 18.
[24] *Furundžija Appeal Judgement*, para. 189.
[25] *Amici* Brief, para. 11.
[26] Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, IT/38/Rev. 8.
[27] Prosecution Response to *Amici*, para. 10.

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24. Not even the most liberal interpretation of Rule 72 could bring this submission within the scope of that Rule. It is not a preliminary motion. However, even if it were, such restrictions as are placed on an accused person in detention in relation to his freedom of expression fall squarely within the category of permissible limitations under the ICCPR, that is, that they are provided by law and are necessary for a variety of public interest considerations, including public order.[28] The European Convention on Human Rights provides for similar limitations on the right to freedom of expression. It states that the exercise of these freedoms may be subject to "such formalities, conditions, restrictions or penalties as are prescribed by law" and are necessary for a number of public interest considerations, including the prevention of disorder or crime.[29] Moreover, it must be noted that Principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides:

> A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, *subject to reasonable conditions and restrictions as specified by law or lawful regulations.*[30] (Emphasis added.)

25. Accordingly, this ground is dismissed.

4. The contention that the accused is not amenable to the jurisdiction of the International Tribunal because of his former status as President of the Federal Republic of Yugoslavia and because of his illegal surrender by the Government of the Republic of Serbia in violation of domestic law

(a) Lack of competence by reason of his status as former President

26. The Chamber observes that this argument has not been raised explicitly by the accused. In the passage cited by the *amici curiae*, what is stated is that the International Tribunal "does not have jurisdiction over the person of President Milošević".[31] The Chamber will, however, deal with the argument, since it has been raised by the *amici curiae*. The Prosecution has argued that Article 7, paragraph 2, of

[28] *See* Article 19(3) of the ICCPR.
[29] Article 10(2) of the European Convention on Human Rights.
[30] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988.
[31] Preliminary Motion, p. 5.

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the Statute reflects customary international law and notes, in particular, that the International Criminal Tribunal for Rwanda convicted Jean Kambanda, the former Prime Minister of Rwanda, for his role in the genocide that occurred in that State in 1994.[32]

27. Article 7, paragraph 2, of the Statute provides that

> the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

The *amici curiae* say that the accused must be understood to be denying the validity of that Article.

28. There is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law.

29. The history of this rule can be traced to the development of the doctrine of individual criminal responsibility after the Second World War, when it was incorporated in Article 7 of the Nuremberg Charter[33] and Article 6 of the Tokyo Tribunal Charter.[34] The customary character of the rule is further supported by its incorporation in a wide number of other instruments, as well as case law.

30. As for instruments, the following may be mentioned: Article IV of the Convention for the Prevention and the Punishment of the Crime of Genocide;[35] Principle III of the Nuremberg Principles;[36] Article 6 of the Statute of the International Criminal Tribunal for Rwanda;[37] Article 6, paragraph 2, of the Statute of the Special Court for Sierra Leone;[38] Article 27 of the Rome Statute of the

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[32] Prosecution Response to *Amici*, paras 12 and 13.
[33] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.S. 279.
[34] Charter of the International Military Tribunal for the Far East, Vol. 2, *The Records of the International Military Tribunal for the Far East* (R. John Pritchard ed.).
[35] Paris, 9 Dec. 1948, 78 U.N.T.S. 277.
[36] Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, G.A.O.R., 5th session, Supp. No. 12, U.N. doc. A/1316 (1950).
[37] Security Council resolution 955 establishing the International Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994).
[38] U.N. Doc. S/2000/915, 4 Oct. 2000.

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International Criminal Court ("ICC");[39] and Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind.[40]

31. Particular mention must be made of the Rome Statute of the ICC which, although not yet in force, has been signed by 139 States and now has 43 of the 60 ratifications required for its entry into force. This is a multilateral instrument of the greatest importance, which, even at this stage, has attracted fairly widespread support. The Chamber also attaches particular significance to the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, prepared in 1996. The Chamber cites these two modern instruments as evidence of the customary character of the rule that a Head of State cannot plead his official position as a bar to criminal liability in respect of crimes over which the International Tribunal has jurisdiction.

32. Moreover, case law also confirms the rule: in the Nuremberg Judgement, it was said:

> The principle of international law, which under certain circumstances, protects the representative of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings ... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.[41]

33. More recently in the *Pinochet* case,[42] the House of Lords held that Senator Pinochet was not entitled to immunity in respect of acts of torture and conspiracy to commit torture, alleged to have been committed in his capacity as a Head of State. In particular, Lord Millett stated:

> In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence.

