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 and 31 December 1994

Case No: ICTR-97-19-AR72

Date: 3 November 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: **Mr. Agwu U. Okali**

Decision of: **3 November 1999**

JEAN-BOSCO BARAYAGWIZA

v.

THE PROSECUTOR

DECISION

Counsel for the Appellant:
Mr. Justry P. L. Nyaberi

The Office of the Prosecutor:
Mr. Mohamed C. Othman
Mr. N. Sankara Menon
Mr. Mathias Marcussen

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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 and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seized of an appeal lodged by Jean-Bosco Barayagwiza ("the Appellant") against the "Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect" of Trial Chamber II of 17 November 1998 ("the Decision")[1]. By Order dated 5 February 1999, the appeal was held admissible[2]. On 19 October 1999, the Appellant filed a Notice of Appeal seeking to disqualify certain Judges of the Trial Chamber from sitting on his case ("19 October 1999 Notice of Appeal"). On 26 October 1999, the Appellant filed an additional Notice of Appeal concerning a request of the Prosecutor to amend the indictment against the Appellant ("26 October 1999 Notice of Appeal").

2. There are several areas of contention between the parties. The primary dispute concerns the arrest and detention of the Appellant during a nineteen-month period between 15 April 1996, when he was initially detained, and 19 November 1997, when he was transferred to the Tribunal's detention unit pursuant to Rule 40*bis* of the Tribunal's Rules of Procedure and Evidence ("the Rules")[3]. The secondary areas of dispute concern: 1) the Appellant's right to be informed promptly of the charges against him; 2) the Appellant's right to challenge the legality of his arrest and detention; 3) the delay between the Tribunal's request for the transfer of the Appellant from Cameroon and his actual transfer; 4) the length of the Appellant's provisional detention; and 5) the delay between the Appellant's arrival at the Tribunal's detention unit and his initial appearance.

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[1] Prosecutor v. Barayagwiza, *Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect* ("*Decision*"), Case No. ICTR-97-19-1, undated but filed on 17 November 1998. See also Prosecutor v. Barayagwiza, *Corrigendum*, Case No. ICTR-97-19-1, 24 November 1998.

[2] Prosecutor v. Barayagwiza, *Decision and Scheduling Order* ("*5 February 1999 Scheduling Order*"), Case No. ICTR-97-19-AR72, 5 February 1999.

[3] In the interim, the indictment was confirmed on 23 October 1997. Not all of this nineteen-month period of provisional detention is attributable to the Tribunal, as will be discussed, *infra*.

3. The accused made his initial appearance before Trial Chamber II on 23 February 1998. On 24 February 1998, the Appellant filed a motion seeking to nullify his arrest and detention[4]. Trial Chamber II heard the oral arguments of the parties on 11 September 1998 and rendered its Decision on 17 November 1998[5].

4. The dispute between the parties initially concerns the issue of under what authority the accused was detained. Therefore, the sequence of events since the arrest of the accused on 15 April 1996, including the lengthy procedural history of the case, merits detailed recitation. Consequently, we begin with the following chronology[6].

5. On 15 April 1996, the authorities of Cameroon arrested and detained the Appellant and several other suspects[7] on suspicion of having committed genocide and crimes against humanity in Rwanda in 1994[8]. On 17 April 1996, the Prosecutor requested that provisional measures pursuant to Rule 40 be taken in relation to the Appellant[9]. On 6 May 1996, the Prosecutor asked Cameroon for a three-week extension of the detention of all the suspects, including the Appellant[10]. However, on 16 May 1996, the Prosecutor informed Cameroon

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[4] Prosecutor v. Barayagwiza, *Extremely Urgent Motion by the Defence for Orders for Review and/or Nullify the Arrest and Provisional Detention of the Suspect* ("*Extremely Urgent Motion*"), Case No. ICTR-97-19-1, dated 19 February 1998, filed 24 February 1998.

[5] See footnote 1. The Prosecutor did not file a Response to the *Extremely Urgent Motion*. Prosecutor v. Barayagwiza, *Transcript*, 11 September 1997 at p. 8.

[6] Appendix A contains most of the information that follows in the form of a timeline.

[7] It is unclear from the record precisely how many individuals were arrested, but it was between 12 and 14, including the Appellant.

[8] *Decision* at p. 4. The Appellant asserts in the *Extremely Urgent Motion* that he was arrested and detained at the behest of the Prosecutor, while the Prosecutor claimed that the Cameroon authorities arrested and detained the Appellant at the behest of the Belgian and Rwandan authorities. See Prosecutor v. Barayagwiza, *Prosecutor's Provisional Memorial (Pursuant to the Scheduling Order of the Appeal Chamber made on 5 February 1999)*("*Prosecutor's Provisional Memorial*"), Case No. ICTR-97-19-1, dated 16 February 1999, filed 23 February 1999 at para. 3. The Trial Chamber found that there was no evidence supporting the Appellant's claim and held that he had been arrested and detained on the basis of requests from Rwanda and Belgium. *Decision* at p. 4. We note, however, that although the record makes references to the disposition of the Rwandan extradition request, there is no such reference to the disposition of the Belgian extradition request. The Appellant asserts that Belgium never made such an extradition request and that only Rwanda had requested his extradition. See Prosecutor v. Barayagwiza, *Rejoinder to the Prosecutor's Provisional Memorial filed on 22 February 1999* ("*Rejoinder*"), Case No. ICTR-97-19-72(A), 11 March 1999 (English version filed 9 July 1999), at para. 3. For our purposes, it is unnecessary to consider the disposition of the Belgian extradition request—if indeed there was one.

[9] *Decision* at p. 4.

[10] See 15 October 1996 letter from the Prosecutor to the Appellant (and others), attached as Annex 1 ("*15 October 1996 letter*") to Prosecutor v. Barayagwiza, *The Appellant's Reply to Prosecutor's Response Pursuant to the Scheduling Order of 3rd June 1999* ("*Appellant's Reply*"), Case No. ICTR-96-19-A, 2 July 1999.

that she only intended to pursue prosecutions against four of the detainees, *excluding* the Appellant[11].

6. The Appellant asserts that on 31 May 1996, the Court of Appeal of Cameroon adjourned *sine die* consideration of Rwanda's extradition request, pursuant to a request to adjourn by the Deputy Director of Public Prosecution of the Court of Appeal of the Centre Province, Cameroon[12]. The Appellant claims that in making this request, the Deputy Director of Public Prosecution relied on Article 8(2) of the Statute[13].

7. On 15 October 1996, responding to a letter from the Appellant complaining about his detention in Cameroon, the Prosecutor informed the Appellant that Cameroon was not holding him at her behest[14]. Shortly thereafter, the Court of Appeal of Cameroon re-commenced the hearing on Rwanda's extradition request for the remaining suspects, including the Appellant. On 21 February 1997, the Court of Appeal of Cameroon rejected the Rwandan extradition request and ordered the release of the suspects, including the Appellant[15]. The same day, the Prosecutor made a request pursuant to Rule 40 for the provisional detention of the Appellant and the Appellant was immediately re-arrested pursuant to this Order[16]. The Prosecutor then requested an Order for arrest and transfer pursuant to Rule 40*bis* on 24 February 1997[17] and on 3 March 1997, Judge Aspegren signed an Order to that effect[18]. The Appellant was not transferred pursuant to this Order, however,

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[11] *Decision* at p. 4.

[12] Prosecutor v. Barayagwiza, *Amended Version of Appellant's Brief* ("*Amended Brief*"), Case No. ICTR-97-19-72, dated 23 February 1999, English Version filed 13 April 1999 at p. 2, para. 7.

[13] *Ibid.*

[14] See *15 October 1996 letter*. See also *Prosecutor's Provisional Memorial* at para. 6.

[15] *Ibid.* at para. 7.

[16] Prosecutor v. Barayagwiza, *Prosecutor's Response Pursuant to Scheduling Order of 3 June 1999* ("*Prosecutor's Response*"), Case No. ICTR-96-19-A, 22 June 1999, at para. 10. See also Annexes 2, 3 and 4 attached thereto. It is unclear from the record what exactly transpired between 21 February 1997, when the Cameroon Court of Appeal ordered the Appellant's release, and 24 February 1997, when the Appellant was re-arrested pursuant to the Tribunal's Rule 40 Order. However, the Appeals Chamber takes judicial notice of the fact that 21 February 1997 was a Friday and 24 February 1997 was a Monday. Moreover, the record does not seem to include the Rule 40 request or the resulting Order. However, in a letter to the Registrar requesting the transfer and provisional detention of the Appellant, the Prosecutor states: 'Until Friday last week, the two suspects concerned were in detention in the Republic of Cameroon pursuant to a request for extradition by the Republic of Rwanda. On Friday 21 February 1997, a Cameroon court ordered their immediate release following a refusal of the extradition request. However, *I was able to secure a continuation of their detention by means of a request to the Republic of Cameroon under Rule 40*'. See Annex 3 to *Prosecutor's Response* (emphasis added).

[17] *Ibid.*

[18] *Ibid.* The Rule 40*bis* Order was filed on 4 March 1997. See Prosecutor v. Barayagwiza, *Ordonnance aux fins de transfert et de placement en detention provisoire (Article 40 bis)*("*Rule 40bis Order*"), Case No. ICTR-97-19-DP, 3 March 1997, attached as Annex 5 to *Prosecutor's Response*. The *Rule 40bis Order* states at p. 4: 'THE TRIBUNAL, in accordance with Rule 40*bis* of the Rules... REQUESTS the Prosecutor to submit the indictment

until 19 November 1997[19].

8. While awaiting transfer, the Appellant filed a *writ of habeas corpus* on 29 September 1997[20]. The Trial Chamber never considered this application[21].

9. The President of Cameroon issued a Presidential Decree on 21 October 1997, authorising the transfer of the Appellant to the Tribunal's detention unit[22]. On 22 October 1997, the Prosecutor submitted the indictment for confirmation, and on 23 October 1997, Judge Aspegren confirmed the indictment[23], and issued a Warrant of Arrest and Order for Surrender addressed to the Government of Cameroon[24]. The Appellant was not transferred to the Tribunal's detention unit, however, until 19 November 1997 and his initial appearance did not take place until 23 February 1998[25].

9. On 24 February 1998, the Appellant filed the Extremely Urgent Motion seeking to have his arrest and detention nullified[26]. The arguments of the parties were heard on 11 September 1998[27]. Trial Chamber II, in its Decision of 17 November 1998, dismissed the Extremely Urgent Motion *in toto*. In rejecting the arguments put forward by the Appellant in the Extremely Urgent Motion, the Trial Chamber made several findings. First, the Trial

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against Jean Bosco Barayagwiza before the expiration of the said 30-day limit of the provisional detention'. See *Prosecutor's Response*, Annex 5. The Appellant also asserts that he was not shown any authentic documents relating to his arrest and detention until 6 May 1997. *Amended Brief*, at p. 4. However, the Appellant also acknowledges that on 10 March 1997, the Deputy Director of Prosecutions of the Court of Appeal of the Centre Province of Cameroon showed him 'photocopies of documents supposed to have been sent by the ICTR for [his] transfer and detention'. *Ibid.*.

[19] *Decision* at pp. 3, 5.

[20] This *writ* was not addressed to a specific Trial Chamber. Prosecutor v. Barayagwiza, *Extremely Urgent Motion by the Counsel for the Suspect for Orders for Immediate Release of Jean Bosco Barayagwiza*, Case No. 97-19-I, 29 September 1997. Attached as Annex 12 to *Appellant's Reply*.

[21] See discussion at section IV.B.3., *infra*.

[22] See Annex 5 to *Appellant's Reply*.

[23] *Decision* at pp. 2, 5. In noting the delay between the Rule 40*bis* Order filed on 4 March 1997 and the submission of the indictment for confirmation on 22 October 1997, the Trial Chamber stated: 'It is regrettable that the Prosecution did not submit an indictment until 22 October 1997'. *Ibid.* at p. 5.

[24] See Annex 4 to *Prosecutor's Response*.

[25] *Decision* at p. 2. One other event occurring *prior* to the Appellant's initial appearance is worthy of note. On 11 March 1997, the Appellant made an application for Defence Counsel to be assigned to him. According to the Prosecutor, the Appellant was not assigned Defence Counsel until 5 December 1997. See *Prosecutor's Response*, at para. 19 and Annexes 6 and 7 attached thereto. Notwithstanding the fact that the Appellant was not formally assigned Defence Counsel until 5 December 1997, 16 days after his transfer to the Tribunal's detention unit, there are documents in the record that bear the name and signature of the Appellant's Counsel, Mr. Justry P. L. Nyaberi, prior to that date. It is unclear from the record under what authority Mr. Nyaberi was acting prior to his formal assignment as the Appellant's Counsel on 5 December 1997.

[26] *Extremely Urgent Motion*. See also footnote 5, *supra*.

[27] *Decision* at p. 2. See also footnote 5, *supra*.

Chamber held that the Appellant was initially arrested at the behest of Rwanda and Belgium and not at the behest of the Prosecutor[28]. Second, the Trial Chamber found that the period of detention under Rule 40 from 21 February until 3 March 1997 did not violate the Appellant's rights under Rule 40[29]. Third, the Trial Chamber found that the Appellant had failed to show that the Prosecutor had violated the rights of the Appellant with respect to the length of his provisional detention or the delay in transferring the Appellant to the Tribunal's detention unit[30]. Fourth, the Trial Chamber held that Rule 40*bis* does not apply until the actual transfer of the suspect to the Tribunal's detention unit[31]. Fifth, the Trial Chamber concluded that the provisional detention of the Appellant was legally justified[32]. Sixth, the Trial Chamber found that when the Prosecutor opted to proceed against some of the individuals detained with the Appellant, but excluding the Appellant, the Prosecutor was exercising prosecutorial discretion and was not discriminating against the Appellant[33]. Finally, the Trial Chamber held that Rule 40*bis* is valid and does not contradict any provisions of the Statute[34]. On 4 December 1998, the Appellant filed a Notice of Appeal against the Decision[35] and ten days later the Prosecution filed its Response[36].

11. The Appeals Chamber considered the Appellant's appeal and found that the Decision dismissed an objection based on the lack of personal jurisdiction over the accused and, therefore, an appeal lies as of right under Sub-rule 72(D). Consequently, a Decision and Scheduling Order was issued on 5 February 1999[37], and the parties submitted additional

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[28] *Ibid.* at p. 4.
[29] *Ibid.*
[30] *Ibid.* at p. 5.
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.* at p. 6.
[34] *Ibid.*
[35] Prosecutor v. Barayagwiza, *Notification of Appeal of Decision of Trial Chamber II, Case No. ICTR-97-19-I*, dated 27 November 1998, filed 4 December 1998. The Appeals Chamber deemed the Appellant's Notice of Appeal to be filed in a timely manner in the *5 February 1999 Scheduling Order.*
[36] Prosecutor v. Barayagwiza, *Prosecutor's Response to Defence's Appeal of the Decision of Trial Chamber II on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect (17 November 1998)*, Case No. ICTR-97-19-I, 14 December 1998. Both parties subsequently filed briefs. See Prosecutor v. Barayagwiza, *Memorandum of Appeal*, Case No. ICTR-97-19-I, dated 27 November 1998, filed 10 December 1998; Prosecutor v. Barayagwiza, *Prosecutor's Motion to Reject the Defence Appeal of the Decision of Trial Chamber II* ("*Prosecutor's Motion*"), Case No. ICTR-97-19-I, 18 December 1998; Prosecutor v. Barayagwiza, *The Defence Memorial in Support of the Accused Person's Appeal of the Decision of Trial Chamber II on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Accused* ("*Defence Memorial*"), Case No. ICTR-97-19-I, 2 February 1999; and Prosecutor v. Barayagwiza, *Rejoinder to the Prosecutor's Response to the Defence's Appeal* ("*Rejoinder*"), Case No. ICTR-97-19-I, dated 17 December 1998, filed 4 April 1999.
[37] *5 February 1999 Scheduling Order.*

briefs[38]. Notwithstanding these additional submissions by the parties, however, the Appeals Chamber determined that additional information was required to decide the appeal. Consequently, a Scheduling Order was filed on 3 June 1999[39], directing the Prosecutor[40] to specifically address the following six questions and provide documentation in support thereof:

1) Whether the Appellant was held in Cameroon for any period between 21 February 1997 and 19 November 1997 at the request of the Tribunal, and if so, what effect did this detention have in relation to personal jurisdiction.
2) Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction.
3) The reason for any delay between the request for transfer and the actual transfer.
4) The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.
5) The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion.
6) The disposition of the *writ of habeas corpus* that the Appellant asserts that he filed on 2 October 1997[41].

12. The Prosecutor filed her Response to the 3 June 1999 Scheduling Order on 22 June 1999[42], and the Appellant filed his Reply on 2 July 1999[43]. The submissions of the parties in response to these questions are set forth in section II.C., *infra*.

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[38] Prosecutor v. Barayagwiza, *Defence Written Brief in Compliance of the "Decision and Scheduling Order" of the Appeals Chamber dated 5 February 1999* ("*Defence Written Brief*"), Case No. ICTR-97-19-1, 18 February 1999; *Amended Brief*; and *Prosecutor's Provisional Memorial*.

[39] Barayagwiza v. The Prosecutor, *Scheduling Order* ("*3 June 1999 Scheduling Order*"), Case No. ICTR-97-19-A, 3 June 1999.

[40] Pursuant to the *3 June 1999 Scheduling Order*, the Appellant was given an opportunity to respond to the Prosecutor's submission.

[41] *3 June 1999 Scheduling Order* at pp. 3-4. Although the Appellant asserted that he filed the *writ of habeas corpus* on 2 October 1997, the document was actually filed (as evidenced by the ICTR date-stamp) on 29 September 1997.

[42] *Prosecutor's Response*.

[43] *Appellant's Reply*.

II. THE APPEAL

A. The Appellant

13. As noted *supra*[44], the Appellant has submitted numerous documents for consideration with respect to his arrest and detention. The main arguments as advanced by the Appellant are consolidated and briefly summarised below.

14. First, the Appellant asserts that the Trial Chamber erred in constructing a "Chronology of Events" without a proper basis or finding. According to the Appellant, the Trial Chamber further erred in dividing the events into arbitrary categories with the consequence that the Trial Chamber considered the events in a fragmented form. This resulted in a failure to perceive the events in their totality[45].

15. Second, the Appellant claims that the Trial Chamber erred in holding that the Appellant failed to provide evidence supporting his version of the arrest and detention. Thus, the Appellant contends, it was error for the Trial Chamber to conclude that the Appellant was arrested at the behest of the Rwandan and Belgian governments. Further, because the Trial Chamber found that the Appellant was detained at the behest of the Rwandan and Belgian authorities, the Trial Chamber erroneously held that the Defence had failed to show that the Prosecutor was responsible for the Appellant's being held in custody by the Cameroon authorities from 15 April 1996 until 21 February 1997[46].

16. Third, the Appellant contends that the Trial Chamber erred in holding that the detention under Rule 40 between 21 February 1997 and 3 March 1997, when the Rule 40*bis* request was approved, does not constitute a violation of the Appellant's rights under Rule 40. Further, the Trial Chamber erred in holding that there is no remedy for a provisionally detained person before the detaining State has transferred him prior to the indictment and warrant for arrest[47].

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[44] See, e.g., *Extremely Urgent Motion*; *Memorandum of Appeal*; *Defence Memorial*; *Amended Brief*; *Defence Written Brief*; *Rejoinder* and *Appellant's Reply*. In total, the Appellant raises more than 20 issues, most of which are repetitive or irrelevant.
[45] *Defence Memorial* at p. 6, paras. 3-5.
[46] *Ibid.* at pp. 6-7, paras. 6-11.
[47] *Ibid.* at p. 8, paras. 15-17.

17. Fourth, the Appellant argues that the Trial Chamber erred in failing to declare that there was a breach of the Appellant's rights as a result of the Prosecutor's delay in presenting the indictment for confirmation by the Judge. Furthermore, the Appellant contends that the Trial Chamber erred in holding that the Appellant failed to show that the Prosecutor violated his rights due to the length of the detention or delay in transferring the Appellant. Similarly, the Appellant contends that the Trial Chamber erred in holding that the provisional charges and detention of the Appellant were justified under the circumstances[48].

18. Fifth, with respect to the effect of the detention on the Tribunal's jurisdiction[49], the Appellant sets forth three arguments. The Appellant's first argument is that the overall length of his detention, which was 22 months[50], was unreasonable, and therefore, unlawful. Consequently, the Tribunal no longer has personal jurisdiction over the accused[51]. The Appellant next asserts that the pre-transfer detention of the accused was 'very oppressive, torturous and discriminative'[52]. As a result, the Appellant asserts that he is entitled to unconditional release[53]. Finally, the Appellant contends that his detention cannot be justified on the grounds of urgency. In this regard, the length of time the Appellant was provisionally detained without benefit of formal charges amounts to a 'monstrous degree of prosecutorial indiscretion and apathy'[54].

19. In conclusion, the Appellant requests the Appeals Chamber to quash the Trial Chamber Decision and unconditionally release the Appellant[55].

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[48] *Ibid.* at pp. 8-9, paras. 18-20.
[49] The *5 February 1999 Scheduling Order* had specifically found that the *Decision* dismissed an objection based on the lack of personal jurisdiction over the accused and therefore, an appeal lies of right under Sub-rule 72(D). The *5 February 1999 Scheduling Order* requested the parties to brief the issue of whether the Appellant was unlawfully in the custody of the Tribunal before his transfer to the detention unit. However, in his submission pursuant to the *5 February 1999 Scheduling Order*, the *Defence Written Brief*, the Appellant closely linked his relief sought, immediate release from confinement, with the issue of personal jurisdiction. Consequently, this line of argument is briefly summarised.
[50] From his arrest on 15 April 1996 until his initial appearance on 23 February 1998.
[51] *Defence Written Brief* at paras. 12, 16.
[52] *Ibid.* at para. 18.
[53] *Ibid.*
[54] *Ibid.* at para. 22.
[55] *Ibid.* at para. 25.

B. The Prosecutor

20. In responding to the Appellant's arguments, the Prosecutor relies on three primary counter-arguments, which will be summarised. First, the Prosecutor submits that the Appellant was not in the custody of the Tribunal before his transfer on 19 November 1997, and consequently, no event taking place prior to that date violates the Statute or the Rules. The Prosecutor contends that her request under Rule 40 or Rule 40*bis* for the detention and transfer of the accused has no impact on this conclusion[56].

21. In support of this argument, the Prosecutor contends that the Appellant was detained on 15 April 1996 at the instance of the Rwandan and Belgian governments[57]. Although the Prosecutor made a request on 17 April 1996 to Cameroon for provisional measures[58], the Prosecutor asserts that this request was 'only superimposed on the pre-existing request of Rwanda and Belgium' for the detention of the Appellant[59].

22. The Prosecutor further argues that the Tribunal does not have custody of a person pursuant to Rule 40*bis* until such person has actually been physically transferred to the Tribunal's detention unit. Although an Order pursuant to Rule 40*bis* was filed directing Cameroon to transfer the Appellant on 4 March 1997, the Appellant was not actually transferred until 19 November 1997. Consequently, the responsibility of the Prosecutor for any delay in bringing the Appellant to trial commences only after the Tribunal established custody of the Appellant on 19 November 1997[60].

