International Criminal Tribunal for the Former Yugoslavia: Current Survey

The Jurisprudence of the Yugoslavia Tribunal: 1994-1996

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Introduction

The International Criminal Tribunal for the Former Yugoslavia ('Tribunal') was established by the United Nations Security Council in 1993 in order to put an end to the widespread and flagrant violations of international humanitarian law occurring in the former Yugoslavia. As the first truly international war crimes court in history, the Tribunal has been the object of considerable attention from international lawyers. Although its first judgment is yet to be rendered, the Tribunal has already sentenced one defendant who pleaded guilty and has developed an extensive jurisprudence through the numerous motions filed before it and its own procedural innovations.

Any evaluation of the Tribunal's accomplishments must perforce begin with an overview of the constitutional and procedural structure within which the Tribunal operates. The Statute of the Tribunal ('Statute'), which was adopted by the Security Council, is the Tribunal's constitutive instrument.[1] Pursuant to the Statute, the Tribunal's eleven judges are assigned to one of the three Chambers: Trial Chambers I and II, each comprising three judges, and a five-judge Appeals Chamber. The Statute provides for jurisdiction over four categories of offences: under Article 2 the Tribunal has jurisdiction over grave breaches of the 1949 Geneva Conventions; Article 3 gives it jurisdiction over violations of the laws or customs of war; genocide

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1 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991 (adopted 25 May 1993), reprinted in *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991: Basic Documents*, Sales No. E/F/.95.III.P.1 (hereinafter ICTY Statute).

is covered by Article 4; and Article 5 establishes the Tribunal's jurisdiction over crimes against humanity.

The Statute also gives the Tribunal's judges the authority and responsibility to adopt rules of procedure and evidence to govern its proceedings. The Tribunal's Rules of Procedure and Evidence ('Rules') were first adopted in January-February 1994.[2] The Rules constitute an ambitious attempt to create a fully developed set of international rules for the conduct of pre-trial proceedings, trials and appeals. Since they were first adopted, the Rules have been amended several times

> ... in the light of new problems ... or unanticipated situations.... The Rules have been amended for a variety of reasons; to enhance the rights of the accused; to help better protect victims and witnesses; to take account of the views of the host country; to improve the consistency, clarity and comprehensiveness of the Rules.[3]

Since the Tribunal is an 'international' institution, its Rules attempt to combine the procedural traditions of the major systems of law prevalent in developed nations – that is, the civil and common law systems. For example, the initiation of prosecutions is modelled closely on the adversarial system and gives an independent prosecutor the authority and responsibility for investigating war crimes and issuing indictments. The role of the judges during proceedings, on the other hand, is more extensive than in common law countries and resembles the practice of civil law systems. Judges – unlike in common law systems – are explicitly authorized to question witnesses and may call for additional evidence or recall a witness.

In developing rules of international criminal law and procedure, the Tribunal is required above all to respect the international human rights standards set out in the International Covenant on Civil and Political Rights (ICCPR) as they relate to the rights of accused persons. All but one provision on the rights of the accused contained in Article 14 of the ICCPR are reproduced in Article 21 of the Tribunal's Statute. Moreover, the Report of the United Nations Secretary-General that was submitted to the Security Council with the Statute explicitly states that:

> [It] is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognised standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.[4]

2 See *1994 Yearbook of the International Criminal Tribunal for the Former Yugoslavia* 24 (1995), UN Sales No. E.95.III.P.2. See also Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, UN Doc. IT/32/Rev.9 (5 July 1996) (hereinafter ICTY Rules).

3 Address of the President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations General Assembly, UN Doc. A/51/PV59 at 6 (19 Nov. 1996).

4 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) para. 106, UN Doc. UN S/25704 (3 May 1993) (hereinafter Report of the Secretary-General).

The decisions rendered by the Tribunal's Chambers thus far cover a broad spectrum of issues and demonstrate the difficulties inherent in melding civil law and common law rules and international human rights standards into a truly 'international' body of procedural and substantive criminal law. This article analyses the principal decisions issued by the Tribunal in the first three years of its operation with a view to providing a broad overview of its jurisprudence and identifying the difficult and controversial areas in which the Tribunal has had to operate.[5] It concentrates, in particular, on the Tribunal's adherence to, and development of, international standards regarding the rights of accused persons.

Part I of this article focuses on the Tribunal proceedings that take place prior to an accused's first appearance before the Tribunal. This part examines at section A the initiation of the prosecution of a case – i.e., the submission of an indictment by the Prosecutor and its review and confirmation by a Trial Chamber judge. As discussed in section B, in some cases the indictment is preceded by a request for deferral by a national court to the jurisdiction of the tribunal. Rule 61 proceedings are the subject of section C. Under Rule 61, if an accused is not arrested within a reasonable time after the issuance of an indictment against him, a Trial Chamber may conduct an open court review of the evidence supporting the indictment to determine whether there are reasonable grounds for believing that the accused committed the crimes with which he is charged. The five Rule 61 proceedings thus far conducted by the Tribunal are described in this section, which concludes with a brief examination of the issues raised by these novel proceedings.

Part II of the article examines trial-related proceedings. Because the judgment in the Tribunal's first trial has not been rendered, this part is concerned mainly with decisions issued prior to and during the trial. It also addresses miscellaneous proceedings involving persons who have not been indicted but have been brought to the Tribunal through various means, as well as one sentencing judgment. Part II begins, at section A, with a discussion of the *Tadic* case, which has been tried and in which a judgment is expected shortly. Section B covers the *Blaskic* case, which is expected to be tried in the spring of 1997 and section C describes the multi-defendant case, *Prosecutor v. Mucic, Delic, Delalic and Landzo*, which also appears almost ready for trial. The case against Djukic, who died prior to his trial, is discussed in section D, while section E briefly examines the mistaken arrest in *Prosecutor v. Lajic*. Lastly, the guilty plea and sentencing in the *Erdemovic* case is covered in section F.

The article concludes with a brief evaluation of the extent to which the Tribunal has thus far succeeded in developing procedural and substantive rules of international criminal law. This conclusion indicates the areas in which the Tribunal has departed from, or modified, the principles regarding criminal trials that have been

5 Under the ICTY Rules, its Registrar is also authorized to make certain determinations regarding matters such as the assignment of counsel to accused persons and conditions of detention. The Registrar's decisions on these matters are beyond the scope of this article.

developed by other international judicial bodies and the reasons proffered for such adjustments.

I. Proceedings Prior to the First Appearance of the Accused

A. Review and Confirmation of Indictments

The Tribunal's Statute places with the Prosecutor the authority and responsibility for investigating crimes within the jurisdiction of the Tribunal. If the Prosecutor determines that 'a prima facie case exists', he 'shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute'.[6] The indictment is then submitted to a Trial Chamber judge for review.[7] The judge, '[i]f satisfied that a prima facie case has been established by the Prosecutor', confirms the indictment.[8] If the judge is not so satisfied, he must dismiss the indictment. At this stage, the judge may 'at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial'.[9]

The procedure for submission and review of indictments is further explicated in Rule 47 of the Tribunal's Rules. Rule 47(A) develops the 'prima facie case' standard of Article 18(4) of the Statute; it requires the Prosecutor to submit an indictment for confirmation if he 'is satisfied that there are *reasonable grounds for believing* that a suspect has committed a crime within the jurisdiction of the Tribunal'.[10] With respect to the standard of review to be used by the judge to whom the indictment is presented, the Rule is less clear than the Statute and provides only that the indictment will be reviewed by a judge who 'may confirm or dismiss each count'.[11] The confirming judge is also given the option of adjourning the review of the indictment, which is not provided for in the Statute. Finally, Rule 47(E) provides that the dismissal of a count in an indictment 'shall not preclude the Prosecutor from subsequently bringing a new indictment based on the acts underlying that count if supported by additional evidence'.

Thus far, the Prosecutor has issued indictments against seventy-five persons, all of which have been confirmed in accordance with the procedure described above. All confirmations take place in Chambers and the proceedings are not open to the public. The resulting decisions reviewing the indictments are, however, public documents. There is some variety in the indictment reviews issued by the judges.

6 ICTY Statute, Art. 18(4).
7 *Ibid*, Arts. 18(4), 19(1).
8 *Ibid*, Art. 19(1).
9 *Ibid*, Art. 19(2).
10 ICTY Rules, Rule 47(A) (emphasis added).
11 *Ibid*, Rule 47(D).

These reviews can be divided into three main categories. First, the vast majority of the indictments submitted by the Prosecutor are confirmed by a simple one-page order. Second, some reviews explicitly examine the evidence submitted against the accused to see whether it meets the required threshold.[12] Finally, a few confirmations have addressed legal issues arising out of the confirmation process.[13]

B. Deferral Proceedings

The procedure for deferral by states to the competence of the Tribunal has evolved out of the twin principles of concurrent jurisdiction and the Tribunal's primacy over national courts. Article 9 of the Statute provides:

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

The Statute makes plain that, although the Tribunal and national courts have concurrent jurisdiction over war crimes in the former Yugoslavia, the Tribunal can request national courts to defer to its competence.