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[39] U.N. Doc. A/CONF. 183/9, 17 July 1998.

[40] International Law Commission, text adopted by the Commission at its forty-eighth session, from 6 May to 26 July 1996, G.A.O.R., 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 ("Report of the International Law Commission").

[41] Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10; *see* Report of the International Law Commission, commentary (3) to article 7.

[42] Decision of the House of Lords dated 24 March 1999, *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, (2000) 1 AC 147, (1999) 2 All ER 97, (1999) 2 WLR 827, (1999) 1 LRC at 588 – 89.

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34. Accordingly, this ground is dismissed.

(b) Lack of competence by reason of his unlawful surrender

35. This ground is usefully developed by the *amici curiae* in paragraph 15. The argument is that the accused was unlawfully surrendered to the International Tribunal for the following reasons:

(a) The International Tribunal sent the arrest warrants to the authorities of the Federal Republic of Yugoslavia, not to the government of the Republic of Serbia. However, it was the latter that transferred the accused to the International Tribunal. That government had no power to act in such a manner.

(b) The Serbian government had no international obligation to cooperate with the International Tribunal.

(c) Article 18 of the Federal Constitution does not provide for the extradition or transfer of Yugoslav citizens to an international body.

(d) In the circumstances set out in (a), (b) and (c) above, his transfer is an abuse of process in that the procedures of the Federal Republic of Yugoslavia were bypassed and he was unlawfully transferred to the International Tribunal.

36. As to this matter, the Prosecution argues that it is a well-established principle of law that States may not rely on their national legislation to defeat their international obligations. In this regard, the Prosecution notes that the Federal Republic of Yugoslavia was under an international obligation, pursuant to Articles 9, paragraph 1, and 29 of the Statute to transfer the accused to the International Tribunal.[43]

37. Article 9, paragraph 4, of the ICCPR provides:

> 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.

[43] Prosecution Response to *Amici*, paras 15 – 16.

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38. This provision is not reflected in the International Tribunal's Statute. However, as one of the fundamental human rights of an accused person under customary international law, it is, nonetheless, applicable, and indeed, has been acted upon by this International Tribunal.

39. In *Barayagwiza*,[44] the Appeals Chamber of the International Criminal Tribunal for Rwanda stressed the importance of the right of the accused to invoke that provision, which in some common-law jurisdictions is called *habeas corpus*.

40. One of the essential features of the right of an accused person to challenge the legality of his detention is that such a challenge should be heard as promptly as possible. For that reason, the Chamber will treat this motion as the proceedings by which the accused is challenging the legality of his detention. The Chamber is in a position to do this because the challenge has been raised by the accused, and it has heard arguments on this question from all the parties, as well as the *amici curiae*.

41. At the hearing, the Prosecution contended that the Federal Republic of Yugoslavia "has no executing power; that is, all transfers, all decisions by the police or any binding measures taken are carried out by the Republic of Serbia [...] which executes and carries out the arrests and transfers, which is the case of the other accused who came from Belgrade."[45]

42. Rule 58 provides:

> The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

43. The question that arises here is whether that Rule is applicable, since the obligation under Article 29 was that of the Federal Republic of Yugoslavia, and not the Republic of Serbia.

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[44] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 Nov. 1999 ("*Barayagwiza Appeal Decision*"). This case was overturned by the Appeals Chamber on a review on grounds that do not in any way affect the validity of the Chamber's rulings as to the significance of the right of an accused to *habeas corpus*.
[45] Motion Hearing, 29 Oct. 2001, Transcript pages 62–63.

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44. The arrest warrants of the International Tribunal dated 24 May 1999 and 22 January 2001 were directed to the authorities of the Federal Republic of Yugoslavia, and were not issued to the government of the Republic of Serbia. The last dated arrest warrant was received by personal service on the Federal Minister of Justice in Belgrade on 6 April 2001. On 3 May, the President of the District Court in Belgrade announced that the Indictment, dated 22 May 1999, and the Decision on the Review of the Indictment, dated 24 May 1999, had been served on the accused. On 21 May 2001, the Minister of Justice confirmed to the Registrar of the International Tribunal that the Indictment had been served on the accused. The accused was then being held in custody in connection with a charge against him under the criminal law of the Republic of Serbia, which was unrelated to the charges in the Indictment issued by the International Tribunal. Before any further steps could be taken by the Federal Republic of Yugoslavia, then seized of the matter, the Serbian authorities transferred the accused to the custody of the International Tribunal on 28 June 2001.