23. The Prosecutor argues that custody involves 'care and control' and since the Appellant was not under the 'care and control' of the Tribunal prior to his transfer, the Prosecutor is not responsible for any delay resulting from Cameroon's failure to promptly transfer the Appellant[61]. Furthermore, the Prosecutor asserts that Article 28 of the Statute strikes a delicate balance of distributing obligations between the Tribunal and States[62]. Under this arrangement, 'neither entity is an agent or, *alter ego*, of the other: and the actions of the one

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[56] See *Prosecutor's Provisional Memorial* at paras. 26-39.
[57] *Ibid.* at para. 27.
[58] *Decision* at p. 4.
[59] *Prosecutor's Provisional Memorial* at para. 29.
[60] *Ibid.* at paras. 30-31.
[61] *Ibid.* at paras. 35-36, citing to *Black's Law Dictionary*.
[62] *Prosecutor's Provisional Memorial* at para. 37.

may not be imputed on the other just because they were carrying out duties apportioned to them under the Statute'[63].

24. The Prosecutor acknowledges that although the 'delay in this transfer is indeed long, there is no factual basis to impute the fault of it to the ICTR Prosecutor'[64]. She summarises this line of argument by concluding that since the Appellant was not in the custody of the Tribunal before his transfer to the Tribunal's detention unit on 19 November 1997, it follows that the legality of the detention of the Appellant while in the custody of Cameroon is a matter for the laws of Cameroon, and beyond the competence of the Appeals Chamber[65].

25. The second principal argument of the Prosecution is that the Prosecutor's failure to request Cameroon to transfer the Appellant on 16 May 1996[66] does not give the Appellant 'prescriptive claims against the Prosecutor's eventual prosecution'[67]. The thrust of this contention seeks to counter the argument[68] that the Prosecutor is somehow estopped from prosecuting the Appellant as the result of correspondence between the Prosecutor and both Cameroon[69] and the Appellant himself[70].

26. The Prosecutor asserts that simply because at a certain stage of the investigation she communicated to the Appellant that she was not proceeding against him, this cannot have the effect of creating statutory or other limitations against prosecution for genocide and other serious violations of international humanitarian law[71]. Moreover, the Prosecutor argues that she cannot be barred from proceeding against an accused simply because she did not proceed with the prosecution at the first available opportunity[72]. Finally, the Prosecutor claims that her 'abstention from proceeding against the Appellant-Defendant before 3 March 1997 was

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[63] *Ibid.*
[64] *Ibid.* at para. 31.
[65] *Ibid.* at para. 39.
[66] On this day, four of the suspects arrested and detained with the Appellant were transferred to the Tribunal's detention unit pursuant to a request by the Prosecutor. See *Decision* at p. 4.
[67] *Prosecutor's Provisional Memorial* at paras. 40-49.
[68] A review of the record shows that this argument does not seem to be directly raised by the Appellant.
[69] See text at para. 7, *supra*.
[70] In a letter dated 15 October 1996, the Prosecutor communicated to the Appellant that she was not proceeding against him at that time. See text at footnote 14 and *Prosecutor's Provisional Memorial* at para. 40.
[71] *Prosecutor's Provisional Memorial* at para. 41.
[72] *Ibid.* at para. 42.

due to on-going investigation'[73].

27. The third central argument of the Prosecutor is that any violations suffered by the Appellant prior to his transfer to the Tribunal's detention unit have been cured by subsequent proceedings before the Tribunal, presumably the confirmation of the Appellant's indictment and his initial appearance[74].

28. In conclusion, the Prosecution argues that there is no provision within the Statute that provides for the issuance of the order sought by the Appellant, and, in any event, the remedy sought by the Appellant is not warranted in the circumstances. In the event the Appeals Chamber finds a violation of the Appellant's rights, the Prosecutor suggests that the following remedies would be proper: 1) an Order for the expeditious trial of the Appellant; and/or 2) credit for the period of undue delay as part of the sentence, if the Appellant is found guilty, pursuant to Rule 101(D)[75].

C. Arguments of the Parties Pursuant to the 3 June 1999 Scheduling Order

29. With respect to the specific questions addressed to the Prosecutor in the 3 June 1999 Scheduling Order, the parties submitted the following answers.

1) **Whether the Appellant was held in Cameroon for any period between 21 February 1997 and 19 November 1997 at the request of the Tribunal, and if so, what effect did this detention have in relation to personal jurisdiction.**

30. On 21 February 1997, following the Decision of the Cameroon Court of Appeal to release the Appellant, the Prosecutor submitted a Rule 40 Request to detain the Appellant for the benefit of the Tribunal. Further, the Prosecutor submits that following the issuance of the Rule 40*bis* Order on 4 March 1997, Cameroon was obligated, pursuant to Article 28, to implement the Prosecutor's request. However, because the Tribunal did not have custody of the Appellant until his transfer on 19 November 1997, the Prosecutor contends that the Tribunal 'could not regulate the conditions of detention or other matters regarding the

[73] *Ibid.* at para. 43.
[74] *Ibid.* at para. 44. The Prosecutor does not specify which subsequent proceedings cured the alleged violations.
[75] *Ibid.* at para. 45.

confinement of the accused'[76]. Nevertheless, the Prosecutor argues that between 21 February 1997 and 19 November 1997, 'there existed what could be described as joined or concurrent personal jurisdiction over the Appellant, the personal jurisdiction being shared between the Tribunal and Cameroon'[77].

31. The Appellant contends that Cameroon was holding him at the behest of the Prosecutor during this entire period[78]. Furthermore, the Appellant argues that '[t]he only Cameroonian law applicable to him was the law concerning the extradition'[79]. Consequently, he argues that the issue of concurrent or joint personal jurisdiction by both the Tribunal and Cameroon is 'fallacious, misleading and unacceptable'[80]. In addition, he asserts that, read in conjunction, Articles 19 and 28 of the Statute confer obligations upon the Detaining State only when the appropriate documents are supplied[81]. Since the Warrant of Arrest and Order for Surrender[82] was not signed by Judge Aspegren until 23 October 1997, the Appellant contends that his detention prior to that date was illegal, given that he was being held after 21 February 1997 on the basis of the Prosecutor's Rule 40 request[83].

2) Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction.

32. The parties are in agreement that the Appellant was transferred to the Tribunal's detention unit on 19 November 1997, and consequently was not held by Cameroon at any period after that date[84].

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[76] *Prosecutor's Response* at para. 12.
[77] *Ibid.* at para. 13.
[78] *Appellant's Reply* at paras. 6-10. He also asserts that he was being held at the behest of the Prosecutor from 17 April 1996, when the first Rule 40 request relating to the Appellant was issued, until 15 October 1996, when the Prosecutor sent a letter to the Appellant, in which the Prosecutor informed him that she no longer had any interest in his detention. *Ibid.* at para. 6. See *15 October 1996 letter.*
[79] *Ibid.* at para. 8.
[80] *Ibid.*
[81] *Ibid.* at para. 9.
[82] Prosecutor v. Barayagwiza, *Warrant of Arrest and Order for Surrender* ("*Arrest Warrant*"), 23 October 1997, attached as Annex 4 to the *Appellant's Reply*.
[83] *Appellant's Reply* at para. 9.
[84] *Prosecutor' Response* at para. 14; *Appellant's Reply* at para. 11.

3) The reason for any delay between the request for transfer and the actual transfer.

33. The Prosecutor fails to give any reason for this delay. Rather, without further comment, the Prosecutor attributes to Cameroon the period of delay[85] between the request for transfer and the actual transfer[86].

34. The Appellant contends that the Prosecutor 'forgot about the matter and didn't really bother about the actual transfer of the suspect'[87]. He argues that since Cameroon had been holding him pursuant to the Tribunal's Rule 40*bis* Order, Cameroon had no further interest in him, other than to transfer him to the custody of the Tribunal. In support of his contentions in this regard, the Appellant advances several arguments. First, the Prosecutor did not submit the indictment for confirmation before the expiration of the 30-day limit of the provisional detention as requested by Judge Aspegren in the Rule 40*bis* Order[88]. Second, the Appellant asserts that the Prosecutor didn't make any contact with the authorities of Cameroon to provide for the transfer of the Appellant pursuant to the Rule 40*bis* Order. Third, the Prosecutor did not ensure that the Appellant's right to appear promptly before a Judge of the Tribunal was respected. Fourth, following the Rule 40*bis* Order, the Appellant claims, '[t]he Prosecutor didn't make any follow-up and didn't even show any interest'[89]. Fifth, the Appellant contends that the triggering mechanism in prompting his transfer was his filing of a *writ of habeas corpus*[90]. In conclusion, the Appellant rhetorically questions the Prosecutor, 'How can she expect the Cameroonian authorities to be more interested [in his case] than her?' [sic][91].

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[85] The delay, from 4 March 1997 until 19 November 1997, totaled 260 days.
[86] *Prosecutor's Response* at para. 15. In a meager attempt to bolster this claim, the Prosecutor submits that long delays occurred in the transfer of other accused from Cameroon to the Tribunal's detention unit. See *ibid.* at para. 16.
[87] *Appellant's Reply* at para. 12.
[88] See footnote 18, *supra*.
[89] *Appellant's Reply* at para. 12.
[90] *Ibid.*
[91] *Ibid*

4) The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.

35. The Prosecutor contends that the Trial Chamber and the Registry have responsibility for scheduling the initial appearance of accused persons[92].

36. While the Appellant acknowledges that the Registrar bears some responsibility for the delay[93], he argues that the Prosecutor 'plays a big role in initiating of hearings' and plays a 'key part in the process'[94]. The Appellant contends that the Prosecutor took no action to bring him before the Trial Chamber as quickly as possible. On the contrary, the Appellant asserts that the Prosecutor delayed seeking confirmation of the indictment and 'caused the removal of the Defence's motion for Habeas Corpus from the hearing list on 31 October 1997 thus delaying further the appearance of the suspect before the Judges'[95].

5) The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion.

37. With respect to the delay between the initial appearance and the hearing on the Urgent Motion, the Prosecutor again disclaims any responsibility for scheduling matters, arguing that the Registry, in consultation with the Trial Chambers, maintains the docket[96]. The hearing on the Urgent Motion was originally docketed[97] for 14 May 1998[98]. However, on 12 May 1998, Counsel for the Appellant informed the Registry that he was not able to appear and defend his client at that time, because he had not been assigned co-counsel as he had requested and because the Tribunal had not paid his fees[99]. Consequently, the hearing was re-scheduled for 11 September 1998.

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[92] *Prosecutor's Response* at para. 17. In this regard, it should be noted that the delay between the Appellant's transfer, on 19 November 1997, and his initial appearance, on 23 February 1998, totaled 96 days. Moreover, the Prosecutor seems to rely on the fact that a Judicial Holiday from 15 December 1997 until 15 January 1998 should excuse delay in scheduling the Appellant's initial appearance during that 31 day period. See *ibid.* at para. 20.
[93] *Appellant's Reply* at para. 15.
[94] *Ibid.* at para. 14.
[95] *Ibid.*
[96] *Prosecutor's Response* at para. 21.
[97] Prosecutor v. Barayagwiza, *Scheduling Order*, Case No. ICTR-97-19-T, 9 March 1998.
[98] This was 79 days after the Appellant's initial appearance.
[99] See *Appellant's Reply* at paras. 16-17 and Annexes 6, 7, 8 and 9 thereto.

6) The disposition of the *writ of habeas corpus* that the Appellant asserts that he filed on 2 October 1997[100].

38. With respect to the disposition of the *writ of habeas corpus* filed by the Appellant on 2 October 1997[101], the Prosecutor replied as follows:

> 24. The Prosecutor respectfully submits that following the filing of the *habeas corpus* on 2 October 1997 the President wrote the Appellant by letter of 8 October 1997, informing him that the Office of the Prosecutor had informed him that an indictment would be ready shortly.
>
> 25. The Prosecutor is not aware of any other disposition of the *writ of habeas corpus*[102].

39. In fact, the letter[103] referred to was written on 8 *September* 1997—prior to the filing of the *writ of habeas corpus*—and the Appellant contends that it was precisely this letter which prompted him to file the *writ of habeas corpus*. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997[104]. However, directly contradicting the claim of the Prosecutor, the Appellant asserts that 'the Registry without the consent of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'[105]. Moreover, the Appellant claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*[106]. The Appellant is of the view that the *writ of habeas corpus* is still pending, since the Trial Chamber has not heard it, notwithstanding the fact that it was filed on 29 September 1997.

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[100] See footnote 41 with regard to the date.
[101] *Ibid.*
[102] *Prosecutor's Response* at paras. 24-25.
[103] *Prosecutor's Response*, Annex 12. The letter from President Kama to the Appellant's Counsel is five sentences long, and substantively consists of the following: 'I acknowledge receipt of your letter dated 1 September 1997 concerning the detention of Mr. Jean Bosco Barayagwiza by Cameroonian authorities, and I take note of the fact that the situation is indeed a matter for concern. I have already reminded the Prosecutor of the need to establish as soon as possible an indictment against Mr. Jean Bosco Barayagwiza, if she still intends to prosecute him. Only recently, Mr. Bernard Muna, the Deputy Prosecutor, reassured me that an indictment against Mr. Jean Bosco Barayagwiza should soon be submitted to a Judge for review. Such being the case, I recognise your right to submit to the Tribunal a motion in due form on this matter. The motion will then be referred to one of the Tribunal's Chambers for consideration.'
[104] *Appellant's Reply* at para. 18.
[105] *Ibid.*
[106] *Ibid.* at para. 21.

III. APPLICABLE AND AUTHORITATIVE PROVISIONS

40. The relevant parts of the applicable Articles of the Statute, Rules of the Tribunal and international human rights treaties are set forth below for ease of reference. The Report of the U.N. Secretary-General[107] establishes the sources of law for the Tribunal. The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.

A. The Statute

Article 8
Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 17
Investigation and Preparation of Indictment

1. [...]

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. [...]

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[107] Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), U.N. Doc. S/1995/134 at paras. 11-12. See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 and Add. 1 (22 February 1993), establishing the International Criminal Tribunal for the former Yugoslavia at paras. 33-35.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an Indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the present Statute. The Indictment shall be transmitted to a Judge of the Trial Chamber.

Article 20
Rights of the accused

1. [...]

2. [...]

3. [...]

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 in which he or she understands of the nature and cause of the charge against him or her;

   (b) [...]

   (c) To be tried without undue delay;

   (d) [...]

   (e) [...]

   (f) [...]

   (g) [...]

Article 24
Appellate Proceedings

1. [...]

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 28
Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) The identification and location of persons;

(b) [...]

(c) [...]

(d) The arrest or detention of persons;

(e) The surrender or transfer of the accused to the International Tribunal for Rwanda.

B. The Rules

Rule 2
Definitions

[...]

Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47.

[...]

Suspect: A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction.

[...]

Rule 40
Provisional Measures

(A) In case of urgency, the Prosecutor may request any State:

(i) to arrest a suspect and place him in custody;

(ii) to seize all physical evidence;

(iii) to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The state concerned shall comply forthwith, in accordance with Article 28 of the Statute.

(B) Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the

seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country of the Tribunal and the Registrar.

(C) In the cases referred to in paragraph B, the suspect shall, from the moment of his transfer, enjoy all the rights provided for in Rule 42, and may apply for review to a Trial Chamber of the Tribunal. The Chamber, after hearing the Prosecutor, shall rule upon the application.

(D) The suspect shall be released if (i) the Chamber so rules, or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer.

Rule 40*bis*
Transfer and Provisional Detention of Suspects

(A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28[108], a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a summary of the material upon which the Prosecutor relies.

(B) The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met:

(i) the Prosecutor has requested a State to arrest the suspect and to place him in custody, in accordance with Rule 40, or the suspect is otherwise detained by a State;

(ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and

(iii) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.

(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.

(D) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the request made by the Prosecutor under Sub-Rule (A), including the provisional charge, and shall state the Judge's grounds for making the order, having regard to Sub-Rule (B). The order shall also specify the initial time limit for the provisional detention of the suspect,

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[108] Rule 28 governs Duty Judges.

and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42[109] and 43[110].

(E) As soon as possible, copies of the order and of the request by the Prosecutor are served upon the suspect and his counsel by the Registrar.

(F) At the end of the period of detention, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the provisional detention for a period not exceeding 30 days.

(G) At the end of that extension, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the detention for a further period not exceeding 30 days.

(H) The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made.

(I) The provisions in Rules 55(B) to 59 shall apply *mutatis mutandis* to the execution of the order for the transfer and provisional detention of the suspect.

(J) After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the initial order, or another Judge of the same Trial Chamber, who shall ensure that his rights are respected.

(K) During detention, the Prosecutor, the suspect or his counsel may submit to the Trial Chamber of which the Judge who made the initial order is a member, all applications relative to the propriety of provisional detention or to the suspect's release.

(L) Without prejudice to Sub-Rules (C) to (H), the Rules relating to the detention on remand of accused persons shall apply *mutatis mutandis* to the provisional detention of persons under this Rule.

Rule 58
National Extradition Provisions

The obligations laid down in Article 28 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.

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[109] Rule 42 governs the Rights of Suspects during Investigation.
[110] Rule 43 governs Recording Questioning of Suspects.

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. The Trial Chamber shall:

(i) satisfy itself that the right of the accused to counsel is respected;

(ii) read or have the indictment read to the accused in a language he speaks and understands, and satisfy itself that the accused understands the indictment;

(iii) call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;

(iv) in case of a plea of not guilty, instruct the Registrar to set a date for trial.

Rule 72
Preliminary Motions

(A) Preliminary motions by either party shall be brought within sixty days following disclosure by the Prosecutor to the Defence of all material envisaged by Rule 66(A)(I)[111], and in any case before the hearing on the merits.

(B) Preliminary motions by the accused are:

i) objections based on lack of jurisdiction;

ii) [...]

iii) [...]

iv) [...]

(C) The Trial Chamber shall dispose of preliminary motions *in limine litis*.

(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.

(F) Failure to comply with the time-limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.

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[111] Rule 66 governs disclosure of materials by the Prosecutor, including all supporting material which accompanied the indictment when confirmation was sought and all prior statements obtained by the Prosecutor from the accused.

C. International Covenant on Civil and Political Rights[112]

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. 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.

Article 14

1. [...]

2. [...]

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

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

   (b) [...]
   (c) [...]
   (d) [...]
   (e) [...]
   (f) [...]
   (g) [...]

4. [...]
5. [...]
6. [...]
7. [...]

---

[112] 999 UNTS 171 (16 December 1966)("ICCPR").

D. European Convention on Human Rights[113]

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

   (a) [...]

   (b) [...]

   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

   (d) [...]

   (e) [...]

   (f) the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. 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.

Article 6

1. [...]

2. [...]

3. Everyone charged with a criminal offence has the following minimum rights:

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

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[113] 213 UNTS 221 (4 November 1950)("ECHR").

(b) [...]
(c) [...]
(d) [...]
(e) [...]

E. American Convention on Human Rights[114]

Article 7

1. [...]

2. [...]

3. No one shall be subject to arbitrary arrest or detention.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before judge or other law officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. 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. In states Parties whose law provides that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. [...]

Article 8

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

(a) [...]
(b) prior notification in detail to the accused of the charges against him;

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[114] 1144 UNTS 123 (22 November 1969)("ACHR")

(c) [...]
(d) [...]
(e) [...]
(f) [...]
(g) [...]
(h) [...]

3. [...]

4. [...]

5. [...]

IV. DISCUSSION

A. Were the rights of the Appellant violated?

1. Status of the Appellant

41. Before discussing the alleged violations of the Appellant's rights, it is important to establish his status following his arrest and during his provisional detention[115]. Rule 2 sets forth definitions of certain terms used in the Rules[116]. The indictment against the Appellant was not confirmed until 23 October 1997. Pursuant to the definitions of 'accused' and 'suspect' set forth in Rule 2, the Appeals Chamber finds that the Appellant was a 'suspect' from his arrest on 15 April 1996 until the indictment was confirmed on 23 October 1997. After 23 October 1997, the Appellant's status changed and he became an 'accused'[117].

2. The right to be promptly charged under Rule 40*bis*

42. Unlike national systems, which have police forces to effectuate the arrest of suspects, the Tribunal lacks any such enforcement agency. Consequently, in the absence of the suspect's voluntary surrender, the Tribunal must rely on the international community for the arrest and provisional detention of suspects. The Statute and Rules of the Tribunal establish a system[118] whereby States may provisionally detain suspects at the behest of the Tribunal pending transfer to the Tribunal's detention unit.

43. In the present case, there are two relevant periods of time under which Cameroon was clearly holding the Appellant at the behest of the Tribunal. Cameroon arrested the Appellant pursuant to the Rwandan and Belgian extradition requests[119] on 15 April 1996. Two days later, the Prosecutor made her first Rule 40 request for provisional detention of the Appellant. On 6 May 1996, the nineteenth day of the Appellant's provisional detention pursuant to Rule

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[115] This is particularly important because the individual's rights, including the permissible length of pre-trial detention, vary based on whether the individual is a suspect or an accused.
[116] The definitions set forth in Rule 2 are in accord with the statutory and case law of most legal systems of the international community.
[117] See also Rule 47(H)(ii), which provides: 'Upon confirmation of any or all counts in the indictment, the suspect shall have the status of the accused'.
[118] See Article 20 of the Statute and Rules 40 and 40*bis*.
[119] See footnote 8, *supra*.

40, the Prosecutor requested the Cameroon authorities to extend the Appellant's detention for an additional three weeks[120]. On 16 May 1996, however, the Prosecutor informed Cameroon that she was no longer interested in pursuing a case against the Appellant at 'that stage'[121]. Thus, the first period runs from 17 April 1996 until 16 May 1996—a period of 29 days[122], or nine days longer than allowed under Rule 40. This first period will be discussed, *infra*, at sub-section IV.B.2.

44. The second period during which Cameroon detained the Appellant for the Tribunal commenced on 4 March 1997[123] and continued until the Appellant's transfer to the Tribunal's detention unit on 19 November 1997. On 21 February 1997, the Cameroon Court rejected Rwanda's extradition request and ordered the release of the Appellant[124]. However, on the same day, while the Appellant was still in custody, the Prosecutor again made a request pursuant to Rule 40 for the provisional detention of the Appellant. This request was followed by the Rule 40*bis* request, which resulted in the Rule 40*bis* Order of Judge Aspegren dated 3 March 1997, and filed on 4 March 1997. This Order comprised, *inter alia*, four components. First, it ordered the transfer of the Appellant to the Tribunal's detention unit. Second, it ordered the provisional detention in the Tribunal's detention unit of the Appellant for a maximum period of thirty days. Third, it requested the Cameroon authorities to comply with the transfer order and to maintain the Appellant in custody until the actual transfer. Fourth, it

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[120] *15 October 1996 letter.*

[121] *Decision* at p. 4. See also *15 October 1996 letter.*

[122] There is reason to believe, however, that the first period actually continued to run until 15 October 1996. On 15 October 1996, the Prosecutor, in a letter to the Appellant and several other detainees, informed them that Cameroon was not holding them at her behest. See Annex 1 to *Appellant's Reply* and *Prosecutor's Provisional Memorial* at para. 6. She stated in this letter that she had informed the Cameroon authorities on 16 May 1996 that at that 'stage' she only wished to proceed against 4 of the individuals then being held by Cameroon. The Cameroon authorities apparently did not consider the Tribunal's request for the Appellant to end on 16 May 1996. This is demonstrated by the fact that on 31 May 1996, the Deputy Director of Public Prosecution of the Cameroon Centre Province Court of Appeal requested the adjournment of the Court's consideration of the Rwandan extradition request on the grounds that the Tribunal had primacy under Article 8(2) of the Statute. See *Amended Brief* at p. 2, para. 7. The Prosecutor has not directed the Appeals Chamber to any evidence refuting this assertion of the Appellant. As a result of the Cameroon Prosecutor's arguments, the Cameroon Court of Appeal adjourned consideration of the Rwanda extradition request. This adjournment continued until shortly after the 15 October 1996 letter. A copy of this letter was sent to the Cameroon authorities, and after they received this letter, the Rwandan extradition hearing apparently resumed, culminating in a decision of 21 February 1997, in which the Cameroon Court denied the Rwandan extradition request. See the following paragraph. However, we will use the 16 May 1996 date as the date on which the first period ended, since that date is most favourable to the Prosecutor, as the Respondent in this appeal.