The Tribunal's Rules set out three grounds on which the Prosecutor may propose to a Trial Chamber that a formal request for deferral be made. The Prosecutor may make such a proposal when it appears to him that, in the investigations or criminal proceedings instituted in the courts of any state:

> (i) the act being investigated or which is the subject of proceedings is characterised as an ordinary crime;
>
> (ii) there is a lack of impartiality or independence, or the investigations or those proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
>
> (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal.[14]

If it appears to the Chamber that 'on any of the grounds specified in Rule 9, deferral is appropriate, the Trial Chamber may issue a formal request to the state concerned

12 See, e.g., *Prosecutor v. Karadzic and Mladic*, Case No. IT-95-18-I, Review of the Indictment, reg. pg. nos. 352-347 (16 Nov. 1995); *Prosecutor v. Erdemovic*, Case No. IT-96-22-I, Review of Indictment, reg. pg. nos. 124-121 (29 May 1996).

13 See, e.g., *Prosecutor v. Rajic*, Case No. IT-95-12-I, Review of the Indictment, reg. pg. nos. 219-210 (29 Aug. 1995); *Prosecutor v. Kordic and Others*, Case No. IT-95-14-I, Review of the Indictment, reg. pg. nos. 1678-1674 (10 Nov. 1995).

14 ICTY Rules, Rule 9.

that its court defer to the competence of the Tribunal'.[15] It is significant that the first two grounds for deferral set out in Rule 9 derive from Article 10 of the Statute, which addresses the instances in which the Tribunal may try persons who have previously been tried for acts constituting serious violations of international humanitarian law. All the deferral requests decided by the Tribunal, however, have been based on the third ground of deferral set out in Rule 9 – namely, that the national proceedings raised issues closely related to, or otherwise involved, significant factual or legal questions that may have implications for investigations or prosecutions before the Tribunal.[16] The appropriateness of this ground for deferral was raised by the Defence in a motion on *non-bis-in-idem* in the *Tadic* case, but was not addressed by the Chamber.[17]

Finally, it is noteworthy that all the deferral applications made by the Prosecutor thus far have been filed prior to the issuance of the related indictments. The early filing of deferral applications has the advantage of minimizing defendants' risk of double jeopardy. As discussed later, the Tribunal has held that, although the Prosecutor has discretion to assess the suitability and timing for submitting to the Tribunal proposals for deferral, he must exercise care to avoid prejudice to the accused.[18]

C. Rule 61 Proceedings

1. The Rule 61 Mechanism

The Tribunal's Statute does not allow for trials *in absentia*. Article 21(4)(d) of the Statute provides that '[i]n the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled ... to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing'. The Report of the United Nations Secretary-General, which accompanied the

15 *Ibid*, Rule 10(A).

16 See *In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the International Tribunal*, Case No. IT-94-1-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the Matter of Dusko Tadic (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence) (8 Nov. 1994) (no registry page numbers available) (hereinafter *Tadic Deferral Decision*); *In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the International Tribunal Addressed to the Republic of Bosnia and Herzegovina Concerning Crimes Committed Against the Population of Lasva River* Valley, Case No. IT-95-6-D, Decision, reg. pg. nos. 78-67 (11 May 1995); *In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Radovan Karadzic, Ratko Mladic and Mico Stanisic*, Case No. IT-95-5-D, Decision, reg. pg. nos. 127-112 (16 May 1995); *In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the International Tribunal Addressed to the Federal Republic of Yugoslavia in the Matter of Drazen Erdemovic*, Case No. IT-96-22-D, Decision, reg. pg. nos. 142-133 (29 May 1996) (hereinafter *Erdemovic Deferral Decision*).

17 See *infra* text accompanying notes 92-95.

18 See *infra* text accompanying notes 175-177.

Statute, indicates that this provision was inspired by Article 14 of the ICCPR. The Secretary-General explained that:

> [a] trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence.[19]

Nonetheless, when drafting the Tribunal's Rules, the judges of the Tribunal could not overlook the possibility that, because of the political situation in the former Yugoslavia, it was possible that certain accused persons would not be arrested and brought before the Tribunal. The judges therefore fashioned an unusual and innovative procedure to provide some measure of recourse for situations where arrest warrants had not been executed. This procedure is known as the 'Rule 61 procedure'.

The Rule 61 procedure is activated when arrest warrants for accused persons are not executed within a 'reasonable time' of their issuance. In such cases, the judge who initially confirmed the indictment invites the Prosecutor to report on the measures taken to effect personal service of the indictment. If satisfied that the Prosecutor has taken 'all reasonable steps to effect personal service', including recourse to the appropriate authorities of the relevant state or states, and has otherwise tried to inform the accused of the existence of the indictment against him by seeking publication of newspaper advertisements, the confirming judge orders the Prosecutor to submit the indictment to the judge's own Trial Chamber.[20]

A Rule 61 hearing is then held, during which the Prosecutor must submit the indictment to the full Trial Chamber in open court, together with all the evidence that was before the confirming judge; the Prosecutor also may examine any witness whose statement was submitted to the confirming judge.[21] The Prosecutor may tender additional evidence to the Chamber. The Chamber considers the indictment anew to determine whether there are reasonable grounds to believe that the accused has committed all or any of the crimes with which he is charged.[22]

The Rule 61 decisions rendered by the Tribunal's Trial Chambers have repeatedly emphasized that such proceedings are not trials and do not result in the conviction or acquittal of the accused. Rather, the purpose of such proceedings, explained by Trial Chamber I, is as follows:

> Recourse to Rule 61 means that the Tribunal, which does not have any direct enforcement powers, is not rendered ineffective by the non-appearance of the accused and can proceed nevertheless. The review by a panel of Judges, sitting in a public hearing, of an indictment initially confirmed by a single Judge, reinforces the rights of the accused and enhances the solemnity and gravity of the Judges' decision. The Rule 61 procedure, which is initiated by the Prosecutor, cannot be considered a trial

19 Report of the Secretary-General, *supra* note 4, para. 101 (references omitted).
20 ICTY Rules, Rule 61(A).
21 *Ibid*, Rule 61(B).
22 *Ibid*, Rule 61(C).

> *in absentia*; it does not culminate in a verdict nor does it deprive the accused of the right to contest in person the charges brought against him before the Tribunal. However, the rights of alleged victims should not be denied; the Rule 61 proceedings provide them with the opportunity to be heard in a public hearing and to become a part of history.[23]

In addition to the public consideration of the evidence against an accused, a Rule 61 determination has two consequences for an accused person: an international arrest warrant for the accused is transmitted to all states and the Chamber 'may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties'.[24] The latter measure has not yet been employed by the Tribunal.

Rule 61 proceedings may also have repercussions for states. If a Trial Chamber finds that the failure to effect personal service is due in whole or in part to a failure or refusal of a state to cooperate with the Tribunal, the President of the Tribunal 'shall notify the Security Council [of this finding] in such manner as he thinks fit'.[25] Such findings and notifications have been made in all but one of the Rule 61 proceedings conducted by the Tribunal.

2. Rule 61 Proceedings Conducted by the Chambers

The Tribunal's Trial Chambers have thus far reviewed and confirmed five indictments pursuant to Rule 61. The principal aspects of the decisions in these cases are discussed below.

(a) *Prosecutor v. Nikolic,* Case No. IT-94-2-R61

The indictment against Dragan Nikolic was confirmed on 4 November 1994 by Judge Odio-Benito and warrants for his arrest were sent to the Republic of Bosnia and Herzegovina and to the Bosnian-Serb administration in Pale.[26] The Prosecutor alleges that in 1992 Nikolic was the commander of the Susica camp in north-eastern Bosnia. According to the Prosecutor, Nikolic, along with certain soldiers under his command, committed a series of crimes against persons in the camp. Nikolic is charged with direct and command responsibility for wilful killings, torture, inhuman acts, imprisonment of civilians, persecution on religious grounds, illegal appropriation and plunder of property and illegal transfer of civilians. These acts are charac-

23 *Prosecutor v. Martic*, Case No. IT-95-13-R61, Decision, reg. pg. nos. 183-170, at 182-181 (8 March 1996) (hereinafter *Martic Rule 61 Decision*). *Accord Prosecutor v. Nikolic*, Case No. IT-94-2-R61, Review of the Indictment Pursuant to Rule 61, reg. pg. nos. 25/1573*bis*-1/1573*bis*, at 24/1573*bis* (20 Oct. 1995) (hereinafter *Nikolic Rule 61 Decision*); *Prosecutor v. Rajic*, Case No. IT-95-12-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, reg. pg. nos. 1423-1392, at 1419 (13 Sept. 1996) (hereinafter *Rajic Rule 61 Decision*).

24 ICTY Rules, Rule 61(D).

25 *Ibid*, Rule 61(E).

26 *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-I, (4 Nov. 1994) (reg. pg. nos. not available).

terized as grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war and/or crimes against humanity.

In May 1995, the confirming judge, satisfied that the requirements for the activation of Rule 61 had been met, ordered the Prosecutor to submit the matter to Trial Chamber I so that it could examine the indictment in open court. At the Rule 61 hearing, which was held from 9 to 13 October 1995, the Prosecutor submitted the confirmation record to the Trial Chamber. He also presented the testimony of fifteen witnesses, including experts, alleged victims and an investigator from his office.