45. The purpose of Rule 58 is to ensure that domestic procedures relating to the surrender and transfer of a person, from a State in respect of whom a request for arrest and transfer has been made, are not used as a basis for not complying with the request. The importance of complying with requests under Article 29 cannot be overstressed. The significance of this legal obligation is highlighted in the Report of the Secretary-General who said that "the establishment of the International Tribunal on the basis of a Chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision" and that "an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations."[46]

46. That being the case, the Rule should be given an interpretation that takes full account of its purpose. Accordingly, the Chamber holds that, notwithstanding the fact that the surrender was made by the government of the Republic of Serbia, rather than the Federal Republic of Yugoslavia to whom the request was made, the provisions of Rule 58 apply and, consequently, the transfer was effected in accordance with the provisions of the Statute.

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47. Article 27 of the Vienna Convention on the Law of Treaties is also relevant. It provides:

> a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The Statute of the International Tribunal is interpreted as a treaty. The Federal Republic of Yugoslavia has an obligation under the Statute to comply with the request to arrest and transfer the accused and, therefore, cannot rely on its internal law, namely the division of power as between the federal government and its States as a justification for failure to comply. Although it is the accused, and not the Federal Republic of Yugoslavia that is seeking to rely on the internal constitutional system of the Federal Republic of Yugoslavia, it follows that if the Federal Republic of Yugoslavia itself cannot rely on internal laws, then, *a fortiori,* neither can the accused. Accordingly, this ground is dismissed.

48. The *amici curiae* have expressly raised the doctrine of abuse of process. This doctrine was considered by the Appeals Chamber in the *Barayagwiza* case. Two points must be noted about that doctrine as it has developed in the case law of certain jurisdictions and also in the International Tribunal's jurisprudence. The first is that, if there is an abuse of process, it does not lead to a lack of jurisdiction on the part of the International Tribunal; what it raises is the question whether, assuming jurisdiction, the International Tribunal should exercise its discretion to refuse to try the accused. Secondly, the International Tribunal will exercise its discretion to refuse to try the accused if there has been an egregious breach of the rights of the accused.

49. As to the first, the case of *R. v. Horseferry Road Magistrates' Court, Ex parte Bennett* makes it clear that:

> A court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) *because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.*[47]

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[46] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), U.N. Doc. S/25704, paras 125 and 126.

[47] Decision of the House of Lords dated 24 June 1993, (1994) 1 AC 42, (1993) 3 All ER 138, (1993) 3 WLR 90, cited in the *Barayagwiza Appeal Decision*, para. 75 (emphasis supplied).

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50. As to the second, paragraph 74 of the *Barayagwiza Appeal Decision* stressed that the discretionary power to dismiss a charge is exercised "in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity".

51. In light of that jurisprudence, the Chamber holds that the circumstances in which the accused was arrested and transferred - by the government of the Republic of Serbia, to whom no request was made, but which is a constituent part of the Federal Republic of Yugoslavia, to whom the request for arrest and transfer was made - are not such as to constitute an egregious violation of the accused's rights. It should be noted that, in *Barayagwiza*, the Appeals Chamber did find an abuse of process but that was on the basis that he was detained for 11 months without being notified of the charges against him.[48] Consequently, the doctrine of the abuse of process is inapplicable, and this ground is dismissed.

5. Territorial jurisdiction

52. The *amici curiae* contend that the limitation on the territorial jurisdiction of the International Tribunal to the former Yugoslavia is discriminatory. This is a restatement of earlier arguments relating to the ad hoc nature of the International Tribunal and selective prosecutions. Those issues have already been addressed in paragraphs 9, 10, 13, 14 and 15 above. Accordingly, this ground is dismissed.

53. Accordingly, all the Motions are dismissed.

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

Richard May
Presiding

Dated this eighth day of November 2001
At The Hague
The Netherlands

[Seal of the Tribunal]

[48] *Barayagwiza Appeal Decision*, para. 86.

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