[123] The Prosecutor made her second Rule 40 request on 21 February 1997, following the decision of the Cameroon Court of Appeal with respect to the Rwandan extradition request. However, we are using the date on which the Rule 40*bis* Order was filed as the starting date for the second period of detention.

[124] *Decision* at pp. 3-4.

requested the Prosecutor to submit the indictment against the Appellant prior to the expiration of the 30-day provisional detention[125].

45. However, notwithstanding the 4 March 1997 Rule 40*bis* Order, the record reflects that the Tribunal took no further action until 22 October 1997. On that day, the Deputy Prosecutor, Mr. Bernard Muna (who had spent much of his professional career working in the Cameroon legal community prior to joining the Office of the Prosecutor) submitted the indictment against the Appellant for confirmation. Judge Aspegren confirmed the indictment against the Appellant the next day and simultaneously issued a Warrant of Arrest and Order for Surrender addressed to the Government of Cameroon on 23 October 1997[126]. However, the Appellant was not transferred to the Tribunal's detention unit until 19 November 1997. Thus, Cameroon held the Appellant at the behest of the Tribunal from 4 March 1997 until his transfer on 19 November 1997. At the time the indictment was confirmed, the Appellant had been in custody for 233 days, more than 7 months, from the date the Rule 40*bis* Order was filed.

46. It is important that Rule 40 and Rule 40*bis* be read together. It is equally important in interpreting these provisions that the Appeals Chamber follow the principle of 'effective interpretation', a well-established principle under international law[127]. Interpreting Rule 40 and Rule 40*bis* together, we conclude that both Rules must be read restrictively. Rule 40 permits the Prosecutor to request any State, in the event of urgency, to arrest a suspect and place him in custody. The purpose of Rule 40*bis* is to restrict the length of time a suspect

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[125] *Rule 40bis Order.*

[126] *Warrant of Arrest and Order for Surrender*, 23 October 1997, attached as Annex 4 to *Prosecutor's Response.*

[127] This principle is also known by the Latin phrase *ut res magis valeat quam pereat.* See Cayuga Indians Claims, Annual Digest and Reports of Public International Law Cases (H. Lauterpacht. ed.), 1925-1926. No. 271. See also Timor Island, The Hague Court Reports (1916); Corfu Channel, 1949 ICJ Reports 24; Free Zones of Upper Savoy and the District of Gex, (second phase), PCIJ Series A, No. 24 at p. 17. This principle is embodied in Article 31(1) of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Although neither the Statute nor the Rules are treaties, the Appeals Chamber and the Trial Chambers of the Tribunal and the International Criminal Tribunal for the former Yugoslavia have had recourse to Article 31(1) of the Vienna Convention in interpreting the Statutes of the Tribunals. Other cases where Trial Chambers of the International Tribunal or the ICTY have had recourse to Article 31 in interpreting the provisions of the Statutes include: Prosecutor v. Théoneste Bagosora and 28 Others, *Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others*, Case No. ICTR-98-37-A, 8 June 1998 at pp. 12-13; Prosecutor v. Tadić, *Decision on the Prosecutor's Motion, Protective Measures for Victims and Witnesses*, Case No. IT-94-I-T, 10 August 1995 at p. 10; Prosecutor v. Erdemović, *Judgement*, Case No. IT-96-22-A, 7 October 1997 at p. 3; and Prosecutor v. Delalić and Others, Case No. IT-96-21-T, 16 November 1998, at pp. 396-397. See also Prosecutor v. Kanyabashi, *Joint and Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. ICTR-96-15-A, 3 June 1999 at para. 15.

may be detained without being indicted. We cannot accept that the Prosecutor, acting alone under Rule 40, has an unlimited power to keep a suspect under provisional detention in a State, when Rule 40*bis* places time limits on such detention if the suspect is detained at the Tribunal's detention unit. Rather, the principle of effective interpretation mandates that these Rules be read together and that they be restrictively interpreted.

47. Although both Rule 40 and Rule 40*bis* apply to the provisional detention of suspects, there are important differences between the two Rules. For example, the time limits under which the Prosecutor must issue an indictment vary depending upon which Rule forms the basis of the provisional detention. Pursuant to Rule 40(D)(ii), the suspect must be released if the Prosecutor fails to issue an indictment within 20 days of the transfer of the suspect to the Tribunal's detention unit, while Rule 40*bis*(H) allows the Prosecutor 90 days to issue an indictment. However, the remedy for failure to issue the indictment in the proscribed period of time is the same under both Rules: *release of the suspect.*

48. The Prosecutor may apply for Rule 40*bis* measures 'in the conduct of an investigation'[128]. Rule 40*bis* applies only if the Prosecutor has previously requested provisional measures pursuant to Rule 40 or if the suspect is otherwise already being detained by the State to whom the Rule 40*bis* request is made[129]. The Rule 40*bis* request, which is made to a Judge assigned pursuant to Rule 28, must include a provisional charge and a summary of the material upon which the Prosecutor relies[130].

49. The Judge must make two findings before a Rule 40*bis* order is issued. First, there must be a reliable and consistent body of material that tends to show that the suspect may have committed an offence within the Tribunal's jurisdiction[131]. Second, the Judge must find that provisional detention is a necessary measure to 'prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation'[132].

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[128] Rule 40*bis*(A). Rule 40, by comparison, applies only in case of urgency. See Rule 40(A).
[129] Rule 40*bis*(B)(i).
[130] Rule 40*bis*(A).
[131] Rule 40*bis*(B)(ii).
[132] Rule 40*bis*(B)(iii).

50. Pursuant to Rule 40*bis*(C), the provisional detention of the suspect may be ordered for an initial period of thirty days[133]. This initial thirty-day period begins to run from the 'day after the transfer of the suspect to the detention unit of the Tribunal'[134]. Two additional thirty-day period extensions are permissible. At the end of the first thirty-day period, the Prosecutor must show that an extension is warranted by the needs of the investigation in order to have the provisional detention extended[135]. At the end of the second thirty-day period, the Prosecutor must demonstrate that special circumstances warrant the continued provisional detention of the suspect for the final thirty-day period to be granted[136]. In no event shall the total period of provisional detention of a suspect exceed ninety days[137]. At the end of this cumulative ninety-day period, the suspect must be released[138] if the indictment has not been confirmed and an arrest warrant signed[139].

51. The Statute and Rules of the Tribunal envision a system whereby the suspect is provided a copy of the Prosecutor's request, including provisional charges, in conjunction with the Rule 40*bis* Order[140]. He is also served a copy of the confirmed indictment with the Warrant of Arrest[141], and pursuant to Rule 62(ii) he is to be orally informed of the charges against him at the initial appearance[142]. In the present case, 6 days elapsed between the filing of the Rule *40bis* Order on 4 March 1997 and the date on which the Appellant apparently was shown a copy of the Rule 40*bis* Order[143]. Additionally, 27 days elapsed between the confirmation of the indictment against the Appellant on 23 October 1998 and the service of a copy of the indictment upon the Appellant on 19 November 1998.

52. The Trial Chamber found that the Appellant was initially arrested at the behest of Rwanda and Belgium, a point the Prosecutor reiterates in this appeal, contending that the Prosecutor's request was merely 'superimposed' on the existing requests of those States. However, the Prosecutor fails to acknowledge that on 16 May 1996, she requested a three-

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[133] Rule 40*bis*(C).
[134] *Ibid.*
[135] Rule 40*bis*(F).
[136] Rule 40*bis*(G).
[137] Rule 40*bis*(H).
[138] Or, if appropriate, delivered to the authorities of the State to which the Rule 40*bis* request was initially made. *Ibid.*
[139] *Ibid.*
[140] Rule 40*bis*(E).
[141] Rule 55(B)(ii).
[142] Rule 62(ii).
[143] See footnote 18.

week extension of the provisional detention of the Appellant. The Appeals Chamber finds the Appellant was detained at the request of the Prosecutor from 17 April 1996 through 16 May 1996. This detention—for 29 days—violated the 20-day limitation in Rule 40.

53. The Prosecutor also successfully argued before the Trial Chamber that Rule 40*bis* is inapplicable, since its operative provisions do not apply until after the transfer of the suspect to the Tribunal's detention unit[144]. It is clear, however, that the purpose of Rule 40 and Rule 40*bis* is to limit the time that a suspect may be provisionally detained without the issuance of an indictment. This comports with international human rights standards. Moreover, if the time limits set forth in Rule 40(D) and Rule 40*bis*(H) are not complied with, those rules mandate that the suspect must be released.

54. Although the Appellant was not physically transferred to the Tribunal's detention unit until 19 November 1997, he had been detained since 21 February 1997 solely at the behest of the Prosecutor. The Appeals Chamber considers that if the Appellant were in the constructive custody[145] of the Tribunal after the Rule *40bis* Order was filed on 4 March 1997, the provisions of that Rule would apply. In order to determine if the period of time that the Appellant spent in Cameroon at the behest of the Tribunal is attributable to the Tribunal for purposes of Rule 40*bis*, it is necessary to analyse the relationship between Cameroon and the Tribunal with respect to the detention of the Appellant. In fact, the Prosecutor has acknowledged that between 21 February 1997 and 19 November 1997, 'there existed what could be described as joined or concurrent personal jurisdiction over the Appellant, the personal jurisdiction being shared between the Tribunal and Cameroon'[146].

55. The Tribunal issued a valid request pursuant to Rule 40 for provisional detention, and shortly thereafter, pursuant to Rule 40*bis*, for the transfer of the Appellant. These requests were honoured by Cameroon, and *but for* those requests, the Appellant would have been

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[144] See *Decision* at p. 5.

[145] Constructive custody has been referred to as 'having power and control over the body'. See Re Mwenya, 1 QB 241, 3 All ER 525 (Court of Appeal, Queen's Bench 1959). A court in the Philippines has even held, in the context of a bail hearing, that a petitioner was in the constructive custody of the courts when he was physically incapacitated in a hospital less than one kilometer from the police station and the police had not attempted to serve an arrest warrant on him, despite the fact that they were aware of his whereabouts. See Miguel P. Panderanga v. Court of Appeals and People of the Philippines, (Philippines Supreme Court, 1995) 1995 Philippines S Ct. LEXIS 3495.

[146] *Prosecutor's Response* at para. 13.

released on 21 February 1997, when the Cameroon Court of Appeal denied the Rwandan extradition request and ordered the immediate release of the Appellant.

56. Thus, the Appellant's situation is analogous to the 'detainer' process, whereby a special type of warrant (known as a 'detainer' or 'hold order') is filed against a person *already in custody* to ensure that he will be available to the demanding authority upon completion of the present term of confinement[147]. A 'detainer' is a device whereby the requesting State can obtain the custody of the detainee upon his release from the detaining State. The U.S. Supreme Court has stated that, '[I]n such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State...'[148]. Moreover, that court has held that since the detaining state acts as an agent for the demanding state pursuant to the detainer, the petitioner is in custody for purposes of filing a *writ of habeas corpus* pursuant to U.S. law[149]. Thus, the court reached the conclusion that the accused is in the constructive custody of the requesting State and that the detaining State acts as agent for the requesting state for purposes of *habeas corpus* challenges[150]. In the present case, the relationship between the Tribunal and Cameroon is even stronger, on the basis of the international obligations imposed on States by the Security Council under Article 28 of the Statute.

57. Other cases have held that a defendant sentenced to concurrent terms in separate jurisdictions is in the constructive custody of the second jurisdiction after the first jurisdiction has imposed sentence on him. For example, In the Matter of Eric Grier, Peritioner v. Walter J. Flood, as Warden of the Nassau County Jail, Respondent[151], the court concluded that '*constructive custody attached before any sentence was imposed*'[152]. In Ex p. Hampton M. Newell[153], the court ruled that although the petitioner was in the physical custody of the federal authorities, he was in the constructive custody of the State of Texas on the basis of a detainer that Texas had filed against him[154].

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[147] See Shelton, *Unconstitutional Uncertainty: A Study of the Use of Detainers*, 1 U.Mich.J.L.Ref. 119 (1968).
[148] Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973) at 498-499.
[149] *Ibid.*
[150] *Ibid.*
[151] In the Matter of Eric Grier, Peritioner v. Walter J. Flood, as Warden of the Nassau County Jail, Respondent, 375 N.Y.S. 2d 506 (Sup Ct of N.Y. 1975). In this case, the court stated, 'In the interests of justice he should get credit toward both sentences for all the time he is in custody, either actual or constructive'. *Ibid.*, at p. 508.
[152] *Ibid.* at p. 509 (emphasis added).
[153] Ex p. Hampton M. Newell, 582 S.W 2d 835, (Ct of Crim App of Texas 1979).
[154] *Ibid.* at p. 836.

58. The Prosecutor relies, in part, on a definition of custody ('care and control') from an oft-cited law dictionary[155]. However, this same law dictionary also defines custody as 'the detainer of a man's person by virtue of lawful process or authority'[156]. Thus, even using the Prosecutor's authority, custody can be taken to mean the detention of an individual pursuant to lawful authority even in the absence of physical control. It would follow, therefore, that notwithstanding a lack of physical control, the Appellant *was* in the Tribunal's custody *if* he were being detained pursuant to 'lawful process or authority' of the Tribunal. Or, as a Singapore court noted in Re Onkar Shrian[157], '[T]hat the person bailed is in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if he were in the actual custody of the proper gaoler'[158].

59. The Prosecutor has also relied on In the Matter of Surrender of Elizaphan Ntakirutimana[159] in support of the proposition that under international law, an order by the Tribunal for the transfer of an individual does not give the Tribunal custody over such a person until the physical transfer has taken place[160]. Reliance on this case is misguided in two respects. First, the U.S. Fifth Circuit Court of Appeals recently upheld a District Court ruling that reversed the Decision of the Magistrate that Ntakirutimana could not be extradited[161]. Second, notwithstanding the reversal, Ntakirutimana had challenged the transfer process and is thus clearly distinguishable from the facts in the present case. There is no evidence here that either the Appellant sought to challenge his transfer to the Tribunal, or that Cameroon

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[155] See discussion at para. 23, *supra*.

[156] *Black's Law Dictionary*, 6th Ed. at p. 384.

[157] Re Onkar Shrian, 1 MLJ 28 (Singapore High Court 1970).

[158] *Ibid.*, citing to 3 Hawkins' Pleas of the Crown, 7th Ed. at p. 186. Another court has held that "constructive custody" includes a fairly broad category of situations in which the prisoner *is not within* the physical custody of the authorities. "*[C]ustody includes* without limitation actual custody ... and *constructive custody of prisoners* and juveniles ... *temporarily outside the institution whether for the purpose of* work, school, *medical case*, a leave granted [by statute], a temporary leave of furlough granted to a juvenile or *otherwise*." Wisconsin v. Sevelin, Case No. 96-0729-CR (Wisconsin Court of Appeals 1996), citing to State v. Gilbert, 115 Wis.2d 371, 378-79, 340 N.W.2d 511, 515 (Wisconsin Supreme Court 1983) (italics in original).

[159] In the Matter of Surrender of Elizaphan Ntakirutimana, 988 F.Supp. 1038, 1997 U.S. Dist. LEXIS 20714 (S.D. Tex. 1997).

[160] *Provisional Memorial* at para. 37.

[161] In the Matter of Surrender of Elizaphan Ntakirutimana, ___ F.Supp. ___, 1998 U.S. Dist. LEXIS 22173, 1998 WL 655708 (S.D. TX 1998). In overruling the Magistrate Judge, Judge John D. Rainey issued the following order: 'Therefore, the Court hereby certifies to the Secretary of State that Ntakirutimana be arrested and detained within this judicial district while awaiting his surrender to the proper authorities. Any transfer of Ntakirutimana, however, should be abated for thirty days in order to provide Ntakirutimana's counsel an opportunity to file any *habeas corpus*'. *Ibid.* at p. 61. On 5 August 1999, the U.S. Fifth Circuit Court of Appeals upheld the District Court decision, and lifted the stay on the extradition. See Elizaphan Ntakirutimana v. Janet Reno, Madeleine Albright and Juan Garza, 184 F.3rd 419, 1999 U.S. App. LEXIS 18253 (5th Cir. 1999)

was unwilling to transfer him. On the contrary, the Deputy Prosecutor of the Cameroon Centre Province Court of Appeal, appearing at the Rwandan extradition hearing on 31 May 1996, argued that the Tribunal had primacy and, thus, convinced that Court to defer to the Tribunal[162]. Moreover, as noted above[163], the President of Cameroon signed a decree order to transfer the Appellant prior to the signing of the Warrant of Arrest and Order for Surrender by Judge Aspegren on 23 October 1997. These facts indicate that Cameroon was willing to transfer the Appellant.

60. The co-operation of Cameroon is consistent with its obligation to the Tribunal. The Statute and Rules mandate that States must comply with a request of the Tribunal for the surrender or transfer of the accused to the Tribunal[164]. This obligation on Member States of the United Nations is mandatory, since the Tribunal was established pursuant to Chapter VII of the Charter of the United Nations[165].

61. Thus, the Appeals Chamber finds that, under the facts of this case, Cameroon was holding the Appellant in constructive custody for the Tribunal by virtue of the Tribunal's lawful process or authority. In the present case, the Prosecutor specifically requested Cameroon to detain and transfer the Appellant[166]. The Statute of the Tribunal obligated Cameroon to detain the Appellant for the benefit of the Prosecutor[167]. The Prosecutor has admitted that it had personal jurisdiction over the Appellant after the Rule 40*bis* Order was issued. That Order also asserts personal and subject matter jurisdiction. This finding does not mean, however, that the Tribunal was responsible for each and every aspect of the Appellant's detention, but only for the decision to place and maintain the Appellant in custody. However, as will be discussed below, this limitation imposed on the Tribunal is consistent with international law. Even if the appellant was not in the constructive custody of the Tribunal, the principles governing the provisional detention of suspects should apply.

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[162] See footnote 122.
[163] See text at footnote 22.
[164] See Article 28(2)(e) and Rules 40 and 40*bis*.
[165] Prosecutor v. Tadić, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, 2 October 1995)at paras. 9-48.
[166] See *Decision* at p. 4.
[167] See Article 28(2)(d) of the Statute.

62. The Appeals Chamber recognises that international standards view provisional (or pre-trial) detention as an exception, rather than the rule[168]. However, in light of the gravity of the charges faced by accused persons before the Tribunal, provisional detention is often warranted, so long as the provisions of Rule 40 and Rule 40*bis* are adhered to. The issue, therefore, is whether the length of time the Appellant spent in provisional detention, prior to the confirmation of his indictment, violates established international legal norms for provisional detention of suspects.

63. It is well-established under international human rights law that pre-trial detention of suspects is lawful[169], as long as such pre-trial detention does not extend beyond a reasonable period of time[170]. The U.N. Human Rights Committee, in interpreting Article 9(2) of the ICCPR, has developed considerable jurisprudence with respect to the permissible length of time that a suspect may be detained without being charged. For example, in Glenford Campbell v. Jamaica[171], the suspect was detained for 45 days without being formally charged.

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[168] See, for example, ICCPR Article 9(3). The Appeals Chamber also takes judicial notice of the fact that pre-trial detention is not the norm throughout many civil law jurisdictions and is more commonly utilised in common law jurisdictions. Islamic law also has an aversion to pre-trial detention of accused persons: 'The system (with which most Westerners are familiar) of the pre-trial detention of accused persons, or their release on bail or promise to appear for trial, is generally not recognized under Islamic law. Most Islamic jurists agree that the accused should be at large prior to trial, since a mere accusation of guilt is not sufficient to justify the *Ta'azir* punishment of incarceration'. M. Lippman, S. McConville and M. Yerushalmi, Islamic Criminal Law and Procedure (New York: Praeger) at p. 62.

[169] Prosecutor v. Delalić, *Decision on Motion for Provisional Release filed by the Accused Zejnil Delalić*, Case No. IT-96-21-T, Trial Chamber II, 25 September 1996 at para. 21 and the cases cited therein.

[170] See, for example, Article 9(2) of the ICCPR, ECHR Article 5(2), ACHR Article 7(4), U.N. Human Rights Committee General Comment 8 and Committee of Ministers of the Council of Europe Resolution 65(11). See also Stögmüller v. Austria, A Series 9 (ECtHR 1969) at p. 40. The domestic criminal procedure codes of many States specify the length of permissible detention for suspects during the investigation phase. See, for example, Articles 24 and 25 of the Indonesian Code of Criminal Procedure. Pursuant to Article 24, an investigator may order the detention of a suspect for up to a maximum of 60 days for purposes of pre-trial investigation. Pursuant to Article 25, a public prosecutor may order the detention of a suspect for a *maximum* of 55 days. See Law-Book on The Code of Criminal Procedure (Act No. 8/1981), Department of Information, Republic of Indonesia. See also Article 208 of the Japanese Code of Criminal Procedure which provides that the maximum period of detention prior to being formally charged is 10 days, which may be extended to an absolute maximum of 28 days in the most exceptional circumstances. See B.J. George, Jr., "Rights of the Criminally Accused", 53 Law and Contemporary Problems, Nos. 1-2 (Winter and Spring 1990) at pp. 89-90. See also Article 10 of the Brazilian Code of Criminal Procedure, Decree-Law No. 3.689 of 3 October 1941, that limits the detention of suspects for investigative purposes to 10 days (as compared with 30 days for detained accused). Article 92(1) of the Chinese Criminal Procedure Law provides that once a suspect has been arrested, the period of time the suspect may remain in pre-trial detention while the police carry out their investigation is generally limited to two months. However, in "complicated cases", this period can be extended up to a *maximum* of seven months. See Wang Chenguang and Zhang Xianchu, Introduction to Chinese Law (Hong Kong: Sweet and Maxwell Asia, 1997) at § 5.09. See also "Opening to Reform? An Analysis of China's Revised Criminal Procedure Law," Lawyers Committee for Human Rights, October 1996 at pp. 25-28.

[171] Glenford Campbell v. Jamaica, *Communication* No. 248/1987, *Official Records of the Human Rights Committee 1991/1992*, CCPR/11/Add. 1 Volume ii, United Nations 1995, at p. 383.

In holding this delay to be a violation of ICCPR Article 9(2), the Committee stated the following:

> [T]he Committee finds that the author was not "promptly" informed of the charges against him: one of the most important reasons for the requirement of "prompt" information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority. A delay from 12 December 1984 to 26 January 1985 does not meet the requirement of article 9, paragraph 2[172].

64. Similar findings have been made in other cases involving alleged violations of ICCPR Article 9(2). For example, in Moriana Hernández Valentini de Bazzano[173], a period of eight months between the commencement of detention and filing of formal charges was held to violate ICCPR Article 9(2). In Monja Jaona[174], a period of eight months under which the suspect was placed under house arrest without being formally charged was found to be a violation of ICCPR Article 9(2). In Alba Pietraroia[175], the petitioner was detained for seven months without being formally charged and the Committee held that this detention violated ICCPR Article 9(2). Finally, in Leopoldo Buffo Carballal[176], a delay of one year between arrest and formal filing of charges was held to be a violation of ICCPR Article 9(2).