The Chamber's decision, which was rendered on 20 October 1995, provides an interesting insight into its views regarding the respective roles of the Prosecutor and the judges of the Tribunal with regard to the crimes charged in indictments.[27] The Trial Chamber took a very broad view of its authority to control the indictments under its review. Although no provision of the Tribunal's Statute or Rules explicitly authorized it to do so, the Chamber assumed for itself the power to 'invite' the Prosecutor to amend the indictment in order to recharacterize the crimes charged and to add new charges.

The Chamber first recommended that the Prosecutor give greater prominence to certain charges. It noted that in the indictment various legal characterizations were posited for the same acts. Thus, a particular act was qualified alternatively as a grave breach of the Geneva Conventions, a violation of the laws or customs of war and/or a crime against humanity. The Chamber proposed – without prejudice to the determination of the judges at an eventual trial in the matter – that the Prosecutor revise the indictment to focus on the charges of crimes against humanity because 'there are reasonable grounds for believing that the crimes [charged in the indictment] are more appropriately characterized as crimes against humanity'.[28]

Second, based on the material submitted by the Prosecutor, the Chamber invited the Prosecutor to supplement the indictment to add charges of rape, sexual assault and 'ethnic cleansing'. The Chamber went so far as to suggest the basis of the Tribunal's jurisdiction for such additional theoretical charges. In its opinion, rape and other forms of sexual violence committed against women constituted acts of torture, which could be characterized as grave breaches of the Geneva Conventions, violations of the laws or customs of war and/or crimes against humanity. As for ethnic cleansing, the Chamber, emphasizing the extreme gravity of the discriminatory acts that fell under this heading and their genocidal nature, concluded that the Tribunal would have jurisdiction over such crimes by virtue of Article 4 of the Statute (genocide). The Chamber therefore invited the Prosecutor to pursue his investigations with a view to indicting Nikolic for complicity in genocide or acts of genocide.[29]

27 See *Nikolic Rule 61 Decision*, reg. pg. nos. 25/1573*bis*-1/1573*bis* and Corr. reg. pg. nos. 2257-2255 (20 Oct. 1995).
28 *Ibid*, at reg. pg. no. 12/1573*bis*.
29 *Ibid*, at reg. pg. nos. 6/1273*bis*-5/1273*bis*.

The Trial Chamber confirmed all counts of the indictment against Nikolic and issued an international arrest warrant for him. Based on its conclusion that the failure to serve the indictment was due to the refusal of the Bosnian-Serb administration to cooperate with the Tribunal, the Chamber invited the President of the Tribunal to so inform the United Nations Security Council.[30]

(b) *Prosecutor v. Martic*, Case No. IT-95-11-R61

On 25 July 1995, Judge Jorda confirmed the indictment against Milan Martic.[31] The Prosecutor alleged that Martic, the former President of the Croatian-Serb administration, knowingly and wilfully ordered the shelling of Zagreb with Orkan rockets on 2 and 3 May 1995, thereby causing death or injury to numerous civilians. He is also charged with command responsibility for failing to take the reasonable and necessary measures to prevent the attacks and for failing to punish the perpetrators of the attacks. These crimes are characterized by the Prosecutor as violations of the laws or customs of war. Upon confirmation of the indictment, arrest warrants were immediately drawn up for transmission to the Croatian-Serb administration in Knin[32] and the Federal Republic of Yugoslavia. An additional arrest warrant was sent, in December 1995, to the Republic of Croatia.[33]

By February 1996, the arrest warrants for Martic had still not been executed. At the request of the confirming judge, the Prosecutor reported on the measures taken to inform Martic of the existence of an indictment against him and to execute the warrant. On considering this report, the confirming judge concluded that the Prosecutor had established that the accused was personally aware of the indictment against him because, during a programme broadcast on the CNN television network which members of the Office of the Prosecutor watched, the accused acknowledged that he had been indicted. Satisfied with the measures taken by the Prosecutor to execute the arrest warrants, the confirming judge ordered the Prosecutor to submit the case to Trial Chamber I for public review under Rule 61.[34]

The hearing in this matter was held on 27 February 1996. In addition to the evidence submitted to the confirming judge, the Prosecutor summoned four witnesses

30 On 31 October 1995, the President of the Tribunal notified the Security Council of the failure of the Bosnian-Serb administration to cooperate with the Tribunal. The President emphasized that 'all States in the region – including self-proclaimed entities de facto exercising governmental functions – must comply with their legal obligation to cooperate with the Tribunal'. Letter from the President of the International Criminal Tribunal for the Former Yugoslavia, to the President of the Security Council, UN Doc. S/1995/910 (31 Oct. 1995).

31 See *Martic*, Case No. IT-95-11-I, Review of the Indictment, reg. pg. nos. 20-18 (25 July 1995); Indictment, *Martic*, Case No. IT-95-11-I, reg. pg. nos. 12-10 (24 July 1995).

32 This arrest warrant could not be transmitted to this self-proclaimed entity because it ceased to exist.

33 On 24 December 1995, following the signature of the Dayton Accords, and at the request of the Prosecutor, Judge Jorda ordered that a copy of the indictment be transmitted to the multinational military Implementation Force deployed in the territory of Bosnia and Herzegovina (IFOR).

34 See *Martic*, Case No. IT-95-11-I, Order to Review the Indictment in Open Court, reg. pg. no. 122 (15 Feb. 1996).

whose testimony included *inter alia* a description of the attacks on Zagreb and their disastrous effects on the civilian population.

On 8 March 1996, the Chamber rendered its decision in the case. Since the offences identified by the Prosecutor were not expressly covered by Article 3 of the Statute, the Chamber verified that they constituted violations of the laws or customs of war referred to in that Article. This exercise was one of the first applications by a Trial Chamber of the test articulated by the Appeals Chamber in its decision on jurisdiction in the *Tadic* case[35] for determining whether particular acts are within the purview of Article 3. The central issue was whether there existed conventional or customary norms underlying the charges against Martic and whether these norms applied to all armed conflicts.

With respect to conventional norms, the Trial Chamber recalled that the Appeals Chamber had already established that Article 3 of the Statute covered violations of Additional Protocols I and II to the 1949 Geneva Conventions. It noted that 'all States which were part of the former Yugoslavia and parties to the present conflict at the time the alleged offences were committed were bound by Additional Protocols I and II'.[36] The Chamber concluded that under the terms of these instruments, attacks against civilians were prohibited; such attacks therefore fell within the Tribunal's jurisdiction under Article 3, regardless of the character of the conflict at issue.

As regards customary law, the Chamber followed the Appeals Chamber's view in the *Tadic* jurisdiction decision that the prohibition on attacking a civilian population was a fundamental rule of customary international law applicable to all armed conflicts. It held:

> There exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterisation as international or non-international armed conflicts. This corpus includes general rules and principles designed to protect the civilian population as well as rules governing means and methods of warfare. As the Appeals Chamber affirmed, the general principle that the right of the parties to the conflict to choose methods or means of warfare is not unlimited and the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of this corpus of customary law.[37]

Nor was an attack against a civilian population permissible in reprisal. The Chamber held that such reprisals were unlawful in *all circumstances*.

> The prohibition against attacking the civilian population as such as well as individual civilians must be respected in all circumstances regardless of the behaviour of the other party. The opinion of the great majority of legal authorities permits the Trial Chamber to assert that no circumstances would legitimise an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party.[38]

35 See *infra* text accompanying note 82.
36 *Martic Rule 61 Decision*, at reg. pg. no. 180.
37 *Ibid*, at reg. pg. no. 179.
38 *Ibid.*

The Chamber concluded that there were reasonable grounds for believing that Martic had committed the crimes charged in the indictment. It therefore confirmed all four counts of the indictment and issued an international warrant for his arrest.

(c) *Prosecutor v. Mrksic, Radic and Sljivancanin*, Case No. IT-95-13-R61

The indictment in what is called the *Vukovar Hospital* case was confirmed on 7 November 1995 by Judge Riad. Arrest warrants addressed to the Federal Republic of Yugoslavia were issued on the same day for the three accused persons, Mile Mrksic, Miroslav Radic and Veselin Sljivancanin, all of whom allegedly were officers in the Yugoslav People's Army (JNA).[39]

In the indictment, the Prosecutor alleges that, after several months of resistance against an armed offensive led by the JNA, the town of Vukovar in Croatia finally fell to Serbian attackers under the command or control of the accused. As local resistance began to crumble, the city's hospital became a point of convergence for civilian victims, resistance combatants who had laid down their weapons and a significant number of injured persons. On or about 20 November 1991, JNA soldiers and Serbian paramilitary groups commanded or controlled by the accused are alleged to have led approximately 260 non-Serbian men from the hospital to sites in surrounding areas. There, the men were beaten for hours and then shot to death. For their acts and omissions with respect to these beatings and killings, the defendants are charged with grave breaches of the 1949 Geneva Conventions (wilfully causing great suffering and wilful killing), violations of the laws or customs of war (cruel treatment and murder) and/or crimes against humanity (inhuman acts and executions).

Having found that the conditions for the activation of Rule 61 had been satisfied, the confirming judge ordered, on 6 March 1996, that the matter be submitted to Trial Chamber I in open court.[40] During the hearings, held on 20, 26, 27 and 28 March 1996, the Chamber considered the evidence that had been submitted to the confirming judge and heard several witnesses summoned by the Prosecutor. Some witnesses benefited from protective measures ordered by the Chamber, such as the use of pseudonyms, non-disclosure of identifying data to the public and voice- and image-altering devices.[41]

39 See *Prosecutor v. Mrksic, Radic and Sljivancanin* (hereinafter *Vukovar Hospital*), Case No. IT-95-13-I, Confirmation of the Indictment, reg. pg. nos. 3/216*bis*-1/216*bis* (7 Nov. 1995); Indictment, *Vukovar Hospital*, Case No. IT-95-13-I, reg. pg. nos. 212-204 (7 Nov. 1995).

40 See *Vukovar Hospital*, Case No. IT-95-13-I, Order for Review in Open Court of the Indictment, reg. pg. nos. 267-264 (6 March 1996).

41 See *Vukovar Hospital*, Case No. IT-95-13-I, Decision on the Prosecutor's Application Requesting Protective Measures for Victims and Witnesses, reg. pg. nos. 291-284 (19 March 1996). For a discussion of the standards used to determine the necessity and appropriateness of protective measures, see *infra* text accompanying notes 83-92, 128-137.

In a decision dated 3 April 1996, the Chamber confirmed all counts of the indictment.[42] As in the *Nikolic* Rule 61 decision,[43] the Chamber asserted its control over the characterization of crimes in the indictment. It found that the alleged crimes seemed to be part of a widespread and systematic attack against the civilian population of the city of Vukovar and therefore emphasized that the indictment showed 'first and foremost that a crime against humanity was committed'. The Chamber issued international warrants for the arrest of the defendants.

The Chamber also certified that the failure to effect service of the indictment was due to the refusal of the Federal Republic of Yugoslavia to cooperate with the Tribunal. In reaching this conclusion, the Chamber relied on the Deputy Prosecutor's assertion in his closing argument that the accused 'hide behind the shelter of the Government of the Federal Republic of Yugoslavia that sent them [to Vukovar] and ... still seeks to protect them'. In this regard, the Chamber opined that 'when a Government gives refuge and support to criminals, in the eyes of the world, that Government then too becomes criminal, and this is exactly what the Belgrade Government has done in this case'.[44] The President of the Tribunal was entrusted with the responsibility of informing the United Nations Security Council of Yugoslavia's failure to cooperate with the Tribunal.[45]

(d) *Prosecutor v. Rajic*, Case No. IT-95-12-R61

The indictment against Ivica Rajic was confirmed by Judge Sidhwa on 29 August 1995.[46] It alleges that in October 1993 troops under Rajic's command attacked a Muslim village in central Bosnia, Stupni Do, killing civilians and destroying the village. For these actions, Rajic is charged with grave breaches of the Geneva Conventions (wilful killing of civilians and the destruction of property) and/or with violations of the laws or customs of war (deliberate attack on a civilian population and wanton destruction of a village).[47]

In March 1996, Judge Sidhwa found that the conditions for holding a Rule 61 hearing had been met and issued an order for a review of the indictment by Trial

42 See *Vukovar Hospital*, Case No. IT-95-13-I, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, reg. pg. nos. 18/312*bis*-1/312*bis* (3 April 1996) (hereinafter *Vukovar Hospital Rule 61 Decision*).

43 See *supra* text accompanying notes 26-29.

44 *Vukovar Hospital Rule 61 Decision*, at reg. pg. no. 3/312*bis*.

45 In response to the notification of the President of the Tribunal, the President of the Security Council expressed the Council's great concern with the failure of the Federal Republic of Yugoslavia to cooperate, deplored the Republic's refusal to act on the arrest warrants, and recalled Security Council Resolution 1022 of November 1995, which provided *inter alia* that the obligation to comply with requests for assistance and orders of the Tribunal constituted a fundamental aspect of the implementation of the Dayton Accords. See Public Statement of the President of the Security Council, UN Doc. S/PRST/1996/23 (8 May 1996).

46 See *Rajic*, Case No. IT-95-12-I, Review of the Indictment, reg. pg. nos. 1423-1392 (29 Aug. 1995).

47 See Indictment, *Rajic*, Case No. IT-95-12-I, reg. pg. nos. 197-195 (29 Aug. 1995).

Chamber II.[48] The Rule 61 hearing was held on 2 and 3 April 1996. Several witnesses, including a number of UN military officials, testified during the hearing.

The Chamber's decision was issued on 13 September 1996.[49] Judge Sidhwa annexed a separate opinion to the decision.[50]

As an initial matter, the Chamber addressed certain evidentiary issues. Among other things, it held that in reaching its decision it would disregard the testimony of an investigator from the Office of the Prosecutor who had orally recounted portions of statements that he had taken from eye witnesses to the attack. This issue is examined in detail in Judge Sidhwa's separate opinion in the case, which is discussed below.

The principal focus of the Chamber's decision was whether it had subject-matter jurisdiction under the Tribunal's Statute over the offences with which the accused was charged. With respect to Article 2 of the Statute (grave breaches provisions of the 1949 Geneva Conventions), the Chamber noted that, based on the Appeals Chamber jurisdiction decision in the *Tadic* case,[51] there were two prerequisites for its application: '(a) there must be an international armed conflict in the sense of Article 2 common to the Conventions; and (b) the crime must be directed against persons or property protected under the provisions of the relevant Convention'.[52] Because the crimes with which Rajic was charged allegedly were directed against civilian persons and property, the Chamber considered these requirements in the context of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War ('Geneva Convention IV').

The Chamber agreed with the Prosecutor that the conflict at issue could be classified as 'international' based on the direct military involvement of Croatia in Bosnia and the existence of hostilities resulting therefrom. It held that:

> ... for purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian Government into an international one.[53]

Perhaps the most interesting part of the Chamber's decision is its treatment of the Prosecutor's additional argument that the conflict between the Bosnian Government and the Bosnian Croats should be regarded as international because of the relationship between Croatia and the Bosnian Croats. The Prosecutor had asserted that

48 *Rajic*, Case No. IT-95-12-I, Order for Review of the Indictment under Rule 61 and Temporary Non-Disclosure, reg. pg. nos. 303-299 (6 March 1996).
49 See *Rajic Rule 61 Decision*, reg. pg. nos. 1423-1392 (13 Sept. 1996).
50 See *Ibid.* Separate Opinion of Judge Sidhwa, reg. pg. nos. 1177-1164.
51 See *infra* text accompanying notes 79-80.
52 *Rajic Rule 61 Decision*, at reg. pg. no. 1417.
53 *Ibid*, at reg. pg. no. 1415.

'Croatia exerted such political and military control over the Bosnian Croats that the latter may be regarded as an agent or extension of Croatia'.[54]

The Chamber agreed with the innovative approach proposed by the Prosecutor. It held that 'an agency relationship between Croatia and the Bosnian Croats – if proven at trial – would also be sufficient to establish that the conflict between the Bosnian Croats and the Bosnian Government was international in character'.[55] Reviewing the evidence, it found reasonable grounds for believing that such a relationship existed.

The Chamber's acceptance of the 'agency' theory had important consequences for its examination of the protected person requirement set out in Article 4 of Geneva Convention IV.[56] The Chamber characterized the issue to be whether the agency relationship between Croatia and the Bosnian Croats was sufficient to meet the test of Article 4, under which a person would be 'protected' if they were 'in the hands of' a state of which they were not nationals. It emphasized that the Commentary of the International Committee of the Red Cross ('ICRC Commentary') on Geneva Convention IV indicated that the protected person requirement was to be interpreted broadly and that the term 'in the hands of' need not necessarily be understood in the physical sense, but meant only that the person was in territory under the control of the state in question. On the basis of the evidence showing that the Bosnian Croats controlled the territory surrounding Stupni Do, and the control of the Bosnian Croats by Croatia, the Chamber held:

> [A]lthough the residents of Stupni Do were not directly or physically 'in the hands of' Croatia, they can be treated as being constructively 'in the hands of' Croatia, a country of which they were not nationals. The Trial Chamber therefore finds that the civilian residents of Stupni Do were – for the purposes of the grave breaches provisions of Geneva Convention IV – protected persons *vis-à-vis* the Bosnian Croats because the latter were controlled by Croatia.[57]

Because the indictment against Rajic included counts relating to property, Trial Chamber II considered whether the protected property definition of Article 53 of Geneva Convention IV was met.[58] Article 53 requires an occupation, so that the key question for the Chamber was 'whether the degree of control exercised by the [Bosnian Croat] forces over the village of Stupni Do was sufficient to amount to an occupation within the meaning of Article 53'.[59] The ICRC Commentary indicated that, as with the protected person requirement, a broad interpretation of the protected

54 *Ibid*, at reg. pg. no. 1410.
55 *Ibid.*
56 Article 4 states: 'Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.'
57 *Rajic Rule 61 Decision*, at reg. pg. nos. 1405-1404.
58 Article 53 states: 'Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.'
59 *Rajic Rule 61 Decision*, at reg. pg. no. 1403.

property requirement was warranted. The Chamber adopted an expansive view of the term 'occupation', essentially equating it with 'control'. It concluded that, because the Bosnian Croats controlled the territory around Stupni Do and because Croatia controlled the Bosnian Croats, the village came under the control of Croatia and 'the property of Stupni Do became protected property for the purposes of the grave breaches provisions of Geneva Convention IV'.[60]

The Chamber next turned to an examination of the requirements for the application of Article 3 of the Statute (violations of the laws or customs of war). The first charge under Article 3, wanton destruction of a village, was covered by the text of Article 3(b). This prohibition clearly applied in situations of international armed conflict, which the Chamber had already found existed in the case before it. It therefore had subject-matter jurisdiction over this charge and did not have to consider whether the prohibition applied also in internal armed conflicts. With respect to the second charge under Article 3, attack on a civilian population, the Chamber agreed with the analysis conducted by Trial Chamber I in Martic[61] and held that it had jurisdiction over the charge, regardless of the nature of the conflict.