65. The Appeals Chamber also notes that the delay in indicting the Appellant apparently caused concern for President Kama. In a letter sent to the Appellant's Counsel on 8 September 1997, President Kama:

> I have already reminded the Prosecutor of the need to establish as soon as possible an indictment against Mr. Jean Bosco Barayagwiza, if she still intends to prosecute him. Only recently, Mr. Bernard Muna, the Deputy Prosecutor, reassured me that an indictment against Mr. Jean Bosco Barayagwiza should soon be submitted to a Judge for review[177].

However, even at that point the 90-day period had expired.

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[172] *Ibid* at p. 386, para. 6.3.

[173] Moriana Hernández Valentini de Bazzano Communication No. 5/1977, 15 August 1979, reprinted in U.N. Human Rights Committee, *Selected Decisions under the Optional Protocol (second to sixteenth sessions)*, CCPR/C/OP/1, United Nations 1985, at p. 40.

[174] Monja Jaona, Communication No. 132/1982, 1 April 1985, reprinted in U.N. Human Rights Committee, *Selected Decisions under the Optional Protocol, vol. 2 (seventeenth to thirty-second sessions)*, CCPR/C/OP/2, United Nations 1990, at p. 161.

[175] Alba Pietraroia, Communication No. 44/1979, 27 March 1981, reprinted in U.N. Human Rights Committee, *Selected Decisions under the Optional Protocol (second to sixteenth sessions)*, CCPR/C/OP/1, United Nations 1985, at p. 76.

[176] Leopoldo Buffo Carballal, Communication No. 33/1978, 27 March 1981, reprinted in U.N. Human Rights Committee, *Selected Decisions under the Optional Protocol (second to sixteenth sessions)*, CCPR/C/OP/1, United Nations 1985, at p. 63.

[177] *Prosecutor's Response*, Annex 12.

66. Additionally, the Trial Chamber, in its Decision dismissing the Extremely Urgent Motion, stated, 'It is regrettable that the Prosecution did not submit an indictment until 22 October 1997'[178]. Moreover, even the Prosecutor acknowledged that the delay in indicting the Appellant was not justified. During the oral argument on the Appellant's Extremely Urgent Motion on 11 September 1998, Mr. James Stewart, appearing for the Prosecutor, acknowledged that the Appellant could or should have been indicted earlier:

> Now, I will say this, and I have to be frank with you, the president of this tribunal – and this is reflected in one of the letters that was sent to the accused –was anxious for the prosecutor to produce an indictment, if we were going to indict this man, and it may have been that *the indictment was, was not produced as early as it could have been or should have been...* [179]

67. In conclusion, we hold that the length of time that the Appellant was detained in Cameroon at the behest of the Tribunal without being indicted violates Rule 40*bis* and established human rights jurisprudence governing detention of suspects. The delay in indicting the Appellant violated the 90-day rule as set forth in Rule 40*bis*. In the present appeal, Judge Aspregren issued the Rule 40*bis* Order with the proviso that the indictment be presented for confirmation within 30 days (the Rule permits for two 30-day extensions). In doing so, he invoked Sub-rule 40*bis*, thereby making an assertion of jurisdiction over the Appellant. The Prosecutor agrees that there was 'joined or concurrent jurisdiction' over the Appellant[180]. Sub-rule 40*bis*(H) provides explicitly that the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made if the indictment is not issued within 90 days. This limitation on the detention of suspects is consistent with established human rights jurisprudence.

3. The delay between the transfer of the Appellant and his initial appearance

68. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer. At the outset of this analysis the Appeals Chamber rejects the Prosecutor's contention that a 31-day holiday recess, between 15 December 1997 and 15 January 1998, could somehow justify this delay. The Appellant should have had his initial appearance well

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[178] *Decision* at p. 5.
[179] Prosecutor v. Barayagwiza, *Transcript*, 11 September 1998 at p. 72 (emphasis added).
[180] *Prosecutor's Response* at para. 13.

before the holiday recess even commenced and did not have it until over one month after the end of the recess.

69. The issue, therefore, is whether the 96-day period between the Appellant's transfer and initial appearance violates the statutory requirement that the initial appearance is held without delay. There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge during the period of the provisional detention and the Appellant contends that he was denied this opportunity. Consequently, it is even more important for the protection of his rights that his initial appearance was held without delay.

70. Rule 62, which is predicated on Articles 19 and 20 of the statute, provides that an accused shall be brought before the assigned Trial Chamber and formally charged *without delay* upon his transfer to the seat of the Tribunal. In determining if the length of time between the Appellant's transfer and his initial appearance was unduly lengthy, we note that the right of the accused to be promptly brought before a judicial authority and formally charged ensures that the accused will have the opportunity to mount an effective defence. The international instruments have not established specific time limits for the initial appearance of detainees, relying rather on a requirement that a person should 'be brought promptly before a Judge' following arrest[181]. The U.N. Human Rights Committee has interpreted 'promptly' within the context of 'more precise' standards found in the criminal procedure codes of most States. Such delays must not, however, exceed a few days[182]. Thus, in Kelly v. Jamaica[183], the U.N. Human Rights Committee held that a detention of five weeks before being brought before a Judge violated Article 9(3).

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[181] ICCPR Article 9(3). See also ICCPR Articles 9(2) and 14(3)(a); ECHR Articles 5(1)-(4) and 6(3); and ACHR Articles 7(3)-(6).

[182] See International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.D. Doc. HRI/GEN/Rev. 1 (1992), at p. 9, cited in M. C. Bassiouni and P. Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia, (Irvington-on-Hudson: Transnational, 1996) at p. 913, footnote 86.

[183] Kelly v. Jamaica, *Communication* No. 253/1987. However, the Committee has found that a period of 50 hours without being promptly brought before a Judge did not violate ICCPR Article 9(3). Portorreal v. The Dominican Republic, *Communication* No. 188/1984, reprinted in CCPR/C/OP/2 at p. 214. See also M. C. Bassiouni and P. Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia, *op. cit.*, at p. 913. The major human rights treaties make a *distinction* between what could be considered pre-trial or investigatory rights and rights that arise at or during trial. Thus, ICCPR Article 9, ECHR Article 5 and ACHR Articles 7(3)-7(6) embrace pre-trial or investigatory rights, while ICCPR Article 14, ECHR Article 6 and ACHR Article 8 cover trial rights. A comparison of ICCPR Article 9(2) and ICCPR Article 14(3)(a) show a striking similarity between those provisions with respect to the *right of the individual* to be promptly informed of the charges. The same is true of ECHR Article 5(2), ECHR Article 6(3) and ACHR Article 8(2)(b). An examination of the jurisprudence under the international human rights treaties shows that delays of as little as ten days between the arrest and the providing of the information required pursuant to ECHR Article 5(2) have been

71. Based on the plain meaning of the phrase, 'without delay', the Appeals Chamber finds that a 96-day delay between the transfer of the Appellant to the Tribunal's detention unit and his initial appearance to be a violation of his fundamental rights as expressed by Articles 19 and 20, internationally-recognised human rights standards and Rule 62. Moreover, we find that the Appellant's right to be promptly indicted under Rule 40*bis* to have been violated. Although we find that these violations do not result in the Tribunal losing jurisdiction over the Appellant, we nevertheless reaffirm that the issues raised by the Appellant certainly fall within the ambit of Rule 72[184].

72. In the Tadić Interlocutory Appeal Decision[185], the Appeals Chamber set forth several policy arguments for why a liberal approach to admitting interlocutory appeals is warranted. The Appeals Chamber there stated:

> Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed—this is by no means conclusive, but interesting nevertheless: *were not those questions to be dealt with in limine litis, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial.* After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of the Appellant's interlocutory appeal is indisputable[186].

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held to violate the 'promptness' requirement of ECHR Article 5(2). See Van Der Leer v. Netherlands, A Series 170-A, (ECtHR 1990), at para. 31. See also Glenford Campbell v. Jamaica, Communication No. 248/1987, in which the Human Rights Committee held that a delay of 45 days between detention and the presentation of *formal* charges violated Article 9(2) of the ICCPR. We note, however, that the right to be informed promptly at the trial stage of the proceedings is governed by ICCPR Article 14(3)(a) and ECHR Article 6(3), which are the fair trial provisions of those treaties and relate to accused persons. The pre-trial or investigatory due process provisions of ICCPR and ECHR, Article 9(2) and Article 5(3), respectively, were the provisions relied on in Glenford Campbell and Van Der Leer. We see no reason why the logic underlying those decisions is invalid solely on the basis that the individual concerned is an accused, rather than a suspect.

[184] See 5 February 1999 Scheduling Order, in which the Appeals Chamber found that the Trial Chamber's Decision 'dismissed an objection based on the lack of personal jurisdiction over the accused and, therefore, an appeal lies as of right under Sub-rule 72(D)'.

[185] Prosecutor v. Tadić, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, 2 October 1995.

[186] *Ibid.* at para. 6 (emphasis added).

We find that the challenge to jurisdiction raised by the Appellant is consistent with the logic underlying the decision reached in the Tadić case[187]. Given that the Appeals Chamber is of the opinion that to proceed with the trial of the Appellant would amount to an act of injustice, we see no purpose in denying the Appellant's appeal, forcing him to undergo a lengthy and costly trial, only to have him raise, once again the very issues currently pending before this Chamber. Moreover, in the event the Appellant was to be acquitted after trial we can foresee no effective remedy for the violation of his rights. Therefore, on the basis of these findings, the Appeals Chamber will decline to exercise jurisdiction over the Appellant, on the basis of the abuse of process doctrine, as discussed in the following Sub-section.

B. The Abuse of Process Doctrine

1. In general

73. The Appeals Chamber now considers, in light of the abuse of process doctrine[188], the Appellant's allegations concerning three additional issues: 1) the right to be promptly informed of the charges during the first period of detention; 2) the alleged failure of the Trial Chamber to resolve the *writ of habeas corpus* filed by the Appellant; and 3) the Appellant's assertions that the Prosecutor did not diligently prosecute her case against him. These assertions will be considered. Before addressing these issues, however, several points need to be emphasised in the context of the following analysis. First and foremost, this analysis focuses on the alleged violations of the Appellant's rights and is not primarily concerned with the entity responsible for the alleged violation(s). As will be discussed, it is clear that there are overlapping areas of responsibility between the three organs of the Tribunal and as a result, it is conceivable that more than one organ could be responsible for the violations of the Appellant's rights. However, even if fault is shared between the three organs of the Tribunal—or is the result of the actions of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus,

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[187] The Appeals Chamber notes that at the time of the Tadić appeal, ICTY Rule 72 and ICTR Rule 72 were identical in that both allowed an appeal based on 'an objection based on lack of jurisdiction'.

[188] 'Abuse of process' is distinguished from 'malicious prosecution' in that abuse of process results from improper use of regularly issued process, while malicious prosecution refers to wrongfully issued process. See Lobel v. Trade Bank of New York, 229 N.Y.S. 778, 781, 132 Misc. 643. See also Andrew L-T Choo, 'Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited', [1995] Crim. L.R. 864 and the cases cited therein. See also § 347 of the New Zealand Crimes Act of 1961. Under that provision, a Judge may order that,

under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights. Second, we stress that the circumstances set forth in this analysis must be read as a whole. Third, none of the findings made in this sub-section of the Decision, in isolation, are necessarily dispositive of this issue. That is, it is the combination of these factors—and not any single finding herein—that lead us to the conclusion we reach in this sub-section. In other words, the application of the abuse of process doctrine is case-specific and limited to the egregious circumstances presented by this case. Fourth, because the Prosecutor initiates the proceedings of the Tribunal, her special responsibility in prosecuting cases will be examined in sub-section 4, *infra*.

74. Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process. The House of Lords summarised the abuse of process doctrine as follows:

> [P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place[189].

It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.

75. The application of this doctrine has resulted in dismissal of charges with prejudice in a number of cases, particularly where the court finds that to proceed on the charges in light of egregious violations of the accused's rights would cause serious harm to the integrity of the judicial process. One of the leading cases in which the doctrine of abuse of process was applied is R. v. Horseferry Road Magistrates' Court *ex parte* Bennett[190]. In that case, the House of Lords stayed the prosecution and ordered the release of the accused, stating 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

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if lawful process has been abused, no indictment be presented or that other appropriate steps be taken for proceedings to be terminated at any stage of the proceedings.

[189] R. Latif; R. Shahzad, 1 All ER 353 (House of Lords 1996).

[190] R. v. Horseferry Road Magistrates' Court, *ex parte* Bennett, [1994] 1 AC 42, 95 I.L.R. 380 (House of Lords 1993).

> 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*[191].

The abuse of doctrine has been applied in several cases. For example, in Bell v. DPP of Jamaica[192], the Privy Council held that under the abuse of process doctrine courts have an inherent power to decline to adjudicate a case which would be oppressive as the result of unreasonable delay. In making this determination, the court set forth four guidelines for determining whether a delay would deprive the accused of a fair trial:

> (1) the length of the delay;
>
> (2) the prosecution's reasons to justify the delay;
>
> (3) the accused's efforts to assert his rights; and
>
> (4) the prejudice caused to the accused[193].

Regarding the issue of prejudice, in R. v. Oxford City Justices, *ex parte* Smith (D.K.B.)[194], the court applied the abuse of process doctrine in dismissing a case on the grounds that a two-year delay between the commission of the offence and the issuing of a summons was unconscionable, stating:

> In the present case it seems to me that the delay which I have described was not only quite unjustified and quite unnecessary due to inefficiency, but it was a delay of such length that it could rightly be said to be unconscionable. That is by no means the end of the matter. It seems to me also that the delay here was of such a length that it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case[195].

In R. v. Hartley[196], the Wellington Court of Appeal relied on the abuse of process doctrine in quashing a conviction that rested on an unlawful arrest and the illegally obtained confession that followed.

76. Closely related to the abuse of process doctrine is the notion of supervisory powers. It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice, regardless of a specific violation. The U.S. Supreme Court has stated that courts have a 'duty of establishing and maintaining civilized standards of procedure and

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[191] [1994] 1 AC 42, at p. 74; 95 I.L.R. at p. 406 (emphasis added).
[192] Bell v. DPP of Jamaica, [1985] AC 937.
[193] *Ibid.*
[194] R. v. Oxford City Justices, *ex parte* Smith (D.K.B.), 75 Cr App R 200 (Divisional Court 1982).
[195] *Ibid.* at p. 206.
[196] R. v. Hartley, 2 N Z.L.R. 199 (Court of Appeal, Wellington, 1978).

evidence' as an inherent function of the court's role in supervising the judicial system and process[197]. As Judge Noonan of the U.S. Ninth Circuit Court of Appeals has stated:

> This court has inherent supervisory powers to dismiss prosecutions in order to deter illegal conduct. The "illegality" deterred by exercise of our supervisory power need not be related to a constitutional or statutory violation[198].

The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process[199].

77. As noted above, the abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct. Considering the lengthy delay in the Appellant's case, 'it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case'[200]. The following discussion, therefore, focuses on whether it would offend the Tribunal's sense of justice to proceed to the trial of the accused.

2. The right to be promptly informed of the charges during the first period of detention

78. In the present case, the Appellant makes several assertions regarding the precise date he was informed of the charges[201]. However, using the earliest date, we conclude that the Appellant was informed of the charges on 10 March 1997 when the Cameroon Deputy Prosecutor showed him a copy of the Rule 40*bis* Order[202]. This was approximately 11 months after he was initially detained pursuant to the *first* Rule 40 request.

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[197] McNabb v. U.S., 318 US 332 (1943) at p. 340.

[198] U.S. v. Matta-Ballesteros, 71 F.3rd 754 (9th Cir. 1994) at p. 774, citing (in part) to U.S. v. Hasting, 461 U.S. 499, 505 (1983) (Noonan, J. concurring).

[199] In U.S. v. Hasting, the U.S. Supreme Court stated: '[G]uided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct'. See U.S. v. Hasting, 461 U.S. 499, 505 (1983) and the cases cited therein.

[200] R. v. Oxford City Justices, *ex parte* Smith (D.K.B.), *op. cit.* footnote 194.

[201] See footnote 18.

[202] *Ibid.*

79. Rule 40*bis* requires the detaining State to promptly inform the *suspect* of the charges under which he is arrested and detained[203]. Thus, the issue is when does the right to be promptly informed of the charges attach to suspects before the Tribunal[204]. Existing international norms guarantee such a right, and suspects held at the behest of the Tribunal pursuant to Rule 40*bis* are entitled, at a bare minimum, to the protections afforded under these international instruments[205], as well as under the rule itself. Consequently, we turn our analysis to these international standards.

80. International standards require that a suspect who is arrested be informed promptly of the reasons for his arrest and the charges against him[206]. The right to be promptly informed of the charges serves two functions. First, it counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect. In this respect, the suspect needs to be promptly informed of the charges against him in order to challenge his detention,

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[203] Although Rule 40*bis*(A) requires the Prosecutor to include a provisional charge with the materials submitted to the Judge in requesting the Order pursuant to Rule 40*bis*. Rule 40*bis*(E) requires the Registrar to serve on the suspect and counsel copies of the Rule 40*bis* order and the Prosecutor's request thereof 'as soon as possible'.

[204] Pursuant to Rule 40*bis*(E), copies of the provisional charges and Rule 40*bis* Order must be provided to the suspect as soon as possible. As discussed *supra*., at Sub-section IV.A.2., the Appellant was apparently shown a copy of the Rule 40*bis* Order and supporting materials on 10 March 1997—6 days after the Order was signed. However, the focus of the inquiry here is the determination of when the Appellant was actually notified of the general nature of the charges during the period of time prior to the Rule 40*bis* Order—that is, whether he was informed of the general nature of the charges at any time *after* the initial Rule 40 request on 17 April 1996, but *before* the filing of the Rule 40*bis* Order.

[205] We also note in this regard that the Appeals Chamber in Prosecutor v. Tadić, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1-AR72, 2 October 1995, at para. 46, pronounced that, 'The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute'. Although the Appeals Chamber in Tadić referred to Article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia, that article is verbatim to Article 20 of the Statute of the Tribunal. We also see no reason to conclude that the protections afforded to suspects under Article 9 of the ICCPR do not also apply to suspects brought before the Tribunal.

[206] See Article 9(2) of the ICCPR, Article 5(2) of the ECHR and Article 7(4) of the ACHR. The domestic criminal procedure codes of most States have similar provisions. See, for example, Article 5(3) of the Malaysian Constitution: 'Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice'. See also § 84 of the Thai Penal Code of 1956, which provides: 'The official or private person making the arrest shall immediately take the person arrested to the office of the administrative or police official and, on arrival, shall produce and read to him the warrant of arrest, if any, and shall notify him of the cause of arrest'. See also Article 9(3) of the Constitution of Singapore, which provides, "An arrested person has a right to be informed, as soon as may be, of the grounds of his arrest". Article 34 of the 1947 Constitution of Japan requires that persons under arrest or detention be immediately informed of the charges lodged against them. See B.J. George, Jr., 'Rights of the Criminally Accused', *op. cit.* at footnote 170. Moreover, Article 61 of the Japanese Code of Criminal Procedure (1980), provides as follows: 'The accused shall not be placed under detention before the court has informed the accused of the charge and has heard his statement regarding it. However, this shall not apply to the cases where the accused has escaped'. Section 25(3)(b) of the South African Constitution (1993) states that the accused has the right to be informed with 'sufficient particularity of the charge' against him. Section 17(2) of the Zimbabwean Emergency Powers (Maintenance of Law and Order) Regulations, Statutory Instrument No. 458 of 1983, provides that a person subjected to pre-trial detention be informed of the charges as soon as 'reasonably practicable after the commencement of his detention, and in any case not later than seven days thereafter, in a language that he understands of the reasons for his detention'.

particularly in situations where the prosecuting authority is relying on the serious nature of the charges in arguing for the continued detention of the suspect. Second, the right to be promptly informed gives the suspect the information he requires in order to prepare his defence[207]. The focus of the analysis in this Sub-section is on the first of these two functions. At the outset of this analysis, it is important to stress that there are two distinct periods when the right to be informed of the charges are applicable. The first period is when the suspect is initially arrested and detained[208]. The second period is at the initial appearance of the accused[209] after the indictment has been confirmed and the accused is in the Tribunal's custody. For purposes of the discussion in this Sub-section, only the first period is relevant.

81. The requirement that a suspect be promptly informed of the charges against him following arrest provides the 'elementary safeguard that any person arrested should know why he is deprived of his liberty'[210]. The right to be promptly informed at this preliminary stage is also important because it affords the arrested suspect the opportunity to deny the offence and obtain his release prior to the initiation of trial proceedings[211].

82. International human rights jurisprudence has developed norms to ensure that this right is respected. For example, the suspect must be notified 'in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, as he sees fit, to apply to a court to challenge its lawfulness...'[212]. However, there is no requirement that the suspect be informed in any particular way[213]. Thus, at this initial stage, there is no requirement that the suspect be given a copy of the arrest warrant or any other document setting forth the charges against him; in fact, there is no requirement at this stage that the suspect be notified in writing at all[214], so long as the suspect is informed promptly.

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[207] Consequently, the charges to be provided to the accused at this second stage must be 'more specific and more detailed' than that provided at the initial arresting stage. See Nielsen v. Denmark No. 343/57, 2 *Yearbook on the European Court of Human Rights* 412 at p. 462 (1959); GSM v. Austria No. 9614/81, 34 DR 119 (1983).

[208] See Rule 55, which governs execution of arrest warrants on accused, and which requires the arresting State to provide the arrested accused with a copy of the warrant for arrest and indictment. See also Article 9(2) of the ICCPR, Article 5(2) of the ECHR and Article 7(4) of the ACHR.

[209] See Articles 19(2) and 19(3) of the Statute and Rule 62. See also ICCPR Article 14(3)(a), ECHR Article 6(3)(a) and Article 8(2)(b) of the ACHR.

[210] Fox, Campbell and Hartley v. UK, A Series 182 (ECtHR 1990) at para. 40.

[211] X v. United Kingdom, No. 8010/77, 16 DR 101 at p. 114 (1979).

[212] *Ibid.*

[213] X v. Netherlands, No. 1211/61, 5 *Yearbook on the European Convention on Human Rights* 224 at 228 (1962).

[214] *Ibid.*

83. The European Court of Human Rights has held that the required information need not be given in its entirety by the arresting officer at the 'moment of the arrest', provided that the suspect is informed of the legal grounds of his arrest within a sufficient time after the arrest[215]. Moreover, the information may be divulged to the suspect in stages, as long as the required information is provided promptly[216]. Whether this requirement is complied with requires a factual determination and is, therefore, case-specific[217]. Consequently, we will briefly survey the jurisprudence of the Human Rights Committee and the European Court of Human Rights in interpreting the promptness requirement of Article 9(2) of the ICCPR, Article 5(2) of the ECHR and Article 7 of the ACHR.

84. As pointed out above[218], the Human Rights Committee held in Glenford Campbell v. Jamaica[219], that detention without the benefit of being informed of the charges for 45 days constituted a violation of Article 9(2) of the ICCPR[220]. Under the jurisprudence of the European Court of Human Rights, intervals of up to 24 hours between the arrest and providing the information as required pursuant to ECHR Article 5(2) have been held to be lawful[221]. However, a delay of ten days between the arrest and informing the suspect of the charges has been held to run afoul of Article 5(2)[222].