Having found that it had jurisdiction over the charges against Rajic, the Chamber reviewed the evidence against him. It found that the evidence provided a reasonable basis for the charges against him.

The final issue addressed by the Trial Chamber was the cause of the non-execution of the arrest warrants for Rajic. The Chamber concluded that the failure to effect personal service of the indictment and to execute the warrants of arrest for Rajic could be ascribed to the refusal of the Republic of Croatia and the Federation of Bosnia and Herzegovina to cooperate with the Tribunal. Accordingly, the Chamber so certified for the purpose of notifying the Security Council.[62]

Judge Sidhwa, while joining with the Chamber's decision, filed a separate opinion in the case on 'certain issues regarding the treatment of evidence'.[63] First, Judge Sidhwa addressed an issue that had arisen during the Rule 61 hearing but was not addressed in the Chamber's opinion: namely, the status of the materials submitted by the Prosecutor in support of an indictment at the Rule 61 stage. Contrary to the Prosecutor's contentions, Judge Sidhwa was of the view that these materials were public unless subject to a non-disclosure order. Second, Judge Sidhwa discussed in detail the admissibility of the testimony of an investigator who had summarized

60 *Ibid.*

61 See *supra* text accompanying notes 35-38.

62 On 16 September 1996, the President of the Tribunal informed the Security Council 'of the "refusal" by the Republic of Croatia a Member State of the United Nations, and by the Federation of Bosnia and Herzegovina, to cooperate with the Tribunal and to comply with its orders, as required by Article 29 of the Tribunal's Statute'. The President of the Tribunal added that 'the failure to cooperate in the arrest of Ivica Rajic is not an isolated incident, but forms part of a general pattern of failure in respect of matters concerning the Tribunal'. Letter from the President of the International Criminal Tribunal for the Former Yugoslavia, to the President of the Security Council, UN Doc. S/1996/763 (17 Sept. 1996).

63 *Rajic Rule 61 Decision*, Separate Opinion of Judge Sidhwa, at reg. pg. no. 1176.

witness statements at the Rule 61 hearing. He read the Tribunal's Statute and Rules to support a preference for direct over secondary evidence and a suspicion of hearsay evidence, which would exclude the investigator's testimony. Judge Sidhwa concluded that, given the ex parte character of Rule 61 proceedings, no laxity in the application of evidentiary rules could be tolerated. He cautioned that the Rule 61 procedure, which

> ... plac[ed] the examination of a *prima facie* case at a higher authoritative level [than the review of an indictment under Rule 47], with a hearing open to the public, so that the world at large may be able to assess the involvement of the accused in the crime imputed, cannot be allowed to be degraded by permitting a procedure which involves ocular accounts being accepted through proxies and substitutes.[64]

(e) *Prosecutor v. Karadzic and Mladic*, Cases Nos. IT-95-5-R61 and IT-95-18-R61

Radovan Karadzic, the former President of the Bosnian-Serb administration, and Ratko Mladic, the former commander of the Bosnian-Serb army, are the subject of two indictments, which were confirmed on 25 July and 16 November 1995.[65] Warrants for their arrest were sent to the Federal Republic of Yugoslavia, the Republic of Bosnia and Herzegovina, and to the Bosnian-Serb administration in Pale.

The first indictment alleges that Karadzic and Mladic were responsible for the general policy of 'ethnic cleansing' that the Bosnian-Serbs used against the Bosnian Muslim and Bosnian Croat populations residing in Bosnia. The two leaders are charged with grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and/or crimes against humanity, based on a series of serious violations of international humanitarian law committed throughout the territory of Bosnia since 1992 in furtherance of this policy. The second indictment charges Karadzic and Mladic with genocide, crimes against humanity and/or violations of the laws or customs of war for the atrocities committed in the course of military operations leading to and following the fall of the United Nations safe area of Srebrenica.

In June 1996, having found that the conditions for activating Rule 61 had been met, the two confirming judges separately ordered that the matter be submitted to Trial Chamber I for joint consideration of the indictments in open court.[66] In the course of the hearings, held on 27 and 28 June and on 1, 3, 4 and 8 July 1996, the Prosecutor tendered the evidence previously provided to the confirming judges, as well as certain additional materials. The Chamber heard the testimony of fourteen witnesses, including experts, an investigator, eye-witnesses and two *amici curiae*.

64 *Ibid*, at reg. pg. no. 1166.

65 See Indictment, *Karadzic and Mladic*, Case No. IT-95-5-I, reg. pg. nos. 337-315 (24 July 1995); *Karadzic and Mladic*, Case No. IT-95-5-I, Review of Indictment, reg. pg. nos. 345-343 (24 July 1995); Indictment, *Karadzic and Mladic*, Case No. IT-95-18-I, reg. pg. nos. 338-325 (15 Nov. 1995); *Karadzic and Mladic*, Case No. IT-95-18-I, Review of the Indictment, reg. pg. nos. 352-347 (16 Nov. 1995).

66 See *Karadzic and Mladic*, Cases Nos. IT-95-5-I, reg. pg. nos. 635-631 (20 June 1996) and IT-95-18-I, reg. pg. nos. 509-506 (21 June 1996).

In its decision of 11 July 1996, the Chamber confirmed all counts of the indictments and issued international arrest warrants for transmission to all states, Interpol and IFOR.[67]

The Chamber's decision concentrated on whether the defendants could be held criminally responsible for the policy of ethnic cleansing. The evidence submitted by the Prosecutor led the Chamber to conclude that the acts at issue were committed as part of a political programme that was devised by the accused persons in order to seize power in certain parts of Bosnia. The acts were, moreover, carried out by an institutional and military organization led by the accused. The Chamber found that the defendants' political plan corresponded to the programme of the Serbian Democratic Party of Bosnia and Herzegovina and was carried out with the direct military and logistical support of the Yugoslav People's Army. In the Chamber's view, the policy of ethnic cleansing promoted by Karadzic and Mladic reached the apogee of horror with the extermination of thousands of Muslims after the fall of the safe area of Srebrenica. The Chamber particularly noted that Mladic was thoroughly involved in the preparation of the Srebrenica operation and masterminded its implementation.

As in the Rule 61 decisions in *Nikolic* and *Vukovar Hospital*, the Trial Chamber suggested that the Prosecutor recharacterize the crimes in the indictment and posited the possibility of adding new charges. For example, the Chamber found that, although the evidence showed that the defendants had *command responsibility* for the atrocities charged in the indictment, their liability was better characterized as *direct responsibility* because

> ... the evidence and testimony tendered all concur in demonstrating that Radovan Karadzic and Ratko Mladic would not only have been informed of the crimes allegedly committed under their authority, but also and, in particular, that they exercised their power in order to plan, instigate, order or otherwise aid and abet in the planning, preparation or execution of the said crimes.[68]

The Chamber therefore invited the Prosecutor to supplement the indictment of 25 July 1995 in order to emphasize the direct criminal responsibility of the two defendants. It also went beyond the parameters of the indictment and invited the Prosecutor's office to 'investigate decision-making responsibility at the same or higher echelons'.[69]

Finally, the Chamber took the view that, with the exception of one charge, a characterization of crimes against humanity or genocide was most appropriate for the totality of the acts charged in the indictments. This conclusion was without prejudice to the findings of the judges who would conduct the eventual trial of the case.

67 See *Karadzic and Mladic*, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, Cases Nos. IT-95-5-R61 and IT-95-18-R61, reg. pg. nos. 58/1440*bis*-1/1440*bis* (11 July 1996).

68 *Ibid*, at reg. pg. nos. 13/1440*bis*.

69 *Ibid*, at reg. pg. nos. 12/1440*bis*.

Turning to the arrest warrants issued for the defendants, the Chamber concluded that the failure to execute the warrants was attributable to the refusal of the Federal Republic of Yugoslavia and the Republika Srpska to cooperate with the Tribunal. The Chamber determined that the Republika Srpska was refusing to cooperate with the Tribunal based on the fact that the accused persons resided on its territory and occupied official positions of authority in that entity. It certified the refusal of the Federal Republic of Yugoslavia to cooperate on the ground that the accused persons had been on its territory on a number of occasions and had not been arrested. The Chamber's conclusion regarding the Federal Republic of Yugoslavia's refusal to cooperate with the Tribunal was also based on the ground that, under the Dayton Accords, it was responsible for the Republika Srpska's cooperation with the Tribunal. The Chamber called upon the President of the Tribunal to so inform the United Nations Security Council.[70]

One feature of the *Karadzic and Mladic* cases that sets them apart from the Tribunal's other Rule 61 proceedings is that on two occasions attorneys for Karadzic attempted to participate in the proceeding. The motions filed by Karadzic's lawyers and the Tribunal's decisions thereon raise the issue of whether Rule 61 proceedings satisfy the requirements of international law regarding the protection of accused persons.