85. In the present case, the Appellant was detained for a total period of 11 months before he was informed of the general nature of the charges that the Prosecutor was pursuing against him. While we acknowledge that only 35 days out of the 11-month total are clearly attributable to the Tribunal (the periods from 17 April—16 May 1996 and 4—10 March 1997), the fact remains that the Appellant spent an inordinate amount of time in provisional detention without knowledge of the general nature of the charges against him. At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is

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[215] Fox, Campbell and Hartley v. United Kingdom, *op. cit.* footnote 210 at para. 40.
[216] *Ibid.*
[217] *Ibid.* See also X v. Denmark, No. 8828/79, 30 DR 93 (1982).
[218] See text at footnote 171, *supra*.
[219] Glenford Campbell v. Jamaica, *op. cit.* footnote 171 at p. 383. See also the cases cited in footnotes 173-176, *supra*.
[220] Mr. Campbell was initially arrested on suspicion of murder on 12 December 1984. He was charged with larceny on 25 January 1985 and with murder on 12 March 1985. Throughout the period in question, he remained in detention. *Ibid.*
[221] X v. Denmark, No. 6730/74, 1 Digest 457 (1975). See also Fox, Campbell and Hartley v. United Kingdom, *op. cit.* footnote 210 at paras. 40-43 (interval of up to seven hours between the arrests and the giving of al the information required by Article 5(2) were found to meet the requirement of 'promptness') and Delcourt v. Belgium, No. 2689/65, 10 *Yearbook on the European Convention on Human Rights* (1967) 238 at pp. 252 and 272.

attributable to the Tribunal, since it is the Tribunal—and not any other entity—that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated.

86. As noted above[223], in Bell v. DPP of Jamaica, the abuse of process doctrine was applied where unreasonable delay would have resulted in an oppressive result had the case gone to trial. Applying the guidelines set forth in that case convinces us that the abuse of process doctrine is applicable under the facts of this case. The Appellant was detained for 11 months without being notified of the charges against him. The Prosecutor has offered no satisfactory justifications for this delay. The numerous letters attached to one of the Appellant's submissions[224] point to the fact that the Appellant was in continuous communication with all three organs of the Tribunal in an attempt to assert his rights. Moreover, we find that the effect of the Appellant's pre-trial detention was prejudicial[225].

3. The failure to resolve the *writ of habeas corpus* in a timely manner

87. The next issue concerns the failure of the Trial Chamber to resolve the Appellant's *writ of habeas corpus* filed on 29 September 1997[226]. The Prosecutor asserts that *after* the Appellant filed the *writ of habeas corpus*, the President of the Tribunal wrote a letter to the

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[222] Van der Leer v. Netherlands, A Series 170-A (ECtHR 1990) at para. 31.

[223] See para. 75, *supra*.

[224] See Annexes 2, 11, 13-20 to *Appellant's Reply*.

[225] See, for example, Prosecutor v. Baravagwiza, *Transcript*, 11 September 1998, at pp. 39-40, in which the Appellant's Counsel argued, *inter alia*, that '[I]n the Cameroonian prison there was no food. In the Cameroonian prison there was no medical attention. Our client, who is the accused person, had a family. The accused person, your Lordships, had a small business which he was carrying on in Cameroon to feed his family. Indeed, as of the time our client was the accused person, was transferred to this Tribunal he was only 59 kilos. His health had deteriorated from more than 70 kilos because of the conditions which he met in the Cameroonian prison'.
Moreover, we find the words of Justice Powell in this respect convincing:

> We have discussed previously the societal disadvantages of lengthy pre-trial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

Barker v. Wingo, 407 US 514, 92 S.Ct. 2182 (1972), at p. 532-533.

[226] Regarding the date the *writ* was filed, see footnote 41.

Appellant[227] informing the Appellant that the Prosecutor would be submitting an indictment shortly[228]. In fact, the President's letter is dated *8 September 1997*, and the Appellant claims that the *writ* was filed on the basis of this letter from the President[229]. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997[230]. The Appellant asserts that 'the Registry without the consent of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'[231]. The Appellant also claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*[232]. These assertions by the Appellant are, of course, impossible for him to prove, absent an admission by the Prosecutor. We note, however, that the Prosecutor has not directed the Appeals Chamber to any evidence to the contrary, and that the Appellant was never afforded an opportunity to be heard on the *writ of habeas corpus*.

88. Although neither the Statute nor the Rules specifically address *writs of habeas corpus* as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules[233]. Moreover, this is a fundamental right and is enshrined in international human rights norms, including Article 8 of the Universal Declaration of Human Rights[234], Article 9(4) of the ICCPR, Article 5(4) of the ECHR and Article 7(6) of the ACHR. The Inter-American Court of Human Rights has defined the *writ of habeas corpus* as:

> [A] judicial remedy designed to protect personal freedom or physical integrity against arbitrary decisions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered[235].

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[227] *Prosecutor's Response*, Annex 12. See footnote 103.
[228] *Prosecutor's Response* at paras. 24-25.
[229] *Appellant's Reply* at para. 18.
[230] *Ibid.*
[231] *Ibid.*
[232] *Ibid.* at para. 21.
[233] See, for example, Articles 19 and 20 of the Statute and Rule 40*bis*(J).
[234] Article 8 reads: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.
[235] Habeas Corpus in Emergency Situations (Arts. 27(2) 25(1) and 7(6) of the American Convention on Human Rights, Advisory Opinion OC-8/87, 30 January 1987, Inter-Am.Ct.H.R. (Ser. A) No. 8 (1987) at para. 33.

Thus, this right allows the detainee to have the legality of the detention reviewed by the judiciary.

89. The European Court of Human Rights has held that the detaining State must provide recourse to an independent judiciary in all cases, whether the detention was justified or not[236]. Under the jurisprudence of that Court, therefore, a *writ of habeas corpus* must be heard, even though the detention is eventually found to be lawful under the ECHR[237]. Thus, the right to be heard on the *writ* is an entirely separate issue from the underlying legality of the initial detention. In the present case, the Appellant's right was violated by the Trial Chamber because the *writ* was filed but was not heard.

90. The Appeals Chamber is troubled that the Appellant has not been given a hearing on his *writ of habeas corpus*. The fact that the indictment of the Appellant has been confirmed and that he has had his initial appearance does not excuse the failure to resolve the *writ*[238]. The Appellant submits that as far as he is concerned the *writ of habeas corpus* is still pending. The Appeals Chamber finds that the *writ of habeas corpus* is rendered moot by this Decision. Nevertheless, the failure to provide the Appellant a hearing on this *writ* violated his right to challenge the legality of his continued detention in Cameroon during the two periods when he was held at the behest of the Tribunal and the belated issuance of the indictment did not nullify that violation.

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[236] See Winterwerp v. Netherlands, A Series 33 (ECtHR 1973) where the European Court stressed that it is essential that a detained person have access to a Court and the right to be heard on the issue of the provisional detention. Some commentators have argued that the theory underlying Article 5(4) of the ECHR is that a judicial remedy should be available to review the legality of an *administrative act of detention only*. Thus, if the detention is ordered by a 'court', Article 5(4) is redundant, since the detention order in that situation is 'incorporated' *into the court's order*. See D.J. Harris, M. O'Boyle and C. Warbrick, Law of the European Convention on Human Rights (Butterworth's 1995) at p. 151. Be that as it may, we do not consider that a Rule 40*bis* Order of a single Judge of the Tribunal constitutes an 'order by a court'. In this context, such an order is tantamount to administrative detention.

[237] De Wilde, Ooms and Versyp v. Belgium, No. 1, A Series 12 (ECtHR 1970) at para. 73. In that case, the European Court held that Article 5(4) had been violated, even though Article 5(1) had *not*. *Thus*, although Article 5(1) and Article 5(4) contain separate requirements, it is possible to find a violation of one provision without finding that the other had been violated. See also Van Der Leer v. Netherlands, A Series 170-A (ECtHR 1990) and Koendjbiharie v. Netherlands, A Series 185-B (ECtHR 1990).

[238] *In this regard*, we note that *had* the Appellant been released from provisional detention while the *writ* was pending—a situation not applicable under the facts of this case—the need to resolve the *writ* would have been obviated. See Fox, Campbell and Hartley v. UK, A Series 182 (ECtHR 1990) where the applicants sought *habeas corpus* the day after their arrest but were released within 24 hours, before their application was heard. Because the applicants had been released prior to the hearing on the writ, the Court declined to determine whether Article 5(4) of the European Convention on Human Rights (which governs *habeas corpus*) had been complied with.

4. The duty of prosecutorial due diligence

91. Article 19(1) of the Statute of the Tribunal provides that the Trial Chambers shall ensure that accused persons appearing before the Tribunal are guaranteed a fair and expeditious trial. However, the Prosecutor, has certain responsibilities in this regard as well. For example, the Prosecutor is responsible for, *inter alia*: conducting investigations, including questioning suspects[239]; seeking provisional measures and the arrest and transfer of suspects[240]; protecting the rights of suspect, by ensuring that the suspect understands those rights[241]; submitting indictments for confirmation[242]; amending indictments prior to confirmation[243]; withdrawing indictments prior to confirmation[244]; and, of course, for actually prosecuting the case against the accused.

92. Because the Prosecutor has the authority to commence the entire legal process, through investigation and submission of an indictment for confirmation, the Prosecutor has been likened to the 'engine' driving the work of the Tribunal. Or, as one court has stated, '[T]he ultimate responsibility for bringing a defendant to trial rests on the Government and not on the defendant'[245]. Consequently, once the Prosecutor has set this process in motion, she is under a duty to ensure that, within the scope of her authority, the case proceeds to trial in a way that respects the rights of the accused. In this regard, we note that some courts have stated that 'mere delay' which gives rise to prejudice and unfairness might by itself amount to an abuse of process[246]. For example, in R. Grays Justices ex p. Graham, the Queen's Bench stated in *obiter dicta* that:

> [P]rolonged delay in starting or conducting criminal proceedings may be an abuse of process when the substantial delay was caused by the improper use of procedure or inefficiency on the part of the prosecution and the accused has neither caused nor contributed to the delay[247].

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[239] See Article 15(1) of the Statute and Rule 39.
[240] Rules 40 and 40*bis*.
[241] Rule 42.
[242] Rule 47.
[243] Rule 50.
[244] Rule 51.
[245] United States v. Judge, 425 F.Supp. 499 at p. 504, citing to United States v. Fay, 505 F.2d 1037 (1st Cir 1976) at p. 1040.
[246] See R. v. Bow Street Stipendiary Magistrate, ex p. DPP; R v. Bow Street Stipendiary Magistrate, ex p. Cherry, 91 Cr App Rep 283, 154 JP 237, (Queen's Bench 1989), where the court held that in criminal proceedings, mere delay which gave rise to prejudice and unfairness may by itself amount to an abuse of process, and in some circumstances, prejudice would be presumed from substantial delay. In the absence of such a presumption, where there was such substantial delay, it would be for the prosecution to justify it.
[247] R. v. Grays Justices ex p. Graham, 1 QB 1239, 3 All ER 653, 3 WLR 596, 75 Cr. App. Rep. 229 (1982).

93. The Prosecutor has asserted that her 'abstention from proceeding against the Appellant-Defendant before 3 March 1997 was due to on-going investigation,[248]. The Prosecutor further argues that she should not be barred from proceeding against the Appellant simply because she did not proceed against the Appellant at the first available opportunity[249]. In putting forth this argument, the Prosecutor relies on Judge Shahabuddeen's Separate Opinion from the Kovačević Decision[250]. In that Separate Opinion, Judge Shahabuddeen referred to United States v. Lovasco[251], a leading United States case on pre-indictment delay, wherein the Court stated:

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgement as to when to seek an indictment. Judges are not free, in defining 'due process', to impose on law enforcement officers our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function'. ... Our task is more circumscribed. We are to determine only whether the action complained of—here, compelling respondent to stand trial after the Government delayed indictment to investigate further—violates ... "fundamental conceptions of justice..." which "define the community's sense of fair play and decency"...[252]

The Court continued:

> It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt[253].

94. The facts in Lovasco are clearly distinguishable from those of the Appellant's case, and, therefore, we do not find the Supreme Court's reasoning persuasive. In Lovasco, the respondent was subjected to an 18-month delay between the alleged commission of the offences and the filing of the indictment. However, Mr. Lovasco had not been arrested during the 18-month delay and was not in custody during that period when the police were conducting their investigation. We also note that in United States v. Scott, in a dissent filed by four of the Court's nine Justices, (including Justice Marshall, the author of the Lovasco

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[248] *Provisional Memorial* at para. 43.
[249] *Ibid.* at para. 42.
[250] Prosecutor v. Kovačević, *Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998*, and *Separate Opinion of Judge Mohamed Shahabuddeen*, Case No. IT-97-24-AR73, 2, July 1998.
[251] United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044 (1977).
[252] *Ibid.* at p. 790.
[253] *Ibid.* at p. 791.

decision), the Lovasco holding regarding pre-indictment delay was characterised as a 'disfavored doctrine'[254].

95. Moreover, in the Kovačević Decision[255] relied upon by the Prosecutor[256], the Appeals Chamber held that that the Rules provide a mechanism whereby the Prosecutor may seek to amend the indictment[257]. Pursuant to Rule 50(A), the following scheme for amending indictments is available to the Prosecutor. The Prosecutor may amend an indictment, without prior leave, at any time before the indictment is confirmed. After the indictment is confirmed, but prior to the initial appearance of the accused, the indictment may be amended only with the leave of the Judge who confirmed it. At or after the initial appearance of the accused, the indictment may be amended only with leave of the Trial Chamber seized of the case. The Prosecutor thus has the ability to amend indictments based on the results of her investigations. Therefore, the Prosecutor's argument that investigatory delay at the pre-indictment stage does not violate the rights of a suspect who is in provisional detention is without merit. Rule 40*bis* clearly requires issuance of the indictment within 90 days and the amendment process is available in situations where additional information becomes available to the Prosecutor.

96. Although a suspect or accused before the Tribunal is transferred, and not extradited, extradition procedures offer analogies that are useful to this analysis. In the context of extradition, several cases from the United States confirm that the prosecuting authority has a due diligence obligation with respect to accused awaiting extradition[258]. For example, in Smith v. Hooey, the Supreme Court found that the Government had a 'constitutional duty to make a diligent, good-faith effort to bring [the defendant] before the court for trial'[259]. In

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[254] United States v. Scott, 437 U.S. 82 (1978)(*diss. op.* Brennan, J.).

[255] Prosecutor v. Kovačević, *Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998*, and *Separate Opinion of Judge Mohamed Shahabuddeen, op. cit.* at footnote 243.

[256] *Provisional Memorial* at para. 42.

[257] See Rule 50.

[258] For example, in United States v. Pomeroy, 822 F.2d 718 (8th Cir. 1987), the court noted that, '[V]arious cases have placed an obligation on the Government to seek extradition of an accused incarcerated in a foreign state when a treaty exists under which the accused could be extradited'. *Ibid.*, at p. 720. In United States v. Saltzmann, 548 F.2d 395 (2nd Cir. 1976), the defendant was a foreign resident and claimed indigency. The Government failed to inform him that his transportation costs to the United States would be furnished at no cost to him. The defendant asserted that the resulting six-month delay and possible prejudice to his defence warranted dismissal of the indictment. The court agreed. In United States v. Judge, 425 F. Supp. 499 (D. Mass. 1976), the accused challenged an indictment, based on his right to a speedy trial. Although the Government was aware of the accused's address in Ecuador, the Government made no effort to inform the accused of the charges for four years. Upon his arrival in the U.S., he was arrested. The court dismissed the indictment on the grounds that the accused was ignorant of the indictment and had suffered prejudice as a result of the delay.

[259] Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575 (1969) at p. 383.

United States v. McConahy[260], the court held that the Government's obligation to provide a speedy resolution of pending charges is not relieved unless the accused fails to demand that an effort be made to return him and the prosecuting authorities have made a diligent, good faith effort to have him returned and are unsuccessful, or can show that such an effort would prove futile. We note that the Appellant made several inquiries of Tribunal officials regarding his status[261]. It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the *writ of habeas corpus*. Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant. Rather, it appears that the Appellant was simply forgotten about.

97. Moreover, conventional law and the legislation of many national systems incorporate provisions for the protection of individuals detained pending transfer to the requesting State[262]. We also note in this regard that the European Convention on Extradition provides that provisional detention may be terminated after as few as 18 days if the requesting State has not provided the proper documents to the requested State[263]. In no case may the provisional detention extend beyond 40 days from the date of arrest[264].

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[260] United States v. McConahy, 505 F.2d 770 (7th Cir. 1974).

[261] See Annexes 2, 11, 13-20 to *Appellant's Reply*.

[262] For example, Article 18(4) of the European Convention on Extradition (1957), European Treaty Series, No. 24. See also Article 18 of the French Extradition Act, which provides that the detainee must be automatically freed if agents of the requesting State have not taken custody of him within thirty days of the judicial order. Similarly, under United Kingdom law, discharge of the detainee is allowed after the expiration of one month from the date the warrant for return is made, unless an application for judicial review has been made. United Kingdom Extradition Act (1989) §16(2)(b). In other States, if the executive authorises the surrender, the requesting State has a prescribed period within which to collect the detainee and failure to do so will usually result in the right of the detainee to petition for his release. For example, see United Kingdom Extradition Act (1989) §§ 12, 13, and 16; Australian Extradition Act (1988) §§ 22-26; Swiss Statute on International Judicial Assistance in Criminal Matters (1991 as amended 9 December 1996) Articles 57 and 61; see also the U.S. Code § 3188, which allows the detainee to be discharged from custody after two months have elapsed, unless sufficient cause is shown for the delay. In the context of inter-state extradition within the United States, the Supreme Court of Ohio has held that, if no agent of the requesting State 'appears within 6 months from the time of arrest, the prisoner may be discharged'. See Ex p. Hiram P. McKnight, 28 N.E. 1034 (Sup. Ct. Ohio 1891) at pp. 1036-1037. Finally, bilateral extradition treaties may include similar provisions. For example, Article XII(2) of the Treaty on Extradition between Japan and the United States of America (3 March 1978), provides as follows: 'If an order to surrender has been issued by the competent authority of the requested Party and the requesting Party fails to receive the person sought within such time as may be stipulated by the laws of the requested Party, it may set him at liberty and may subsequently refuse to extradite that person for the same offense. The requesting Party shall promptly remove the person received from the territory of the requested Party'. *Ibid.*, reprinted in The Japanese Annual of International Law, No. 23, 1979-1980 at p. 41.

[263] European Convention on Extradition (1957), European Treaty Series, No. 24, Article 16(4).

[264] *Ibid.*

98. Setting aside for the moment the Prosecutor's contention that Cameroon was solely responsible for the delay in transferring the Appellant, the only plausible conclusion is that the Prosecutor failed in her duty to take the steps necessary to have the Appellant transferred in a timely fashion. The Appellant has claimed that the Prosecutor simply forgot about his case, a claim that is, of course, impossible for the Appellant to prove. However, we note that after the Appellant raised this claim, the Prosecutor failed to rebut it in any form, relying solely on the argument that it was Cameroon's failure to transfer the Appellant that resulted in this delay. The Prosecutor provided no evidence that she contacted the authorities in Cameroon in an attempt to get them to comply with the Rule 40*bis* Order[265]. Further, in the 3 June 1999 Scheduling Order, the Appeals Chamber directed the Prosecutor to answer certain questions and provide supporting documentation, including an explanation for the delay between the request for transfer and the actual transfer[266]. Notwithstanding this Order, the Prosecutor provided no evidence that she contacted the Registry or Chambers in an effort to determine what was causing the delay.

99. While it is undoubtedly true, as the Prosecutor submits, that the Registry and Chambers have the primary responsibility for scheduling the initial appearance of the accused, this does not relieve the Prosecutor of some responsibility for ensuring that the accused is brought before a Trial Chamber 'without delay' upon his transfer to the Tribunal. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer, in violation of his right to an initial appearance 'without delay'[267]. There is no evidence that the Prosecutor took any steps to encourage the Registry or Chambers to place the Appellant's initial appearance on the docket. Prudent steps in this regard can be demonstrated through written requests to the Registry and Chambers to docket the initial appearance. The Prosecutor has made no such showing and the only logical conclusion to be drawn from this failure to provide such evidence is that the Prosecutor failed in her duty to diligently prosecute this case.

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[265] In this regard, we reiterate that it is only possible to conclude from the record that the Appellant was transferred pursuant to the *Rule 40bis Request*, and not the *Warrant of Arrest and Order for Surrender*, since the Presidential Decree was signed before the *Warrant of Arrest and Order for Surrender*.

[266] See Sub section I.C., *supra*.

[267] See Rule 62. Moreover, Article 20(4)(c) of the Statute guarantees the accused a trial 'without undue delay'

C. Conclusions

100. Based on the foregoing analysis, we conclude that the Appellant was in the constructive custody of the Tribunal from 4 March 1997 until his transfer to the Tribunal's detention unit on 19 November 1997. However, international human rights standards comport with the requirements of Rule 40*bis*. Thus, even if he was not in the constructive custody of the Tribunal, the period of provisional detention was impermissibly lengthy. Pursuant to that Rule, the indictment against the Appellant had to be confirmed within 90 days from 4 March 1997. However, the indictment was not confirmed in this case until 23 October 1997. We find, therefore, that the Appellant's right to be promptly charged pursuant to international standards as reflected in Rule 40*bis* was violated. Moreover, we find that the Appellant's right to an initial appearance, without delay upon his transfer to the Tribunal's detention unit under Rule 62, was violated.

101. Moreover, we find that the facts of this case justify the invocation of the abuse of process doctrine. Thus, we find that the violations referred to in paragraph 101 above, the delay in informing the Appellant of the general nature of the charges between the initial Rule 40 request on 17 April 1996 and when he was actually shown a copy of the Rule 40*bis* Order on 10 March 1997 violated his right to be promptly informed. Also, we find that the failure to resolve the Appellant's *writ of habeas corpus* in a timely manner violated his right to challenge the legality of his continued detention. Finally, we find that the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence.

D. The Remedy

102. In light of the above findings, the only remaining issue is to determine the appropriate remedy for the violation of the rights of the Appellant. The Prosecutor has argued that the Appellant is entitled to either an order requiring an expeditious trial or credit for any time provisionally served pursuant to Rule 101(D). The Appellant seeks unconditional immediate release.

103. With respect to the first of the Prosecutor's suggestions, the Appeals Chamber notes that an order for the Appellant to be expeditiously tried would be superfluous as a remedy. The Appellant is already entitled to an expedited trial pursuant to Article 19(1) of the Statute. With respect to the second suggestion, the Appeals Chamber is unconvinced that Rule 101(D) can adequately protect the Appellant and provide an adequate remedy for the violations of his rights. How does Rule 101(D) offer any remedy to the Appellant in the event he is acquitted?

104. We turn, therefore, to the remedy proposed by the Appellant. Article 20(3) states one of the most basic rights of all individuals: the right to be presumed innocent until proven guilty. In the present case, the Appellant has been in provisional detention since 15 April 1996—more than three years. During that time, he spent 11 months in illegal provisional detention at the behest of the Tribunal without the benefits, rights and protections afforded by being formally charged. He submitted a *writ of habeas corpus* seeking to be released from this confinement—and was never afforded an opportunity to be heard on this *writ*. Even after he was formally charged, he spent an additional 3 months awaiting his initial appearance, and several more months before he could be heard on his motion to have his arrest and detention nullified.