First, armed with a power of attorney granted by Karadzic, Igor Pantelic, a lawyer from Belgrade, petitioned the Chamber on 27 June 1996 for free access to the courtroom and to all relevant documents and case-files submitted by the Prosecutor. In a decision rendered the same day, the Chamber noted that Rule 61 proceedings were not trials and rejected the request for access to relevant documents and case-files on the ground that such access could only be granted as part of a trial following the accused's submission to the Tribunal's jurisdiction.[71] The Chamber interpreted Mr. Pantelic's request to attend the Rule 61 hearing as an assertion of the 'right of his client to be given the fullest information possible as provided by Article 21, paragraph 4(a) of the Statute of the Tribunal'. It therefore decided that the indictments against Karadzic should be read in open court in the presence of his attorney and that, while Mr. Pantelic could not remain in the courtroom during the Rule 61 hearing, an observer's seat would be reserved for him for the entire duration of the hearing. Almost immediately after the reading of the indictments, Mr. Pantelic informed the Tribunal's Registry that he could not represent his client under the conditions imposed by the Trial Chamber and withdrew from the case.

70 The President of the Tribunal informed the Security Council of the Trial Chamber's decision by a communication dated 11 July 1996. See Letter from the President of the International Criminal Tribunal for the Former Yugoslavia, to the President of the Security Council, UN Doc. S/1996/556.

71 See *Karadzic and Mladic*, Case No. IT-95-5-R61, Decision Partially Rejecting the Request Submitted by Mr. Igor Pantelic, reg. pg. nos. 3/1348*bis*-*1*/1348*bis* (2 July 1996). For a different perspective on this issue, see *supra* text accompanying notes 63-64 (discussing Judge Sidhwa's separate opinion in *Rajic*).

Second, on 5 July 1996, two other attorneys for Karadzic filed a motion seeking to challenge the fairness of the Rule 61 procedure and requesting access to documents and the proceedings. The Chamber denied their motions, holding that no such challenge could be made until the accused appeared before the Tribunal and that access to documents would also be provided after that time. The attorneys were granted observer status on the same conditions as were established in respect of Mr. Pantelic.[72]

3. Issues Raised by Rule 61 Proceedings

As illustrated by the Defence motions filed in the *Karadzic and Mladic* Rule 61 proceedings, the unique and innovative nature of these proceedings generates concerns regarding the extent to which proceedings of this character are compatible with international standards regarding the rights of the accused. The motions raised issues relating to the *conduct* of Rule 61 proceedings, i.e., whether the accused's right to obtain information about the charges against him and to defend himself were applicable in such proceedings. Equally important are undecided questions regarding the *effects* of Rule 61 proceedings on subsequent trials conducted by the Tribunal. The discussion above demonstrates that, in several Rule 61 decisions, the Tribunal's Trial Chambers have decided significant questions of law. The precedential effect of these legal conclusions, which were reached without the benefit of defence arguments, is unknown. For instance, could the Trial Chambers' rulings on the conditions necessary for the Tribunal's exercise of its subject-matter jurisdiction pursuant to Articles 2, 3, 4 or 5 of the Statute, which are found in each of the Rule 61 decisions, be considered as precedents in future trials? The same question could be raised with regard to Trial Chamber I's identification of the elements of various crimes in *Nikolic, Vukovar Hospital* and *Karadzic and Mladic*, as well as its exclusion of the defence of reprisal in the *ex parte* proceedings in *Martic*. Even more troubling is the potential precedential import of Rule 61 decisions on mixed questions of law and fact, such as whether a certain conflict was international or internal. For example, can Trial Chamber II's decision in *Rajic* that the conflict between the Bosnian Croats and the Bosnian Government was international in character serve as a precedent when Trial Chamber I is called upon to examine the same conflict in the upcoming trial in the *Blaskic* case? Finally, the status of evidence submitted in Rule 61 proceedings must be carefully considered. Will the record of such proceedings, which would include the un-cross-examined testimony of witnesses, automatically become part of the record at a subsequent trial or will the Prosecutor have to 'start from scratch' to prove his case? The resolution of these issues will, of course, have to be guided by the accused's paramount right to a fair trial set out in the Tribunal's own Statute and in numerous international instruments.

72 See *Karadzic and Mladic*, Decision Rejecting the Request Submitted by Messrs. Medvene and Hanley III, Case No. IT-95-5-R61, reg. pg. nos. 1368/5*bis*-1368/1*bis* (5 July 1996).

II. Pre-Trial and Trial-Related Proceedings

As of the end of 1996, eight persons who had been indicted by the Tribunal had made initial appearances and entered pleas before a Trial Chamber of the Tribunal. In addition, one person who had been mistakenly identified as an indictee also appeared before a Trial Chamber. The proceedings related to these cases are examined below.

A. *Prosecutor v. Tadic*, Case No. IT-94-1-T

The Tribunal's first trial was held in the case of *Prosecutor v. Tadic*, from 7 May to 28 November 1996. The judgment in this landmark case has not yet been issued. However, the case has already prompted a number of decisions on important legal issues.

1. Deferral and Indictment

The *Tadic* case started in November 1995 with an application by the Prosecutor for a Trial Chamber of the Tribunal to issue a formal request to the Federal Republic of Germany for deferral to the competence of the Tribunal in the investigation of the activities of Dusko Tadic. Relying on Article 8 of the Tribunal's Statute and Rules 9 and 10, the Chamber granted the Prosecutor's request.[73]

Tadic was indicted in February 1995 and charged with grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war and/or crimes against humanity for his participation in the rape, murder, mistreatment and torture of Bosnian Muslim and Croat prisoners in the Omarska prison camp.[74] The indictment was subsequently amended twice, with leave, to add charges of persecution and deportation.[75]

Germany, which had custody of Tadic, transferred him to the Hague. Tadic made his initial appearance on 26 April 1995 before Trial Chamber II of the Tribunal, and pleaded not guilty to all charges against him.

2. Preliminary Motions

Rules 72 and 73 of the Tribunal's Rules of Procedure and Evidence permit the filing of a variety of preliminary motions. In the *Tadic* case, both the Prosecutor and the Defence filed a number of motions in accordance with these Rules.

73 See *Tadic Deferral Decision*. The deferral procedure is discussed above, see *supra* text accompanying notes 14-18, and in the examination of Trial Chamber II's decision on *non-bis-in-idem*, see *infra* text accompanying notes 92-95.

74 Indictment, *Prosecutor v. Tadic*, Case No. IT-94-2-I, (13 Feb. 1995) (reg. pg. not available).

75 See Indictment, *Tadic*, Case No. IT-94-1-T, reg. pg. nos. 5633-5625 (1 Sept. 1995); Indictment, *Tadic*, Case No. IT-94-1-T, reg. pg. nos. 7570-7562 (14 Dec. 1995).

(a) Jurisdiction

Acting pursuant to Rule 73(A)(i), Tadic moved to dismiss all charges against him for lack of jurisdiction. Tadic challenged the Tribunal's power to try him on three grounds: the illegality of the establishment of the Tribunal by the United Nations Security Council; the improper grant of primacy to the Tribunal over domestic courts; and the Tribunal's lack of subject-matter jurisdiction. Trial Chamber II issued its decision on 10 August 1995.[76] The Chamber held that it was not competent to decide the Defence's first objection because the legality of the establishment of the Tribunal was not a jurisdictional issue capable of resolution by the Tribunal. Second, the Chamber found that the Defence's primacy argument also in effect challenged the legality of the Security Council's action of establishing the Tribunal, which it had previously refused to review and that, in any event, the accused did not have standing to raise the issue, which was one of state sovereignty. Finally, the Chamber examined Tadic's subject-matter jurisdiction arguments in some detail, concluding that they were without merit.

Relying on Tribunal Rule 72(B), which permits an interlocutory appeal 'in the case of dismissal of an objection based on lack of jurisdiction', Tadic appealed against the Trial Chamber's rejection of his jurisdictional challenge. The Appeals Chamber issued its decision (the '*Tadic Appeals Chamber Jurisdiction Decision*') on 2 October 1995.[77]

Contrary to the Trial Chamber's holding, the Appeals Chamber, by a majority of four to one, Judge Li dissenting, held that it was competent to entertain Tadic's challenge to the legality of the establishment of the Tribunal. The Chamber reasoned that it was competent to decide its own jurisdiction and that the validity of its jurisdiction would be nullified if the Tribunal had been illegally established. Accordingly, it found that it had the power to review the legality of the Tribunal's establishment as part of its authority to determine the Tribunal's jurisdiction. The Appeals Chamber rejected the various objections raised by the Defence to the creation of the Tribunal and found that it had been lawfully established.