105. The Statute of the Tribunal does not include specific provisions akin to speedy trial statutes existing in some national jurisdictions[268]. However, the underlying premise of the

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[268] See, for example, the U.S. Speedy Trial Act of 1974 (As Amended), 18 USC §§ 3161-3174. See also U.S. Federal Rules of Criminal Procedure, Rule 48(b), which permits for dismissal for unnecessary delay in bringing a defendant to trial. In United States v. Correia, 531 F.2d 1095 (1st Cir. 1976), the court held that Rule 48(b) is an independent of the right to a speedy trial, and is not limited to those situations in which the Sixth Amendment right to a speedy trial has been violated. *Ibid.*, at p. 1099. See also the U.S. Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, Rule 4, that provides: 'In all cases the Government must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the Government is not ready for trial within such time, or within the periods as extended by the District Court for good cause under Rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the District Court, after opportunity for argument, the charge shall be dismissed'. Cited in United States v. Saltzman, 548 F.2d 395 (2d Cir. 1976) at p. 400. Other States do not set forth specific time limits within which trials must get underway, but nevertheless guarantee against delays in the proceedings. For example, in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972), the U.S. Supreme Court set forth the following four factors that are to be taken into consideration in analysing a claim that the accused's right to a speedy trial have been violated:

1) the length of the delay;
2) the reason for the delay;
3) the defendant's assertion of his right; and
4) prejudice to the defendant.

Ibid. at p. 530 The Court acknowledged that this approach requires a balancing act, in which the conduct of both the prosecutor and the defence are weighed, and which compels courts to approach speedy trial cases on an

Statute and Rules are that the accused is entitled to a fair and expeditious trial[269]. The importance of a speedy disposition of the case benefits both the accused and society, as has been recognised by national courts:

> The criminal defendant's interest in prompt disposition of his case is apparent and requires little comment. Unnecessary delay may make a fair trial impossible. If the accused is imprisoned awaiting trial, lengthy detention eats at the heart of a system founded on the presumption of innocence. ... Moreover, we cannot emphasize sufficiently that the public has a strong interest in prompt trials. As the vivid experience of a witness fades into the shadow of a distant memory, the reliability of a criminal proceeding may become seriously impaired. This is a substantial price to pay for a society that prides itself on fair trials[270].

106. The crimes for which the Appellant is charged are very serious. However, in this case the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him. This finding is consistent with Rule 40*bis*(H), which requires release if the suspect is not charged within 90 days of the commencement of the provisional detention and Rule 40(D) which requires release if the Prosecutor fails to issue an indictment within 20 days after the transfer of the suspect. Furthermore, this limitation on the period of provisional detention is consistent with international human rights jurisprudence. Finally, this decision is also consistent with

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ad hoc basis. *Ibid.* In R. v. Smith, 2 S.C.R. 1120 (1989), the Canadian Supreme Court enunciated a similar test to be taken into account in deciding whether a criminal trial is being held within a reasonable period of time:

1) the length of the delay;
2) the reasons for the delay;
3) any waivers of time periods; and
4) whether there was any prejudice to the accused.

Ibid at p. 1131. In addition, the Constitutional Court of the Slovak Republic has determined that expeditious proceedings and hearings without unnecessary delays are required and that three criteria are relevant in analysing assertions that the trial has not proceeded expeditiously:

1) the legal and factual complexity of the case being heard;
2) cooperation of the parties; and
3) the procedures used by the court or other body.

See Finding of the Constitutional Court of the Slovak Republic, File Ref. II. ÚS 74/97, No. 28/98, 7 July 1998.

[269] Article 19(1).

[270] United States v. Saltzman, 548 F.2d 395 (2d Cir. 1976) at pp. 399-400.

national legislation dealing with due process violations that violate the right of the accused to a prompt resolution of his case[271].

107. Considering the express provisions of Rule 40*bis*(H), and in light of the Rwandan extradition request for the Appellant and the denial of that request by the court in Cameroon, the Appeals Chamber concludes that it is appropriate for the Appellant to be delivered to the authorities of Cameroon, the State to which the Rule 40*bis* request was initially made.

108. The Appeals Chamber further finds that this dismissal and release must be with prejudice to the Prosecutor. Such a finding is consistent with the jurisprudence of many national systems[272]. Furthermore, violations of the right to a speedy disposition of criminal charges have resulted in dismissals with prejudice in Canada[273], the Philippines[274], the United States[275] and Zimbabwe[276]. As troubling as this disposition may be to some, the Appeals Chamber believes that to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process. Moreover, we find that it is the only effective remedy for the cumulative breaches of the

[271] For example, pursuant to §3162 of the U.S. Speedy Trial Act of 1974 (as amended), *op cit.* footnote 268, the charges against the accused must be dismissed or otherwise dropped for failure to provide the accused with a speedy trial.

[272] See discussion at Sub-section IV.B.1. and the cases cited therein.

[273] See R. v. Askov, 2 R.C.S. 1199 (1990), wherein the Canadian Supreme Court held that a permanent stay of the proceedings is the only possible remedy for failure to bring an accused to trial promptly.

[274] See People of the Philippines v. Alberto Opida y Opiambao and Virgilio Marcelo, 1986 Philippine Supreme Court LEXIS 2598, where the Court unanimously ordered the release of the accused from pre-trial confinement as a result of the violation of their constitutional right to a speedy trial. Having found that the appellants' constitutional right to a speedy trial was violated, the Court stated:

> [W]e now declare that they should not be detained in jail a minute longer. While this is not to say that the accused are not guilty, it does mean that, because their constitutional rights have been violated, their guilt, if it exists, has not been established beyond reasonable doubt and so cannot be pronounced.

In a concurring opinion, Chief Justice Teehankee wrote:

> The Court stands as the guarantor of the constitutional and human rights of all persons within its jurisdiction and must see to it that the rights are respected and enforced. It is settled in this jurisdiction that once a deprivation of a constitutional right is shown to exist, the Court that rendered the judgment or before whom the case is pending is ousted of jurisdiction and habeas corpus is the appropriate remedy to assail the legality of the detention. So accused persons deprived of the constitutional right of a speedy trial have been set free.

[275] See Strunk v. United States, 412 U.S. 434, 440, 93 S.Ct. 2260 (1973), wherein the United States Supreme Court, having found the Appellant's right to a speedy trial violated, ordered the District Court Judgment of conviction set aside, the sentence vacated and the indictment dismissed.

[276] See In re Shadreck Sivapi Mlambo, Zimbabwe Supreme Court Judgment 221/91, cited in A.R. Gubbay in, 'Human Rights in Criminal Justice Proceedings: The Zimbabwean Experience', in M. Cherif Bassiouni and Ziyad Motala, The Protection of Human Rights in African Criminal Proceedings (Dordrecht: Kluwer, 1995) at pp. 307, 316-317. In this case, the Zimbabwean Supreme Court determined that a four-and-one-half year delay between arrest and commencement of the proceedings violated the accused's right to a speedy trial. In making this determination, the Court relied on the analysis set forth by the U.S. Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972).

accused's rights. Finally, this disposition may very well deter the commission of such serious violations in the future.

109. We reiterate that what makes this case so egregious is the combination of delays that seemed to occur at virtually every stage of the Appellant's case. The failure to hear the *writ of habeas corpus*, the delay in hearing the Extremely Urgent Motion, the prolonged detention of the Appellant without an indictment and the cumulative effect of these violations leave us with no acceptable option but to order the dismissal of the charges with prejudice and the Appellant's immediate release from custody. We fear that if we were to dismiss the charges without prejudice, the Appellant would be subject to immediate re-arrest and his ordeal would begin anew[277]. Were we to dismiss the indictment without prejudice, the strict 90-day limit set forth in Rule 90*bis*(H) could be thwarted by repeated release and re-arrest, thereby giving the Prosecutor a potentially unlimited period of time to prepare and submit an indictment for confirmation. Surely, such a 'revolving door' policy cannot be what was envisioned by Rule 40*bis*. Rather, as pointed out above[278], the Rules and jurisprudence of the Tribunal permit the Prosecutor to seek to amend the indictment if additional information becomes available. In light of this possibility, the 90-day rule set forth in Rule 40*bis* must be complied with.

110. Rule 40*bis*(H) states that in the event that the indictment has not been confirmed and an arrest warrant signed within 90 of the provisional detention of the suspect, the 'suspect shall be released'. The word used in this Sub-rule, 'shall', is imperative and it is certainly not intended to permit the Prosecutor to file a new indictment and re-arrest the suspect. Applying the principle of effective interpretation, we conclude that the charges against the Appellant must be dismissed with prejudice to the Prosecutor. Moreover, to order the release of the Appellant *without prejudice*—particularly in light of what we are certain would be his immediate re-arrest—could be seen as having cured the *prior* illegal detention. That would open the door for the Prosecutor to argue (assuming *arguendo* the eventual conviction of the Appellant) that the Appellant would not then be entitled to credit for that period of detention pursuant to Rule 101(D)[279], on the grounds that the release was the remedy for the violation of

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[277] We note in this regard, that in arguing in opposition to the Extremely Urgent Motion, Mr. James Stewart, appearing for the Prosecutor, stated the following: 'If the accused Barayagwiza is released, what happens then? Do we start all over again?' Prosecutor v. Barayagwiza, *Transcript*, 11 September 1998 at p. 54.

[278] See discussion at para. 95, *supra*.

[279] In this regard, we note that at several points during the oral arguments on the *Extremely Urgent Motion*, Mr. James Stewart, appearing for the Prosecutor, argued (without conceding the point) that if there were any defective procedures attendant to the arrest, indictment or transfer of the Appellant, those defects had been cured

his rights. The net result of this could be to place the Appellant in a worse position than he would have been in had he not raised this appeal. This would effectively result in the Appellant being punished for exercising his right to bring this appeal.

111. The words of the Zimbabwean Court in the Mlambo[280] case are illustrative. In ordering the dismissal of the charges and release of the accused, the Zimbabwean Court held:

> The charges against the applicant are far from trivial and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are charged with the commission of serious crimes. Yet, that trial can only be undertaken if the guarantee under...the Constitution has not been infringed. In this case it has been grievously infringed and the unfortunate result is that a hearing cannot be allowed to take place. To find otherwise would render meaningless a right enshrined in the Constitution as the supreme law of the land'[281].

We find the forceful words of U.S. Supreme Court Justice Brandeis compelling in this case:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself: it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face[282].

112. The Tribunal—an institution whose primary purpose is to ensure that justice is done—must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals—including those charged with unthinkable crimes—would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for

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by the Appellant's initial appearance before the Trial Chamber. See Prosecutor v. Barayagwiza, *Transcript*, 11 September 1998 at pp. 49, 50 and 71.

[280] In re Shadreck Sivapi Mlambo, *op.cit.* footnote 276.

[281] *Ibid.*

[282] Olmstead v. United States, 277 U.S. 438 (1928), at p. 485 (Brandeis, J. dissenting). See also the dissenting opinion of Justice Holmes in Olmstead where he stated: 'For my part I *think* it is a less evil that some criminals should escape than that *the Government* should play an ignoble part'. *Ibid.* at p. 470.

some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.

V. DISPOSITION

113. For the foregoing reasons, THE APPEALS CHAMBER hereby:

Unanimously,

(1) ALLOWS the Appeal, and in light of this disposition considers it unnecessary to decide the 19 October 1999 Notice of Appeal or the 26 October 1999 Notice of Appeal;

Unanimously,

(2) DISMISSES THE INDICTMENT with prejudice to the Prosecutor;

Unanimously,

(3) DIRECTS THE IMMEDIATE RELEASE of the Appellant; and

By a vote of four to one, with Judge Shahabuddeen dissenting,

(4) DIRECTS the Registrar to make the necessary arrangements for the delivery of the Appellant to the Authorities of Cameroon.

Judge Shahabuddeen appends a Separate Opinion to this Decision.

Judge Nieto-Navia appends a Declaration to this Decision.

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

Gabrielle Kirk McDonald
Presiding

Mohamed Shahabuddeen

Lal Chand Vohrah

Wang Tieya

Rafael Nieto-Navia

Dated this third day of November 1999
At The Hague,
The Netherlands.

[Seal of the Tribunal]

Appendix A
Chronology of Events

15 April 1996:	Cameroon arrests twelve to fourteen Rwandans on the basis of international arrest warrants. The accused was among those arrested. The parties disagree with respect to the question of under whose authority the accused was detained. The Appellant asserts he was arrested by Cameroon on the basis of a request from the Prosecutor, while the Prosecutor contends that the Appellant was arrested on the basis of international arrest warrants emanating from the Rwandan and Belgian authorities.
17 April 1996:	The Prosecutor requests that provisional measures under Rule 40 be taken in relation to the Appellant.
6 May 1996:	The Prosecutor seeks a three-week extension for the detention of the Appellant in Cameroon.
16 May 1996:	The Prosecutor informs Cameroon that she seeks to transfer and hold in provisional detention under Rule 40*bis* four of the individuals detained by Cameroon, *excluding* the Appellant.
31 May 1996:	The Court of Appeal in Cameroon issues a Decision to adjourn *sine die* consideration of the Rwandan extradition proceedings concerning the Appellant as the result of a request by the Cameroonian Deputy Director of Public Prosecution. In support of his request, the Deputy Director cites Article 8(2) of the ICTR Statute.
15 October 1996:	The Prosecutor sends the Appellant a letter indicating that Cameroon is not holding the Appellant at her behest.
21 February 1997:	The Cameroon court rejects Rwanda's extradition request for the Appellant. The court orders the Appellant's release, but he is immediately re-arrested at the behest of the Prosecutor pursuant to Rule 40. This is the second request under Rule 40 for the provisional detention of the Appellant.
24 February 1997:	Pursuant to Rule 40*bis*, the Prosecutor requests the transfer of the accused to Arusha.

4 March 1997:	An Order pursuant to Rule 40*bis* (signed by Judge Aspegren on 3 March 1997), is filed. This Order requires Cameroon to arrest and transfer the Appellant to the Tribunal's detention unit.
10 March 1997:	The Appellant is shown a copy of the Rule 40*bis* Order, including the general nature of the charges against him.
29 September 1997:	The Appellant files a *writ of habeas corpus*.
21 October 1997:	The President of Cameroon signs a decree ordering the Appellant's transfer to the Tribunal's detention unit.
22 October 1997:	The Prosecutor submits the indictment for confirmation.
23 October 1997:	Judge Aspegren confirms the indictment against the Appellant and issues a Warrant of Arrest and Order for Surrender to Cameroon.
19 November 1997:	The Appellant is transferred to Arusha.
23 February 1998:	The Appellant makes his initial appearance.
24 February 1998:	The Appellant files the Extremely Urgent Motion seeking to nullify the arrest.
11 September 1998:	The Trial Chamber hears the arguments of the parties on the Motion.
17 November 1998:	The Trial Chamber dismisses the Extremely Urgent Motion *in toto*.
27 November 1998:	The Appellant notified the Appeals Chamber of his intention to appeal, claiming that he did not receive the Decision until 27 November 1998. On that same day, he signs his Notice of Appeal.

DECLARATION OF JUDGE NIETO-NAVIA

I wish to clarify my position with respect to the fourth dispositive paragraph. According to Rule 40*bis*, the Appellant "shall be released or, *if appropriate*, be delivered to the authorities of the State to which the request was initially made" (emphasis added). I am not convinced that it is appropriate to direct the Registrar to make the necessary arrangements to deliver the Appellant to the Cameroonian authorities. The Appeals Chamber found that the Appellant was detained by Cameroon since 21 February 1997 "solely at the behest of the Prosecutor".[1] The Chamber further found that the "Appellant would have been released on 21 February 1997, when the Cameroon Court of Appeal denied the Rwandan extradition request and ordered the immediate release of the Appellant" *but for* the Tribunal's "valid request pursuant to Rule 40 for provisional detention, and shortly thereafter, pursuant to Rule 40*bis*, for the transfer of the Appellant".[2] Therefore, Cameroon is under no legal obligation to accept the Appellant unless they wish to proceed with his prosecution. Under these circumstances, the Registrar should obtain the views of the Cameroonian authorities, and deliver the Appellant to them only if appropriate.

Rafael Nieto-Navia
Judge

[1] Jean-Bosco Barayagwiza v. The Prosecutor, *Decision*, Appeal Chamber, Case No.: ICTR-97-19-AR72, para. 54
[2] *Ibid*., para. 55

UNITED
NATIONS

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 and 31 December 1994

Case No: ICTR-97-19-AR72

Date: 3 November 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: **Mr. Agwu U. Okali**

Decision of: **3 November 1999**

JEAN-BOSCO BARAYAGWIZA

v.

THE PROSECUTOR

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

Counsel for the Appellant:

Mr. Justry P. L. Nyaberi

The Office of The Prosecutor:

Mr. Mohamed C. Othman
Mr. N. Sankara Menon
Mr. Mathias Marcussen

3 November 1999

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

Preliminary

I agree with the Appeals Chamber that the appellant should be released and the indictment dismissed. But I do so only on the ground of delay between the time which elapsed between the appellant's transfer to the detention unit of the Tribunal on 19 November 1997 and the time of his initial appearance before the Trial Chamber on 23 February 1998. With regard to pre-transfer delay, I am not able to support the decision of the Appeals Chamber ("Decision"). As, in these respects, matters of some importance are involved, I should like to explain my position below. But it will be convenient to say something in the first place on the branch on which I agree with the Decision.

I. Post-transfer delay

The appeal is from the Trial Chamber's decision of 17 November 1998 on the appellant's Urgent Motion of 24 February 1998 (dated 19 February 1998). So far as concerns delay between transfer and initial appearance, paragraphs 2 and 9 of the Urgent Motion spoke of the appellant's "continued provisional detention". That would include the period following on transfer. This was made clear in Annexure DM2 to that motion. Under the heading "Violations of my Rights" and the subheading "Summary on detention time", this annexure stated the following: "**98 days** of detention after transfer and before initial appearance (19 November 97 - 23 February 98)" (emphasis as in the original).

At the time of his transfer, the appellant had already been indicted. He was then no longer a suspect and liable to be treated under the scheme of Rule 40*bis* of the Rules of Procedure and Evidence of the Tribunal ("Rules"); he was now an accused within the meaning of Rule 62 of the Rules. The delay of 98 days was in breach of the requirement of

Rule 62 that, upon "his transfer to the Tribunal, the accused shall be brought before a Trial Chamber without delay ..."[1].

That requirement of promptitude, which corresponds to standard international norms, was imposed by a specific provision having the force of law. That provision (Rule 62) is susceptible of the interpretation that non-compliance would result in loss of jurisdiction, on the view that jurisdiction was granted by the Statute to the Tribunal subject to defeasance for non-observance of certain fundamental principles stated or implied by the Statute, one of which was later reflected in that provision of the Rules. A different view seems to be taken in paragraph 71 of the Decision, which suggests that "delay between the transfer ... and ... initial appearance" does "not result in the Tribunal losing jurisdiction...". If jurisdiction continued, it is not easy to see how the appeal could be allowed under Rule 72(D). The appeal, under that Rule, is "in the case of dismissal of an objection based on lack of jurisdiction". The appeal invites the Appeals Chamber to uphold the objection based on lack of jurisdiction. It is difficult to appreciate how the Appeals Chamber can uphold an objection based on lack of jurisdiction if it finds that there was jurisdiction. My own respectful view is that, if there is impermissible delay, jurisdiction is lost and the Rule thereupon becomes applicable.

Matters to be taken into account in evaluating whether that consequence follows from a breach of the requirement of promptitude include the seriousness of the offences with which the accused is charged. Here the offences were serious. But the requirement of promptitude was fundamental, and its breach was also grave, the delay extending to a little over three months. On balance, I respectfully agree with the Appeals Chamber that the administration of justice by the Tribunal would suffer from proceeding with the case notwithstanding the delay.

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[1] A similar requirement to be brought before the Judge would apply under Rule 40*bis*(J) even if the appellant was still a suspect.

To be fair to the Trial Chamber, it has, however, to be pointed out that the oral arguments before it were devoted to the question of pre-transfer delay. As is shown by the transcript of the proceedings relating to the appellant's Urgent Motion, no issue was presented as to delay between transfer and initial appearance. The Trial Chamber was not given any reason to believe that there was such an issue.

Also, apart from the fact that the point was not raised orally before the Trial Chamber, it did not form part of the grounds of appeal. Twenty-two grounds of appeal were listed by the appellant in his Memorandum of Appeal of 27 November 1998 (filed on 10 December 1998); none of these grounds referred to delay between transfer and initial appearance. That can be seen from the summary of the appellant's arguments as presented in paragraphs 14-18 of the Decision of the Appeals Chamber, as well as from the summary of the Prosecutor's responding arguments, as presented in paragraphs 20-28 of that Decision. It does not appear that the Prosecutor thought that she was being called upon to meet an argument about delay between transfer and initial appearance. On the contrary, and obviously without thinking that there was such an issue, the Prosecutor was relying, *inter alia*, on the initial appearance to "cure" any previous defect. (Decision, para. 27).

That the appellant's appeal concerned pre-transfer delay is clear from paragraph 25 (the last paragraph) of the Defence Written Brief of 15 February 1999 (filed on 18 February 1999). There counsel for the appellant said:

> " ... the upshot of our submissions is that the Appellant was unlawfully held in Cameroon for about 21 months thereby robbing the Trial Chamber II of personal jurisdiction over him. His detention prior to his transfer to the Tribunal's detention unit was manifestly illegal and unlawful; it was long, arbitrary, tortuous and oppressive. He ought to be discharged unconditionally. Trial Chamber II's

decision was wholly unacceptable and we urge the Appeals Chamber to quash it and set the Appellant free".

Thus, what the appellant was seeking to do in the appeal was to challenge the decision of the Trial Chamber on his claim that his arrest and detention were illegal by reason of matters occurring before his transfer. The question of delay between transfer and initial appearance was not presented to the Appeals Chamber in the appellant's early appeal papers. The appellant has only activated the point in response to the recent query about it which was made by the Appeals Chamber on 3 June 1999.

It is also the case that the appellant is not on record as objecting to the Trial Chamber, which took his initial appearance, that there was lack of jurisdiction on the ground of delay between transfer and initial appearance. That is where the objection should naturally have been made.

Nevertheless, the delay was mentioned in the Urgent Motion, even though only clearly stated in an annexure. I consequently agree with the Appeals Chamber that the appellant is entitled to redress for it, but, in the circumstances mentioned above, I would exempt the Trial Chamber whose decision is under appeal from any significant responsibility.

I do not, however, agree with the fourth item of the disposition in the Decision, under which the Appeals Chamber "DIRECTS the Registrar to make the necessary arrangements for the delivery of the Appellant to the Authorities of Cameroon".

That direction means that custody is extended until "delivery of the Appellant to the Authorities of Cameroon" is effected – i.e., what is extended is the very custody which the Appeals Chamber says is invalid and because of which invalidity, in item three of the disposition, it orders the "IMMEDIATE RELEASE of the Appellant". If Cameroon does not accept delivery, custody by the Tribunal is indefinitely prolonged. If Cameroon accepts delivery, at the point of time at which Cameroon does so the appellant is in the custody of

Cameroon. I do not think that the fact that the delivery is to be made on the basis of "necessary arrangements" affects the matter.

If this is not a problem, it must be because it is considered that Cameroon has a duty to accept delivery of the appellant, or that, at any rate, Cameroon has some legal basis for doing so. Has it?

A possible argument is that the direction to the Registrar to make the necessary arrangements for the delivery of the appellant to the authorities of Cameroon can be supported by Cameroon's obligation to cooperate with the Tribunal. But also possible is an opposing argument that a state's obligation to cooperate with the Tribunal does not extend to assisting the Tribunal to correct its own errors. Whatever may be the strength of the latter argument, Cameroon can at any rate contend that, even if its duty to cooperate can be so extended, there should be reasonable limits to that duty and that those limits would be exceeded if it were to be required to accept delivery of the appellant in this case.

No doubt, Cameroon was at fault in not transferring the appellant to Arusha as speedily as it should have done in compliance with Judge Aspegren's order of 4 March 1997. Nevertheless, with full knowledge of that, the Tribunal did later issue an indictment and arrest warrant for the appellant. Thus, the Tribunal really wanted to have the appellant transferred to Arusha. This being so, and Cameroon having eventually made the transfer, why should it be under a duty to take back the appellant from the Tribunal?

The direction in which these arguments lie finds support from another quarter. In paragraph 107 of its Decision, the Appeals Chamber relies on Rule 40*bis*(H) of the Rules. For the reasons mentioned below, I do not think that that Rule applied; but, on the assumption that it did, the principle of the provision may be consulted.

Rule 40*bis*(H) of the Rules provides that, if an indictment has not been confirmed and an arrest warrant signed within a maximum period of 90 days after transfer, "the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request

was initially made". In determining when it is "appropriate" to deliver custody of the suspect to the requested state, it is useful to bear in mind that the Rule applies where, *inter alia*, "the Prosecutor has requested a State to arrest the suspect and to place him in custody, in accordance with Rule 40, or the suspect is otherwise detained by a State" (Rule 40*bis*(B)(i)). In the present case, immediately before his transfer from Cameroon to Arusha, the appellant could not be described as "otherwise detained by" Cameroon; he was then indeed detained by Cameroon, but solely at the request of the Tribunal. That being so, Cameroon would have no independent legal basis for asserting custody over the appellant if he was returned. It is, therefore, difficult to see how it could be "appropriate" to direct the Registrar to arrange for the "delivery" of the appellant to Cameroon, with the implication that at the point of delivery the appellant reverts to the custody of Cameroon.

The Appeals Chamber considers the criterion of appropriateness by saying:

> "Considering the express provisions of Rule 40*bis*(H), and in light of the Rwandan extradition request for the Appellant and the denial of that request by the court in Cameroon, the Appeals Chamber concludes that it is appropriate for the Appellant to be delivered to the authorities of Cameroon, the State to which the Rule 40*bis* request was initially made". (Decision, para. 107).

With respect, I do not appreciate how the dismissal of the extradition request justifies the conclusion "that it is appropriate for the Appellant to be delivered to the authorities of Cameroon, the State to which the Rule 40*bis* request was initially made". The extradition request was dismissed on 21 February 1997. The appellant was transferred to Arusha on 19 November 1997, that is to say, nine months later. Immediately before the transfer, he was being held by Cameroon but, as observed above, solely at the request of the Tribunal; Cameroon had no other basis for holding him. The Tribunal cannot now give Cameroon a basis which Cameroon does not otherwise have. Therefore it could not be "appropriate" for the Tribunal to require Cameroon to receive delivery of the Appellant from the Tribunal.

For these reasons, I should have thought that the proper order was to set the appellant at liberty and to direct the Registrar to provide him with reasonable facilities to leave Tanzania, if he so wishes.

2. The issue is whether there was lack of jurisdiction

As to the case concerning pre-transfer delay, it is useful to bear in mind that this is not an appeal from a final decision; it is an interlocutory appeal. The competence of the Appeals Chamber in a matter of this kind derives from the Rules. Rule 72(D) of the Rules provides that "[d]ecisions 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". It has not been contested that the appellant's Urgent Motion was a preliminary motion.[2]

The Appeals Chamber may interpret the position of an accused person in a preliminary motion before a Trial Chamber as amounting to an objection based on lack of jurisdiction. If there was such an objection, a dismissal of it would give him a right of appeal. But whether the appeal succeeds depends on whether the Appeals Chamber is satisfied not merely that such an objection was made, but also that it was sound - that is to say, that there was indeed a lack of jurisdiction in the fundamental sense which I believe is contemplated by Rule 72(D). In effect, there is, in my respectful view, a distinction between saying that an objection was based on lack of jurisdiction and saying that there was in fact a lack of jurisdiction as asserted in the objection.[3]

In this case, on 5 February 1999 the Appeals Chamber held that there was a dismissal of "an objection based on lack of jurisdiction", so that an appeal lay as of right. What it now

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[2] Rule 72(A) states that "Preliminary motions ... shall be brought (i) within sixty days following the disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(i), ...". The latter requires the Prosecutor to disclose certain material to the Defence "within 30 days of the initial appearance ...". Though dated 19 February 1998, the Urgent Motion was filed on 24 February 1998, i.e. a day after the initial appearance. It is assumed that the material required to be disclosed by the prosecution under Rule 66(A)(i) was disclosed. In any case, the question whether the Urgent Motion was a preliminary motion has been foreclosed by the fact that the Appeals Chamber has held that the appeal is admissible, as is mentioned below

[3] I sought to address the matter in a dissenting opinion in *Prosecutor v. Kanyabashi*, ICTR, Appeals Chamber, 3 June 1999.

has to determine is whether there was in fact a "lack of jurisdiction". So, did the Trial Chamber lack jurisdiction within the meaning of Rule 72(D) of the Rules by reason of any delay occurring during the pre-transfer period? I do not think so.

I shall try to explain my reasons in relation to the appellant's complaints concerning the furnishing of reasons for his arrest, non-compliance with the requirements of Rule 40*bis* of the Rules, the delay in transferring him from Cameroon to the Tribunal's detention unit in Arusha, and the non-hearing of his habeas corpus motion.

3. The question of non-disclosure of reasons for arrest

As to the appellant's complaint of non-disclosure of the reasons for his arrest, I agree with the Appeals Chamber's finding "that the Appellant was informed of the charges on 10 March 1997 when the Cameroon Deputy Prosecutor showed him a copy of the Rule 40*bis* Order". (Decision, para. 78). What the Appeals Chamber says is that this "was approximately 11 months after he was initially detained pursuant to the *first* Rule 40 request" (*ibid.*), and that "the Appellant was detained for a total period of 11 months before he was informed of the general nature of the charges that the Prosecutor was pursuing against him". (Decision, para. 85). It would not be correct to suggest, as these statements by themselves do, that during the whole of the 11-month period the appellant was being held at the instance of the Tribunal. And, indeed, the Appeals Chamber acknowledges "that only 35 days out of the 11-month total are clearly attributable to the Tribunal". (Ibid.). Nevertheless, the larger period seems to have influenced its finding "that the abuse of process doctrine is applicable under the facts of this case", that finding being immediately followed by the statement that the "Appellant was detained for 11 months without being notified of the charges against him" (Decision, para. 86) and being preceded, in paragraph 85 of the Decision, by the statement that at "this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal ...".

The exact period attributable to the Tribunal may be unclear; it was probably 40-46 days. The total consisted of two custodial periods which were initiated by requests from the Prosecutor to Cameroon. The first period began on 17 April 1996 and ended 29 days later on 16 May 1996. The second began nine months later, on 21 February 1997. It ended either 11 days later, on 4 March 1997, when there was filed a transfer order made by Judge Aspegren on 3 March 1997 (hereinafter referred to as Judge Aspegren's order of 4 March 1997), or, at the latest, on 10 March 1997, when a photocopy of the transfer order was shown to the appellant. During the first and longer of these two periods, and for some time both before and after it, the appellant was in fact being held by Cameroon under legal process not commenced by the Prosecutor. That does not say that the appellant was not also being held pursuant to the Prosecutor's request, but it is a fact worth noticing.

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Even if the two periods of custody initiated by the Prosecutor (separated by a nine-month gap and totalling 40-46 days) were for any reason legally defective (as to which I express no opinion), I do not see that this circumstance by itself prevented the Trial Chamber from subsequently exercising jurisdiction pursuant to Judge Aspegren's order of 4 March 1997. Speaking of the period of detention from 17 April 1996 to 16 May 1996, the Appeals Chamber said, "This detention – for 29 days – violated the 20-day limitation in Rule 40." (Decision, para. 52). But the Appeals Chamber did not go on to determine that that holding of invalidity as to that period of detention by itself operated to invalidate any subsequent period of detention. Accordingly, the question of non-disclosure need only be considered with respect to the period of detention covered by Judge Aspegren's order of 4 March 1997. By comparison, it seems that the Appeals Chamber considered the question of non-disclosure in relation to the 11-month period from 17 April 1996 to 10 March 1997, holding that "the delay in informing the Appellant of the general nature of the charges between the initial Rule 40 request on 17 April 1996 and when he was actually shown a copy of the Rule 40*bis* Order on

10 March 1997 violated his right to be promptly informed." (Decision, para. 101). In any event, as the Appeals Chamber otherwise recognised, not all of that period could be attributed to the Tribunal. As to Judge Aspegren's second order made on 23 October 1997 in consideration of Article 19(2) of the Statute and Rules 54 to 61 of the Rules, it is not my impression that a question of non-disclosure of reasons has been raised in connection with this.

The question, then, is whether there was undue delay between the commencement of custody after the making of Judge Aspegren's order of 4 March 1997 and 10 March 1997 when a photocopy, or facsimile, of the order was shown to the appellant, that is to say, a period of six days. The appellant was at the time being held pursuant to the Prosecutor's request of 21 February 1997, that request and the consequential detention being explicitly referred to in Judge Aspegren's order of 4 March 1997. In the light of Rule 40*bis*(B)(i), the intent of that Rule may be understood to be that an order made under the Rule would replace any existing period of detention effected at the request of the Prosecutor not from the time the order was made but from the time when the order was put into operation: otherwise there could be a gap. Thus, after 4 March 1997 it is difficult to appreciate why there should be any question of the appellant being first held and then only being later shown a copy of the Judge's order. So far as that order is concerned, it is reasonable to regard the appellant as being held on the date on which he was shown a copy of the order, namely, on 10 March 1997. However, assuming that there was a gap between these events, it seems to me that, in the peculiar circumstances in which the Tribunal is functioning, the jurisprudence of the European Court of Human Rights and the Human Rights Committee on the question of what period of delay is inadmissible does not require me to consider the gap as excessive.

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In parenthesis, it may be added that the appellant's complaint was that a photocopy of the Rule 40*bis* order which he was shown on 10 March 1997 was not a certified copy; he was

only shown a certified copy on 6 May 1997. If the photocopy was sufficient, he does not seem to be complaining of any delay in showing it to him on 10 March 1997. What would be applicable at that time would be the principle of Article 9(2) of the International Covenant on Civil and Political Rights. However, it is well understood, as I think is recognised in paragraph 82 of the Decision, that that provision (unlike Article 14(3)(a) of the Covenant) does not require communication of detailed charges or formalities; it is sufficient if the authorities give enough information (whether in writing or orally) to the arrested person of the substance of the allegation on the basis of which he was arrested so as to enable him to challenge the legality of the curtailment of his liberty on that basis, apart from also enabling him to begin the preparation of his defence. In this case, what was required was done.

Also, the appellant challenged the validity of Rule 40*bis* of the Rules as being in excess of the rule-making power conferred on the judges by Article 14 of the Statute. The challenge was correctly dismissed by the Trial Chamber. So too was his argument that, because of Article 19(2) of the Statute, he could only be arrested on the basis of a confirmed indictment. It is useful to mention these issues because they seemed to be connected in the appellant's mind with his arguments about non-disclosure of reasons.

*4. The provisions of Rule 40*bis *did not apply to pre-transfer detention*

The question which the foregoing leaves is whether there were other factors which impaired the legality of what may be regarded as a third custodial period commencing with Judge Aspegren's order of 4 March 1997 and ending with the transfer of the appellant to the detention unit of the Tribunal on 19 November 1997. The appellant says, and the Appeals Chamber agrees, that there was non-compliance with Rule 40*bis* of the Rules in relation to his detention in Cameroon at the instance of the Tribunal. I am not persuaded. A preliminary issue is whether the provisions of that Rule apply to pre-transfer custody.

I understand the Appeals Chamber to be taking the view that the appellant was "in the constructive custody of the Tribunal after the Rule 40*bis* Order was filed on 4 March 1997" (footnote omitted); on this basis, it considers that "the provisions of that Rule would apply" to the pre-transfer detention. (Decision, para. 54). With respect, to hold that "the provisions of that Rule would apply" before the transfer conflicts with the clear meaning of the Rule that the procedural guarantees which it provides begin to operate only as from the time of transfer to the detention unit of the Tribunal. This meaning of the Rule conforms with the holding of the Appeals Chamber that the "initial thirty-day period begins to run from the 'day after the transfer of the suspect to the detention unit of the Tribunal'". (Ibid., para.50).

The text of Rule 40*bis* need not be reproduced here; it is set out in the Decision and may be consulted there. It is enough to say that the body of the Rule corresponds to its title, which reads, "Transfer and Provisional Detention of Suspects". The Rule is speaking to the question of the mode of authorising a transfer of a suspect to the detention unit of the Tribunal in Arusha and to the question of the conditions under which he is to be provisionally detained after his transfer to that unit; it is not addressed to the conditions applicable to pre-transfer detention. The references in Rule 40*bis*(F) and (G) to an extension of time being granted "subsequent to an *inter partes* hearing" are at least consistent with the view that the protective procedures of Rule 40*bis* apply only after the transfer of the suspect to Arusha. The Rule assumes that there would always be an interval between arrest in the requested state and transfer to Arusha but that the time stipulated by the Rule would nevertheless begin to run only as from transfer. That assumption is overlooked by an interpretation which says that "the provisions of that Rule would apply" to pre-transfer detention and that accordingly the time stipulated by the Rule is to begin to run from the time of arrest in the requested state and not from the time of transfer to Arusha. If time is to begin to run from the time of arrest in the requested state, it cannot also begin to run from the time of transfer to Arusha. The plain

meaning of the text that the latter should be the case will therefore stand amended by force of judicial decree. That is not possible.

The Appeals Chamber draws attention to the circumstance that "the Prosecutor has acknowledged that between 21 February 1997 and 19 November 1997, 'there existed what could be described as joined or concurrent personal jurisdiction over the Appellant, the personal jurisdiction being shared between the Tribunal and Cameroon'". (Decision, para. 54). Jurisdiction is not necessarily custody, actual or constructive. The reality of the control exercised by Cameroon over the appellant is evidenced by the circumstance that effect to Judge Aspegren's transfer order of 4 March 1997 was given by an order made by the President of Cameroon on 21 October 1997, whereby the President authorised the transfer ("est autorisé, le transfert ..."): in effect, without the active participation of Cameroon, there could be no transfer.

The necessity, unremarkable enough, for the active participation of the requested state is not denied by *Ntakirutimana v. Attorney-General of the United States* (cited in paragraph 59 of the Decision). In that case, the appellate court of the requested state ruled in favour of the transfer of an accused whose surrender had been requested by the Tribunal. There is nothing in the appellate decision which shows that a requested state does not have exclusive custody of the accused person until transfer, or that, at any point of time before that stage, it would tolerate any assertion of authority by the Tribunal over the custody of the accused.

But, even if jurisdiction were necessarily the same as custody, I do not see how that suffices to found the Appeals Chamber's holding that "the provisions of [Rule 40*bis*] would apply" to the pre-transfer period of detention. (Decision, para. 54). Whether this is so or not depends on the terms of the Rule. The terms of the Rule limit its safeguards to post-transfer detention.

The maxim *ut res magis valeat quam pereat* may be thought supportive of the interpretation placed on Rule 40*bis* by the Appeals Chamber, which invokes it in paragraph

46 and footnote 127 of the Decision. However, it seems to me that the maxim, in the sense of "effective interpretation", is directed to the adoption of an interpretation which would give effect to the substantial purpose of the text; it is not directed to changing the substance of the purpose of the text. The latter is legislation, not interpretation.[4] Here the substantial purpose of the text is to ensure release if no indictment has been filed after a maximum period of provisional detention by the Tribunal following on transfer to the detention unit of the Tribunal in Arusha. That purpose is substantially changed if the procedure prescribed by the text is made to apply also to the materially different matter of pre-transfer detention in the requested state.

Within reasonable limits, the principle of the maxim in question is a good servant, and it has of course been repeatedly used in international law;[5] outside of reasonable limits, it is a bad master, colliding, for example, with statements to the effect that the duty of the court is to interpret and not to revise a treaty or to rewrite it or to reconstruct it.[6] The maxim cannot be applied in a way which overlooks a distinction between the general sentiment inspiring a provision and the actual purpose of the provision.[7] In this case, the general sentiment underlying Rule 40*bis* was unquestionably a concern with the liberty of a suspect; it does not follow that the specific procedure laid down by the Rule was directed to ensuring his liberty in all circumstances in which his liberty might be in question.

Judge Aspegren, correctly, did not understand Rule 40*bis* in the way in which the Rule has been interpreted by the Appeals Chamber, namely, that "the provisions of that Rule

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[4] An example of the proper functioning of the maxim is provided by the decision in a case in which a statutory provision "which empowered justices to suspend, in case of sickness, the order of removal of any pauper who should be 'brought before them for the purpose of being removed,' was construed as authorising such suspension without the actual bringing up of the pauper before the justices, as the literal construction would have defeated the humane object of the enactment". (See Sir Peter Benson Maxwell, *The Interpretation of Statutes*, 9th ed., p. 244, citing *R. v. Everdon* (1807), 9 East. 101). There the substantial purpose of the statute - to suspend a removal order in case of sickness - was not changed; what the interpretation did was to say that the prescribed mechanism for giving effect to that purpose was not exhaustive.

[5] See, for example *The Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, p. 25, para. 51.

[6] See, inter alia, *Acquisition of Polish Nationality, P.C.I.J., Ser. B, No. 7, p. 20; The Peace Treaties, I.C.J.Reports 1950, p. 229; and Aerial Incident of 27 July 1955, I.C.J.Reports 1959*, p. 183, Judge Sir Hersch Lauterpacht, dissenting.

[7] In *Nuclear Tests (New Zealand v. France), I.C.J. Reports 1995*, p.313, I happened likewise to think that a distinction could be drawn between general motivation and specific solution.

would apply" to pre-transfer detention. The operative provisions of his order of 4 March 1997 stated as follows:

> "Orders the transfer of the suspect Jean Bosco Barayagwiza to the Tribunal's dominion;
>
> Orders the provisional detention of Jean Bosco Barayagwiza in the Tribunal's Detention Facilities for a maximum period of thirty days from the day after his transfer;
>
> Respectfully requests the Cameroonian Government to comply with the Tribunal's order for transfer, and to keep Jean Bosco Barayagwiza in custody until he is handed over to the Tribunal for transfer and detention under the authority of the Tribunal;
>
> Requests the Prosecutor to submit the indictment against Jean Bosco Barayagwiza before the expiration of the said 30-day limit of the provisional detention;
>
> Requests the Registrar of the Tribunal to notify the Cameroonian Government and to inform the Rwandan Government of this decision"

Judge Aspegren's order visualised that the transfer would be made to the detention unit of the Tribunal in Arusha; that, pending transfer, Cameroon would hold the suspect in custody; and that, within 30 days of the transfer, the Prosecutor would submit an indictment against him.[8] In the event, Cameroon did not make the requested transfer until 19 November 1997. It is not easy to see how this delay operated to impose a reading on Judge Aspegren's order of 4 March 1997 so as to require the Prosecutor to submit an indictment within 30 days of the date of the order, instead of 30 days of the date of the transfer as the Judge plainly intended. The indictment was both submitted and confirmed even before the accused was transferred to the Tribunal's detention unit and therefore even before the 30-day period

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[8] The judge was thus giving the prosecution less time to present an indictment than could be allowed under Rule 40*bis*. A question, into which I do not enter *without* the benefit of argument, is whether he could competently do so having regard to the circumstance that such a requirement is not specified as one of the conditions which, if satisfied, ground a mandatory duty of the judge to issue an order. The judge could refuse to extend time after the first maximum period of 30 days; but could he at the beginning of the process impose a requirement to file an indictment within that time? Possibly, a term to similar effect could be imposed as a condition of renewal of

specified in the Judge's order had begun to run. By contrast, the Appeals Chamber held that the "delay in indicting the Appellant violated the 90-day rule as set forth in Rule 40*bis*". (Decision, para. 67). That was so only if the interpretation of the Appeals Chamber as to when time begins to run under that Rule is correct.

If a suspect is held by a requested state under a Rule 40*bis* order for an unreasonable time, the answer is not to square the circle and to force upon the Rule a meaning which it cannot bear, but to move before the issuing judge or a Trial Chamber for relief as suggested in the second and third of three courses mentioned in section 5 below. These courses need not rest on any theory of constructive custody. Constructive custody or no constructive custody, if the suspect is being made to suffer as a result of process issuing out of the Tribunal, the Tribunal has competence to correct the injustice by terminating the process which leads to that result. But that does not mean that "the provisions of [Rule 40*bis*] would apply" to pre-transfer detention.

In my view, under Rule 40*bis*(C) time begins to run only from the transfer of the suspect to the detention unit of the Tribunal. On that basis, the safeguard steps prescribed by the provision were not violated.

*

I have considered an alternative interpretation of the Decision of the Appeals Chamber. This is that, while the *provisions* of Rule 40*bis* did not themselves apply to the pre-transfer period, the *principle* of those provisions applied on the basis that the appellant was in the constructive custody of the Tribunal and therefore entitled to the protection of the purpose of the Rule, which was largely to secure the release of an arrested person if a confirmed indictment was not presented against him within a maximum of 90 days. Granted, for the purposes of argument, the applicability of the theory of constructive custody, the suggested interpretation really rests on the idea of abuse of process. However, as will be later

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the period, but that is another question.

argued, that concept assumes the continued existence of jurisdiction, with the result that an entitlement to release by reason of that concept could not be said to rest on lack of jurisdiction within the meaning of Rule 72(D) of the Rules under which the appeal is being entertained. The point, in its more general aspect, is dealt with in section 8 below.

5. The delay in making a transfer from Cameroon to Arusha

The appellant's main contention lies in his complaint that the Tribunal was responsible for failing to ensure that he was transferred by Cameroon to the Tribunal's detention unit as speedily as possible in accordance with Judge Aspegren's order of 4 March 1997; the appellant was not transferred until 19 November 1997. The Appeals Chamber takes the view that the Tribunal was responsible on the ground that the appellant was in the constructive custody of the Tribunal while he was held in Cameroon at the Tribunal's request, a view which, as I understand it, is premised on there being a relationship of agent and principal as between Cameroon and the Tribunal. (See para. 56 of the Decision, where references are made to "agent" as used in United States case-law). With respect, I am not persuaded that that was the relationship or that there was any relationship giving rise to constructive custody.

I favour the submission of the Prosecutor that Cameroon and the Tribunal are not the *alter ego* of each other. What the Security Council did was to apportion responsibilities to states and to the Tribunal on the basis of there being a legal obligation on the part of states to cooperate with the Tribunal - an obligation deriving immediately from the Statute of the Tribunal and ultimately from the Charter of the United Nations. A state which is cooperating with the Tribunal is discharging its own responsibilities and not those of the Tribunal.