With respect to the Tribunal's primacy over national courts, the Appeals Chamber essentially agreed with the Trial Chamber, except that it found that the accused did indeed have standing to argue that the Tribunal's primacy was a violation of

76 See *Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction, reg. pg. nos. 5011-4979 (10 Aug. 1995).

77 See *Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, reg. pg. nos. 6491-6413 (2 Oct. 1995) (hereinafter *Tadic Appeals Chamber Jurisdiction Decision*). Appended to the decision were separate opinions by Judges Li, Abi-Saab and Sidhwa, as well as a declaration by Judge Deschênes. See *ibid*, Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, reg. pg. nos. 6412-6404; Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, reg. pg. nos. 6403-6397; Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, reg. pg. nos. 6396-6319; Separate Declaration of Judge Deschênes on the Defence Motion for Interlocutory Appeal on Jurisdiction, reg. pg. nos. 6412-6404. Judge Deschênes' declaration was limited to pointing out the necessity of simultaneous publication of the English and French texts of the decisions of the Tribunal and the equally authoritative character of both texts.

state sovereignty. Tadic's primacy challenge was nonetheless dismissed on the ground that primacy was necessary to prevent the accused from forum shopping and to prevent phoney proceedings designed to shield war criminals.

Finally, the Tribunal's Appeals Chamber examined the Defence's objections to the Tribunal's assertion of subject-matter jurisdiction over the charges against Tadic. As a preliminary matter, the Chamber noted that the basis for the application of international humanitarian law is the existence of an armed conflict; such a conflict exists, the Chamber held, 'wherever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[78] Applying these principles to the former Yugoslavia, the Appeals Chamber found that an armed conflict existed at all times relevant to the *Tadic* case.

Turning to the question of the classification of the conflict in the former Yugoslavia, the Appeals Chamber found that the conflict had both internal and international aspects. The Security Council was aware of this situation and, in creating the Tribunal for the prosecution and punishment of persons responsible for war crimes, 'intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts'.[79] In light of this purpose of the Security Council, the Appeals Chamber proceeded to consider the scope of the Tribunal's jurisdiction.

The Chamber held that, in the present state of development of international law, for the Tribunal to have jurisdiction under Article 2 of its Statute (grave breaches of the 1949 Geneva Conventions), the alleged offences must have been committed within the context of an international armed conflict and against persons or property protected by the relevant Geneva Convention. Judge Abi-Saab, in his separate opinion in the case, took a different view of the matter. He contended that the existence of an international armed conflict was not necessary for the application of the grave breaches provisions of the Geneva Conventions. The grave breaches covered by Article 2 were 'subsumed in the "serious violations of the laws or customs of war"' which applied in internal armed conflicts.[80]

Although the Chamber held that it had subject-matter jurisdiction over the case, it did not explicitly decide whether the conflict at issue in the *Tadic* case was international.[81] The Chamber's refusal to clearly classify the conflict in the former

78 *Tadic Appeals Chamber Jurisdiction Decision*, at reg. pg. no. 6452.

79 *Ibid*, at reg. pg. no. 6445.

80 *Ibid*, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, at reg. pg. nos. 6399-6398.

81 In the *dispositif* the Chamber concluded that the Tribunal had subject-matter jurisdiction over the case. Judge Sidhwa apparently understood this to mean that the majority had indeed decided on the character of the conflict and dissented from the majority opinion on this point. In Judge Sidhwa's view, the Chamber should not have decided the question on the sparse record before it and the accused's motion should have been remanded to the Trial Chamber for decision following a further evidentiary hearing on the issue. See *Ibid*, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, at reg. pg. nos. 6323-6321.

Yugoslavia as international or internal imposes a significant burden of proof on the prosecution, which has to establish the character of the conflict in every case where the accused is charged with violating the grave breaches provisions of the Geneva Conventions or other norms that apply only in international conflicts.

In contrast to its strict construction of Article 2, the Appeals Chamber took an innovative and expansive approach to Article 3. This provision of the Statute is entitled 'Violations of the laws or customs of war', a phrase which is traditionally understood to mean violations of the rules of warfare committed during an international armed conflict. Indeed, the non-exhaustive list of crimes in Article 3 is taken directly from the Regulations annexed to the 1907 Hague Convention which are applicable in international armed conflicts. The Appeals Chamber, however, took a broader view of the term 'laws or customs of war', finding that such rules applied in respect of any armed conflict, whether internal or international in character. Moreover, the Chamber concluded that the Article covered not just the Hague Regulations, but rather all violations of international humanitarian law *other than* the grave breaches of the four Geneva Conventions covered by Article 2 or the violations covered by Articles 4 and 5 (genocide and crimes against humanity respectively).

Given the breadth of Article 3, the Appeals Chamber believed it necessary to set out conditions that had to be met for a violation of international humanitarian law to be subject to the Tribunal's jurisdiction under Article 3. These were: the offence must be serious, it must involve individual criminal responsibility, and the rule violated either must be part of customary international law or, if based on treaty law, must have been binding on the parties at the time of the alleged offence.[82]

The Chamber's expansive reading of Article 3, combined with its articulation of several conditions for its application, means that the Tribunal will have to directly confront the complex and unsettled issue of what rules may be considered laws and customs of war applicable to internal armed conflicts. Such an exercise, difficult though it may be, will hopefully result in a development of the humanitarian law rules applicable in internal armed conflicts and thereby contribute to narrowing the differences that are presently perceived between the laws applicable in different types of conflicts.

(b) Protection of Witnesses

On 10 August 1995, the Trial Chamber seized of the *Tadic* case issued a seminal decision on protective measures for victims and witnesses (hereinafter *Tadic Protective Measures Decision*).[83] The issue of providing appropriate protection for witnesses is obviously of particular concern for the Tribunal, given that it cannot

82 The Chamber also concluded that the existence of an armed conflict was sufficient to meet the jurisdiction requirements of Article 5 of the Statute (crimes against humanity).

83 See *Tadic*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, reg. pg. nos. 5078-5037 (10 Aug. 1995).

rely on an efficient witness protection programme and that many of the witnesses and their families reside in the conflict-torn former Yugoslavia.

Before analysing the substantive issue of protective measures, the Chamber examined the sources of law that it should consider in interpreting its Statute and Rules. Emphasizing the Tribunal's unique nature as an international institution charged with trying crimes that were so horrific as to warrant universal jurisdiction, and the explicit instruction in its Statute to pay due regard to the protection of witnesses, the Trial Chamber concluded that it was not obliged to follow the interpretations given by other judicial bodies to the fair trial guarantees contained in the ICCPR and the European Convention on Human Rights. Rather, the Chamber would interpret the Tribunal's Statute and Rules 'within its own context and determine where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses within its unique legal framework'.[84]

The Tribunal's Statute explicitly acknowledges a relationship between the accused's right to a fair trial and the need to protect certain witnesses. Article 20(1) of the Statute requires the Trial Chambers to 'ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses'. Article 21(2) sets out the accused's right to a 'fair and public hearing' but makes this subject to Article 22, which requires the Tribunal to 'provide in its rules of procedure and evidence for the protection of victims and witnesses' and lists as examples of appropriate protective measures 'the conduct of *in camera* proceedings and the protection of the victim's identity'.

The central provisions of the Tribunal's Rules relating to protective measures are contained in two Rules, which are reproduced below:

> Rule 69
> Protection of Victims and Witnesses
>
> (A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal....
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.
>
> Rule 75
> Measures for the Protection of Victims and Witnesses
>
> (A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused....

84 *Ibid*, at reg. pg. no. 5063.

The Rules, like the Statute, leave the Chambers with broad discretion to fashion appropriate protective measures. Both the Rules and the Statute, however, clearly indicate that the boundary circumscribing this discretion is found in the fair trial rights of the accused. In order to decide on protective measures, the Chamber was therefore required to examine the requested measures and determine whether they could be implemented in a manner consistent with the rights of the accused.

The Prosecutor's motion sought several different types of protective measures. The two principal categories of measures were those designed to: (i) keep certain witnesses' names and identifying data confidential *vis-à-vis* the public, but allow their release to the Defence; and (ii) keep other witnesses anonymous so that neither the Defence nor the public could learn their identity. With respect to the first category of measures, which the Trial Chamber characterized as 'confidentiality' measures, the Chamber analysed whether confidentiality would violate the accused's right to a public hearing articulated in Article 21(2) of the Tribunal's Statute. While acknowledging the preference for public hearings expressed in the Statute, the Chamber noted that this had to be 'balanced with other mandated interests, such as the duty to protect victims and witnesses'.[85] Such a balancing, the Chamber found, was compatible with the principles articulated by the European Court of Human Rights and the principles of criminal procedure in domestic courts. It concluded by granting the confidentiality measures sought by the Prosecutor.[86]

The Chamber then turned to the Prosecutor's request for anonymity for certain witnesses. It noted the general principle that all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument, but it went on to hold that

> ... the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the witness. The balancing of these interests is inherent in the notion of a 'fair trial'. A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses.[87]

In light of the provisions of the Tribunal's Statute, which place great emphasis on the protection of witnesses, the Chamber believed it was authorized to order anonymity.[88]

The Chamber indicated that it can only restrict the right of the accused to examine or have examined witnesses against him in exceptional circumstances. It found, however, that the situation of armed conflict in the former Yugoslavia constituted

85 *Ibid*, at reg. pg. no. 5062.

86 In the context of confidentiality, the Chamber also considered the Prosecutor's request that four of the witnesses protected by confidentiality, who were allegedly victims of sexual assault, be permitted to testify through closed circuit television and thereby be protected from seeing the accused. This measure was 'intended to protect them from possible retraumatization'. Considering the unique concerns of victims of sexual assault, the Chamber acceded to the Prosecutor's request. *Ibid*, at reg. pg. no. 5056.