The obligation of a state to cooperate with the Tribunal may be triggered in different ways; however triggered, the obligation remains that of the state. The trigger could be an order of a judge requesting the state to hold the suspect and to transfer him to the detention

unit of the Tribunal. The order of the judge of the Tribunal is but the condition precedent to the activation of the obligation of the state under the Statute; it does not create a relationship of agent and principal as between the state and the Tribunal or put the Tribunal in constructive custody of the suspect for the purpose of fixing it with responsibility for the acts or omissions of the state. If, for example, the state were to hold the suspect in unacceptable physical conditions, the responsibility would be that of the state, not of the Tribunal. The state and the Tribunal are each separately responsible for their own acts or omissions.

Arguing for a different view, the Decision of the Appeals Chamber refers to what is substantially United States internal extradition law. Generally valuable as is that respected body of law, I am not confident of the utility of any analogies which it furnishes, in this particular field, on the subject of principal and agent, or on the subject of constructive custody, or on the subject of detainer process. Internal extradition in the United States "is founded on, and controlled by, the Constitution of the United States and effectuating federal statutes"; it is not "governed by the same principles as are applicable to international extradition"; the proceedings are "sui generis". (See 35 *Corpus Juris Secundum*, p. 381). True, as it was put in a dissenting opinion in a United States case, "The Tribunal is not a sovereign nation". (*Ntakirutimana v. Attorney-General of the United States, supra*, Judge DeMoss, dissenting). But neither is it a state within a federal-type arrangement. The legislation and jurisprudence of a particular state as to relations between components of the state offer limited guidance on relations between the Tribunal and states which are sovereign on the international plane. These latter relations are regulated by the unique system devised by the Statute of the Tribunal; they are not based on the internal distribution of power among the units of a state, however those units are designated.

But the foregoing does not mean that there is nothing that the Tribunal can or should do. The Tribunal has an obligation to consider the situation if in fact delay is caused by the state. Three possibilities may be considered:

The first possibility arises under Article 28 of the Statute and the corresponding provisions of Rule *7bis* of the Rules, relating to the duty of states to cooperate with the Tribunal.[9] Under those provisions, the President of the Tribunal may report the conduct of a non-cooperating state to the Security Council. The remedy thus provided is a powerful one; but it may come too late so far as the suspect is concerned. More pertinently, it does not result from the kind of decision that would ground an appeal.

A second possibility is this. The view can be taken that the power of a judge to issue an order for custody and transfer includes by necessary implication power to rescind the order in proper cases. Whether or not recourse was made to the reporting provisions mentioned above, if, on a report from the Registrar or the Prosecutor or on an application made by or on behalf of the suspect, the judge, after an appropriate hearing, was satisfied that the suspect was kept too long in custody and was consequently suffering unjustly because of the process of the Tribunal, the judge could, in my opinion, competently rescind the order and thus set the suspect at liberty so far as the Tribunal was concerned. He could do so on the footing that any authority given by him to the state to hold the suspect in custody pending transfer incorporated an implicit condition that the authority was to be exercised by the state within a reasonable time (as is implied, in the case of an accused, by Rule 59(B) of the Rules), and that, accordingly, the judge retained competence to consider whether the condition had been breached. No question of constructive custody need be involved.

But a decision of that kind would not be a decision on a preliminary motion within the meaning of Rule 72(D) of the Rules, and there could be no question of an appeal. Even if such a decision were one on a preliminary motion, appellate intervention would really rest on the doctrine of abuse of process, the question being whether the proceedings should be stayed in the light of the delay in giving effect to the process of the Tribunal. As argued below, the

[9] The reporting provisions of Rule 59 of the Rules seem to be restricted to the case of an accused, as distinguished from a suspect.

application of this doctrine would not result in a finding of lack of jurisdiction so as to entitle the Appeals Chamber to give a remedy under Rule 72(D) of the Rules.

A third possibility remains. It may be said that the *statutory* power of the Prosecutor to investigate and to prosecute was impliedly conditioned by a duty of due diligence, which in turn required her to be active on the question of compliance by Cameroon with the judge's transfer order. I respectfully agree with the Appeals Chamber in considering that that is right; after all, it is the Prosecutor who wanted the suspect to be transferred for purposes of continuing investigations relating to the same suspect. It follows that failure to discharge the duty to monitor the situation could ground a release by the judge. The appellant says that he was simply "forgotten" by the Prosecutor. The evidence does not go all that way, but it goes far enough to recall that there "is as a rule no difficulty encountered by doing nothing or little".[10] The trouble is that doing nothing or little in this case was not allowed.

But, again, a decision of that kind would not be a decision on a preliminary motion. Even if the decision could be regarded as one made on a preliminary motion, appellate intervention would really rest on the doctrine of abuse of process, the question being whether the proceedings should be stayed in the light of the delay produced by the neglect. As argued below, that doctrine would not ground an interlocutory appeal on the basis of lack of jurisdiction.

Thus, in none of the three cases can the Appeals Chamber intervene.

6. The failure to hear the appellant's habeas corpus motion

Now for the question of the appellant's habeas corpus motion of 29 September 1997 (filed on 2 October 1997). In paragraph 90 of its Decision, the Appeals Chamber found that "the failure to provide the Appellant a hearing on this *writ* violated his right to challenge the legality of his continued detention in Cameroon during the two periods when he was held at

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[10] *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23 at p. 53, Judge Sir Hersch Lauterpacht, separate opinion.

the behest of the Tribunal...". But for the fact that its actual decision rendered the point moot, it is evident that the Appeals Chamber would have ordered a hearing of the habeas corpus motion on the basis that it is "still pending", as asserted by the appellant, in which case the question of release would fall to be decided both in the present proceedings and in the habeas corpus motion.

I am not persuaded that an issue relating to the hearing of the habeas corpus motion is before the Appeals Chamber. This is because none of the twelve prayers addressed to the Trial Chamber in the Appellant's Urgent Motion of 24 February 1998 referred to the habeas corpus motion, complained of non-hearing of it, or sought a hearing of it. It has to be remembered that the appeal is from the decision of the Trial Chamber on that Urgent Motion.

The Trial Chamber was not asked by the appellant to determine an objection based on lack of jurisdiction arising from the non-hearing of the habeas corpus motion. The Trial Chamber's summary of the issues presented to it by the defence, as set out in its written decision, shows that it did not consider that it had such an objection before it. That is supported by the transcript of the oral arguments before the Trial Chamber. As is seen below, defence counsel mentioned the habeas corpus motion in the course of his oral arguments before the Trial Chamber, but he did not, in my view, do so on the basis that the motion was still outstanding and should be heard. Interestingly too, none of the twenty-two errors alleged in the appellant's Memorandum of Appeal of 27 November 1998 (filed on 10 December 1998) complained about the Trial Chamber's decision in so far as the habeas corpus motion was concerned.

It is not correct to tax the Trial Chamber with not dealing with an issue which it was not asked to determine. Nor, subject to narrow exceptions, can it be right for the Appeals Chamber to pass on an issue which was not argued before the Trial Chamber and on which the latter has not expressed its views, either as to the facts or as to the law. The jurisdiction of the Appeals Chamber is limited to matters which formed part of an objection based on lack

of jurisdiction which was dismissed by the Trial Chamber. No such objection was dismissed by the Trial Chamber so far as concerns the non-hearing of the habeas corpus motion. Consequently, the Appeals Chamber is without jurisdiction to deal with the point.

Further, I do not consider that a hearing of the habeas corpus motion by any Chamber is still required. The Appeals Chamber can draw a reasonable inference that, at the time, defence counsel himself took the view that the filing of the indictment made a hearing pointless. In the Trial Chamber, defence counsel said that "these [documents relating to the indictment] were meant [presumably by the Prosecutor] to pre-empt the argument of our application for habeas corpus". (Transcript of oral arguments in the Trial Chamber, 11 September 1998, pp. 84-85). Defence counsel did not say that he himself did not share the view that the filing of the indictment would pre-empt the argument of the application for habeas corpus; I think that at the time he thought that it would.

And why would he think so? Because of the nature of the orders requested in the habeas corpus motion. These, as set out in that motion, were as follows:

"1. An order for Habeas Corpus requiring that the suspect Jean Bosco Barayagwiza be produced before the tribunal.

2. An order requiring the immediate release of Jean Bosco Barayagwiza who is currently in prison custody in Yaounde, Cameroon.

3. An order requiring that in the alternative and if for any lawful reason the suspect, Jean Bosco Barayagwiza cannot be released, he be indicted and transferred to the tribunal's seat in Arusha within 30 days or such reasonable time as this Honourable Tribunal may set.

4. An order requiring that in the meantime, the suspect Jean Bosco Barayagwiza be accorded medical attention by the tribunal and that the tribunal do provide him with food and other basic needs."

Thus, in the alternative to his immediate release, what the appellant sought was an indictment and transfer to the Tribunal's seat in Arusha. In these respects, the position later changed in favour of the very position desired by the appellant: an indictment was filed and he was transferred to Arusha. A principal part of the prayers of his motion thereby became *sans objet*. Further, after the transfer he could no longer ask for medical attention and food - the complaint was directed to the period while he was in Cameroon. What was left was a demand for his release. But since this demand was taken over by his Urgent Motion of 24 February 1998, it cannot credibly be accepted that the original habeas corpus request was regarded by counsel for the appellant as "still pending" so as to result in duplicated applications before the Trial Chamber on the same point. Habeas corpus is of course a great writ; but that does not settle everything. If, in this case, the motion for the writ is not "still pending", it simply cannot be considered, with the result that there is no need to review cases in which, although a matter has become moot, the fundamental importance of the issues involved may justify a pronouncement.[11]

The appellant suggests that the Prosecutor somehow managed to arrange for the removal of the case from its place in the hearing list, on which, so he was informed, it was due to be heard on 31 October 1997. The appellant has no proof of that. What he could say, but what he does not say, is whether he later sought to get the Registrar to put back the case for hearing or in any way to protest to him about the alleged removal of the case from the calendar. There is no evidence that he did.

The appellant did not tell the Trial Chamber which took his initial appearance on 23 February 1998 that his habeas corpus motion was "still pending". The "applications" to which his counsel then referred were, in my opinion, different motions. Counsel mentioned "two motions". (Transcript of the initial appearance proceedings, 23 February 1998, p.16). One was a motion to quash the whole indictment on the basis of alleged defects of form.

[illegible] *Corpus Juris Secundum*, para. 1354(1).

(Ibid., p.18). The other was a motion "to review and or nullify the arrest and provisional detention of the accused person". (Ibid., p.17). That referred to the Urgent Motion which is the subject of this appeal. This Urgent Motion was dated 19 February 1998 although bearing a filing date of 24 February 1998; somehow, though not yet filed, reference was made to it at the hearing on 23 February 1998. In my understanding, the habeas corpus motion of 29 September 1997 (filed on 2 October 1997) was not referred to in the oral proceedings on 23 February 1998.

The appellant is saying now (29 June 1999) that "the motion is still pending".[12] But he is saying that to the Appeals Chamber in response to the Appeals Chamber's inquiry of 3 June 1999 as to the "disposition of the writ of Habeas Corpus that the Appellant asserts that he filed on 2nd October 1997". What he is saying now he did not say before. Paragraph 9 of his "Duplique" of 18 December 1998 (filed on 28 December 1998) did say that the habeas corpus motion was never heard; but the appellant said that to the Appeals Chamber and not to the Trial Chamber, and then only by way of stating an alleged consequence of the Prosecutor being precipitated by the filing of the habeas corpus motion into filing the indictment.[13] He did not claim that the habeas corpus "motion is still pending" and demand a speedy hearing. That simple statement was never made in his voluminous previous pleadings. I have given reasons why he did not make it and why he could not make it.

Finally, if, contrary to the foregoing, the habeas corpus motion is "still pending" as is now asserted by the appellant, any delay in hearing it would merely ground action to stay further proceedings on the basis of the doctrine of abuse of process. As argued below, the Appeals Chamber is not competent to grant relief on that basis in an interlocutory appeal. At this stage, the Appeals Chamber must take the view that the matter was one for the relevant Trial Chamber alone.

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[12] Para. 22 of the Appellant's Reply to the Prosecutor's Response Pursuant to the Scheduling Order of 3rd June 1999.

[13] See also the heading of section VII of the amended version of Appellant's Brief dated 15 February 1999, [illegible] 23 February 1999, where he says that there was "Refusal to hear the Motion of Habeas Corpus".

7. The delay in hearing the Urgent Motion

Among the things which led to its decision, the Appeals Chamber mentions "the delay in hearing the Extremely Urgent Motion" (Decision, para. 109), that is to say, the Urgent Motion which is the subject of this appeal. So the Appeals Chamber is finding that there was such delay and that such delay is a ground of its decision.

The Urgent Motion was filed on 24 February 1998, but determined only on 17 November 1998. The facts show that, except for the first eleven weeks, the time was taken up by the appellant in settling a dispute concerning arrangements for his legal representation. (See annex 10 to Prosecutor's Response, filed on 22 June 1999, being a letter from defence counsel dated 12 May 1998). For this reason, the focus should be on the first eleven weeks.

The delay of eleven weeks was noticeable, but the material before the Appeals Chamber does not enable any conclusions to be safely drawn as to the reasons. In the case of this appeal - an appeal from the decision of the Trial Chamber on the same motion – forty-seven weeks have already gone by; that there is a good explanation does not efface the fact that much time has passed. From the factual point of view, I do not believe that the Appeals Chamber is in a good position to link its decision to the time taken to hear the Urgent Motion.

From the jurisdictional point of view, there is also a problem. It is evident that any delay in hearing the Urgent Motion could not have formed part of the matters put to the Trial Chamber in the same motion as material to justify an objection based on lack of jurisdiction. Since the appeal is from the decision of the Trial Chamber on the matters which were put to it in support of the Urgent Motion, it follows that the Appeals Chamber has no competence to consider any delay in hearing the Urgent Motion.

8. If there was abuse of process, this did not lead to a lack of jurisdiction on the part of the Tribunal

This section assumes that there was abuse of process in relation to pre-transfer detention but considers whether this led to a "lack of jurisdiction" within the meaning of Rule 72(D) of the Rules so as to enable the Appeals Chamber to act under that provision.

The appellant fell prima facie within the jurisdictional provisions of the Statute. A possible argument is that to prosecute him notwithstanding the alleged breaches of his human rights amounted to an abuse of process, that such abuse of process deprived the Trial Chamber of jurisdiction, and that consequently there was a "lack of jurisdiction" within the meaning of Rule 72(D). Does the doctrine of abuse of process support the proposition? In particular, assuming that there were breaches of the appellant's human rights so as to attract the application of the doctrine, did the doctrine lead to a lack of jurisdiction?

Cases on the subject of abuse of process assume that the trial court had jurisdiction, or indeed that a fair trial was perfectly possible in exercise of that very jurisdiction, but are directed to the different question whether, in its discretion, the court should have permitted that jurisdiction to be exercised having regard to the public interest in maintaining the integrity of the criminal justice system free of affronts to the public conscience. (*R. v. Latif and Shahzad*, [1996] 1 WLR 104, HL, at p. 112, Lord Steyn; and see *R. v. Mullen, The Times*, 15 February 1999 (CA)). In a leading case of 1994, Lord Griffiths made this clear when he said that the question was "whether assuming the court has jurisdiction, it has a discretion to refuse to try the accused". (*R. v. Horseferry Road Magistrates' Court, ex parte Bennett*, 95 ILR 398, HL, at p. 390). In the words of Lord Lowry, "it is not jurisdiction which is in issue but the exercise of a discretion to stay proceedings ...". (Ibid., p. 408). Referring to another case, he said, "While that (magistrates') court had *jurisdiction* to entertain committal proceedings, the High Court decided that to permit the criminal proceedings against the accused to continue would be an abuse of process of the court (of

trial)". (Ibid., p. 411, original italics). In other words, the legal machinery had the capacity to turn, but the particular circumstances made it unjust to allow it to be put in motion.

Other cases, some from different countries, could be cited; but, in my opinion, even with any variations they may show, they do not overthrow the basic position taken in *Bennett* as to the distinction, in the doctrine of abuse of process, between the existence of jurisdiction and a stay of its exercise. I am reinforced in this view by paragraph 74 of the Decision of the Appeals Chamber, stating:

> "It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity."

I interpret this to mean that the Appeals Chamber recognises that the doctrine of abuse of process goes to discretion, and does not touch jurisdiction. Where I differ is as to the consequences on the appellate process of the Tribunal of this distinction. Abjuring the rigidity of the law but not shunning its rigour, it appears to me that, since the concept of abuse of process assumes the continuing existence of the normal trial jurisdiction and does not remove it, where the concept is applied it cannot logically lead to the conclusion that there was a "lack of jurisdiction."

To come back to the pre-transfer detention in this case, if there were any breaches of human rights this could raise a question whether the jurisdiction of the Tribunal should be exercised; but this would not result in "lack of jurisdiction" within the meaning of Rule 72(D) of the Rules. It is to the actual terms of that Rule that the discussion must turn when considering the application of the doctrine. The reference in the Rule to "jurisdiction" seems to be a reference to "jurisdiction" as prescribed by the Statute. In the case of failure to comply with a fundamental principle, such as that which requires an accused person to be promptly

put before the Trial Chamber, the Statute itself can be interpreted to mean that there is loss of personal jurisdiction. However, I would hesitate to give any larger meaning to the reference to "jurisdiction" in Rule 72(D). More particularly, as set out in the Statute, the ingredients of "jurisdiction" do not exclude a case in which there is jurisdiction in fact and in law, but in which it would be an abuse of process for that jurisdiction to be exercised. The existence of jurisdiction has to be separated from its exercise.

In effect, if there were any breaches of the appellant's human rights in respect of the pre-transfer detention, this did not lead to "lack of jurisdiction" within the meaning of Rule 72(D) of the Rules. It may be that the Appeals Chamber can indeed consider whether there has been an abuse of process, but not in an interlocutory appeal under that Rule.

9. Limits on the competence of the Appeals Chamber

That last remark leads to an observation or two on the scope of the jurisdiction of the Appeals Chamber. The Decision of the Appeals Chamber states that "courts have supervisory powers that may be utilised in the interests of justice, regardless of a specific violation". (Decision, para.76). The Decision makes it clear that these supervisory powers can be exercised as between an appellate court and the court appealed from. The idea is a useful one. But, in applying it in the case of the International Criminal Tribunal for Rwanda, caution is appropriate to the nature and structure of the Tribunal.

Without questioning its validity, it may be observed that the system of interlocutory appeals, as introduced by the Rules, goes somewhat beyond the strict international requirement relating to a right of appeal.[14] This does not relieve the Appeals Chamber of its duty to exercise with vigour any jurisdiction which it has; but it at least serves to emphasise the point that, however robustly the Appeals Chamber does so, it has to confine itself within the framework of the scheme under which it is empowered to act.

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[14] *Cf.* Article 14(5) of the ICCPR, reading, "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

To hold that the interlocutory appellate provisions of Rule 72(D) of the Rules cover a case relating to pre-transfer delay involves a stretching of that provision. That stretching can only be justified on the view that the Appeals Chamber may act as if it were endowed with inherent authority to supervise all the activities of an inferior court. I believe that the Appeals Chamber will accept that it does not have that power; that it does not have overall surveillance or general oversight of the workings of a Trial Chamber as if the latter were an inferior court as understood in some systems; that it may not intervene on the basis that it has competence to do so wherever it is disposed to take the view that something wrong was done. For to do so would amount to an impermissible amendment of Article 24 of the Statute of the Tribunal and an unlawful expansion of the province of action thereunder assigned to the Appeals Chamber.

The first instance jurisdiction of the Tribunal has been confided to the Trial Chambers. Save where it can clearly be demonstrated that the Appeals Chamber has power to intervene, the process is to be administered by the Trial Chambers - errors or no errors. They are the judiciary too. Even a final court of appeal makes errors, as witness cases in which it overrules its own previous decisions. The reason, if one were needed, is that it "is common knowledge that courts of law and other tribunals, however praiseworthy their intentions may be, are not infallible".[15] Their fallibility is part of the entire system; it has to be accepted. A system of appeals may provide a remedy; but it is necessarily limited. And the limits must be observed if the system is not to collapse. In one jurisdiction, it was once estimated that about 33 per cent of all appeals succeeded, whether from the lower courts to an intermediate court of appeal or from the latter to the final court of appeal. Thus, there was "no reason for believing that if there was a higher tribunal still the proportion of successful appeals to it would not reach at least that figure".[16]

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[15] *Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J Reports 1954*, p. 47, at p. 86, Judge Hackworth, dissenting.
[16] Lord Justice Atkin, "Appeal in English Law" (1927-29), 3 Camb. L.J. 1, at p. 9.

With that sobering thought in mind, it seems to me that the Appeals Chamber cannot, in an interlocutory appeal, give a remedy simply because it considers that there were breaches of the appellant's human rights. It can do so only if such breaches deprived the Trial Chamber of jurisdiction. In this case, with the exception of post-transfer delay (which rested on a specific Rule of fundamental importance), they did not.

10. Conclusion

In an opinion which I appended to the decision in *Prosecutor v. Kovacevic* (ICTY, Appeals Chamber, 2 July 1998) I referred to *United States v. Lovasco*, 431 U.S. 783(1977). Recalling that opinion, paragraph 94 of the Decision of the Appeals Chamber in this case refers to *United States v. Scott* (437 U.S. 82 (1978) and states that, in that case, in "a dissent filed by four of the Court's nine Justices, (including Justice Marshall, the author of the Lovasco decision), the Lovasco holding regarding pre-indictment delay was characterised as a 'disfavoured doctrine'".

That, no doubt, is a possible interpretation of what the minority in *Scott* held. It may, however, be of some interest to note that what the minority in *Scott* actually said was that the decision in *Scott* itself "may be limited to disfavoured doctrines like pre-accusation delay. See generally United States v. Lovasco, 431 U.S. 783(1977)". That is all that the minority in *Scott* said on the question of *Lovasco*. For myself, I understand the minority in *Scott* to be referring the reader "generally" to *Lovasco* for information about "disfavoured doctrines like pre-accusation delay", and not to be saying that the specific holding in *Lovasco* regarding the pre-indictment delay in that case could be characterised as a "disfavoured doctrine".

More particularly, I am inclined to the view that the general if brief remark of the minority in *Scott* was not intended to cast doubt on the particular *Lovasco* holding (which was material to the issue in *Kovacevic*) that "prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied that they will be able to establish

the suspect's guilt beyond a reasonable doubt". I should not think that the minority in *Scott* (inclusive of Justice Marshall who authored that statement) intended to question it; the majority did not. The statement looks to me like good law.

On the other hand, I would indeed have a difficulty with *Lovasco* if it was promoting the idea that any kind of pre-accusation delay, however extravagant, could be disregarded on the ground of prosecutorial discretion. But I doubt that it was really doing so; I note that it recognised that a "tactical" delay would be impermissible. That there should be some limitation on pre-accusation delay makes sense. However, for the reasons given above, I do not consider that it is competent for the Appeals Chamber to consider whether any limitation was breached in the circumstances of this case.

Accordingly, I regret my inability to support the Decision of the Appeals Chamber so far as pre-transfer delay is concerned. I agree with the Decision with respect to the three-month delay between transfer and initial appearance. For the reasons mentioned above, I do not, however, agree with item 4 of the disposition, directing "the Registrar to make the necessary arrangements for the delivery of the Appellant to the Authorities of Cameroon"; the appellant should be simply set at liberty and provided with reasonable facilities to leave Tanzania, if he so wishes. On this basis, and subject to these qualifications, I would also allow the appeal.

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

Mohamed Shahabuddeen

Dated this 3rd day of November 1999

At the Hague

The Netherlands