87 *Ibid*, at reg. pg. no. 5053.

88 See also *infra* text accompanying notes 128-137.

'exceptional circumstances *par excellence*', which would warrant derogation from normal procedural guarantees.[89]

In order to determine whether anonymity should be granted in a particular instance, the Chamber identified five criteria that were 'relevant to the balancing of all interests'. These were (i) the existence of a real fear for the safety of the witness or the witness's family; (ii) the testimony must be important enough to the Prosecutor's case to make it unfair to compel him to proceed without it; (iii) there must be no *prima facie* evidence that the witness is untrustworthy; (iv) there is no effective protection programme for the witness or the witness's family; and (v) the measures taken should be strictly necessary. Analysing the specific requests of the Prosecutor based on these criteria, the Chamber granted anonymity for certain witnesses and ordered more limited protective measures for others.

The Chamber acknowledged that anonymous testimony restricted the Defence's right to cross-examination and could therefore impact upon the accused's right to a fair trial. In order to address this concern, the Chamber set out certain guidelines for the questioning of anonymous witnesses. In particular, the Chamber required that the judges be able to observe the witness's demeanour and be aware of his or her identity; the Defence be allowed ample opportunity to question the witness on issues unrelated to identity or current whereabouts; and the identity of the witness be released when there are no longer reasons to fear for his or her security. As a further safeguard, the Chamber noted that if at the end of the trial it found that the need to assure a fair trial substantially outweighed the anonymous testimony, it could strike that testimony from the record and not consider it in reaching its finding as to the guilt of the accused.[90]

The correctness of the Chamber's conclusions regarding protective measures was challenged by one member of the Trial Chamber, Judge Stephen, who dissented from the majority opinion with respect to the issue of anonymity.[91] Judge Stephen first highlighted the nuances of the language of Article 20(1), which demands 'full respect' for the rights of the accused and requires only 'due regard' for the protection of victims and witnesses. He also noted that, although the 'fair and public hearing' requirement of Article 21(2) was subject to the Article 22 requirement to make provision for the protection of witnesses, the *other* fair trial guarantees listed in Article 21 were not subject to Article 22. These guarantees include *inter alia* the accused's right to cross-examine the witnesses against him, which would be prejudiced by witness anonymity. Judge Stephen concluded that only the 'public' hearing component of Article 21(2) was subject to Article 22 and not its 'fair' hearing component. There were two reasons for this conclusions:

89 *Tadic Protective Measures Decision*, at reg. pg. no. 5052.
90 *Ibid*, at reg. pg. no. 5053.
91 *Ibid*, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, reg. pg. nos. 5036-5013.

> [F]irst, because, while Article 22 specifically contemplates non-public hearings, it certainly does not contemplate unfair hearings: secondly, because Article 20(1) itself, unqualifiedly and quite separately from Article 21, requires a Trial Chamber to ensure that a trial is 'fair'.... It is primarily the public quality, not the fairness, of a hearing that may have to give way to the need to protect victims and witnesses, that in turn suggests that the kind of protection being thought of in Article 22 is essentially those measures that will affect the public nature of the trial, rather than its fairness.[92]

Because anonymity was a measure 'which is likely substantially to disadvantage the defendant', Judge Stephen found it was not consistent with the Tribunal's Statute to order anonymity.

(c) *Non-bis-in-idem*

On 14 November 1995, Trial Chamber II dismissed a Defence motion based on the principle of *non-bis-in-idem*.[93] The Defence had argued that the principle of *non-bis-in-idem*, which is enshrined in Article 10 of the Tribunal's Statute as well as in various other international instruments, would be violated if the accused was tried by the Tribunal because criminal proceedings against him had already commenced in Germany. The Chamber noted that, prior to his transfer to the Tribunal, the accused had been indicted by Germany but had not been tried there. The Chamber's review of the Statute and other authorities led it

> ... to the unmistakable conclusion that there can be no violation of *non-bis-in-idem*, under any known formulation of that principle, unless the accused has already been tried. Since the accused has not yet been the subject of a judgement on the merits on any of the charges for which he has been indicted, he has not yet been tried for those charges. As a result, the principle of *non-bis-in-idem* does not bar his trial before this Tribunal.[94]

The second argument raised by the Defence was that the principle of *non-bis-in-idem* included a 'procedural aspect', which was violated when a national court deferred its proceedings against an accused in order to allow a trial by the Tribunal in circumstances other than those set out in Article 10(2) of the Tribunal's Statute. The Defence asserted that the Rule 9, under which the *Tadic* case was transferred from Germany to the Tribunal, violated the Statute by allowing deferral in situations other than those enumerated in the Statute.[95] The Trial Chamber did not consider the merits of the Defence arguments on the propriety of the deferral of the case.

(d) Form of the Indictment

The Trial Chamber denied in part and granted in part a Defence motion on the form of the indictment.[96] Tadic had argued that the indictment against him was flawed

92 *Ibid*, at reg. pg. no. 5027-5026.
93 *Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, reg. pg. nos. 7127-7112 (14 Nov. 1995).
94 *Ibid*, at reg. pg. no. 7118.
95 For an examination of the deferral rule, see *supra* text accompanying notes 14-18.
96 See *Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, reg. pg. nos. 7135-7128 (14 Nov. 1995).

because (i) its allegations were imprecise; and (ii) each allegation of fact gave rise to a number of charged offences, which were alleged not in the alternative but cumulatively. With respect to the objection of imprecision, the Chamber noted that under Article 21 of the Statute, the accused was entitled to be informed in detail of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. Most of the charges in the indictment satisfied these criteria. Certain counts that alleged a course of conduct, however, were too 'generalized' and did not 'provide the accused with any specific, albeit concise statement of the case and of the crimes with which he is charged'.[97] The Chamber held that if the Prosecutor wished to pursue these charges, he should amend the indictment within 30 days to provide additional details. The Chamber postponed consideration of the Defence complaint of cumulativeness, reasoning that 'since this is a matter that will only be relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration'.[98]

3. Motions during Trial

During the course of the *Tadic* trial, there was considerable judicial activity with respect to several motions.

(a) Protection of Defence Witnesses and Video-conference Link

On 26 June 1996, the Trial Chamber rendered its decision on Defence motions to summon and protect Defence witnesses and on the giving of evidence by video-conference link.[99]

The Defence's first request – that the Trial Chamber summon certain witnesses to appear at the seat of the Tribunal to testify – was not opposed by the Prosecutor and was granted by the Chamber. The Defence also requested the Chamber to provide for the safe conduct of four of its witnesses, or alternatively to allow the witnesses to be heard by video-link. The Chamber noted that video-link testimony was less desirable than live testimony. It also emphasized that safe conduct orders provided only limited immunity from prosecution, i.e., immunity for crimes committed prior to coming to the court and only for the time that the witness was present at the seat of the court for the purpose of giving testimony. The Chamber regarded 'this limited restriction on the powers of prosecution reasonable in light of the importance for the administration of justice of having the witnesses physically present before this Trial Chamber'.[100] The Trial Chamber declined, however, to grant the Defence request to provide safe conduct to protect the witnesses in the countries through which they would have to travel to reach the Tribunal, giving no reason for its refusal.

97 *Ibid*, at reg. pg. no. 7130.
98 *Ibid*, at reg. pg. no. 7129.
99 See *Tadic*, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, reg. pg. nos. 9162-9148 (26 June 1996).
100 *Ibid*, at reg. pg. no. 9157.

The Chamber next considered the Defence request to allow certain witnesses, who were unwilling to come to the Tribunal, to testify via video-link.[101] The Chamber did not believe that the Tribunal's Rules specifically covered the giving of video-link testimony. Nonetheless, 'because of the extraordinary circumstances attendant upon conducting a trial while a conflict is ongoing or recently ended', the Chamber determined, in the interest of justice, to be 'flexible and endeavour to provide the Parties with the opportunity to give evidence by video-link'.[102] The Chamber stressed that generally a witness should be physically present to testify before the Tribunal and that video-link testimony would be permitted only if it was shown that (i) the testimony of the witness was sufficiently important to make it unfair to proceed without it; and (ii) the witness was unable or unwilling to come to the Tribunal. The Chamber gave permission for the Defence witnesses who fulfilled these criteria to testify by video-link. It explicitly warned, however, that '[t]he evidentiary value of testimony provided by video-link, although weightier than that of testimony given by deposition, is not as weighty as testimony given in the courtroom'.[103]

(b) Hearsay

The admissibility of hearsay evidence was another significant issue considered by Trial Chamber II during the *Tadic* trial. The Defence filed a motion contending that admitting hearsay evidence would violate the right of the accused, set forth in Article 21 of the Tribunal's Statute, to examine the witnesses against him. The Defence averred that the Tribunal should refuse to admit hearsay evidence directly implicating the accused unless it found that the probative value of the evidence substantially outweighed its prejudicial effect. The Prosecutor opposed the Defence's request, arguing that the Tribunal's Rules deliberately did not exclude hearsay evidence, which position was consistent with a system in which judges, rather than laypersons, were the finders of fact and also with the civil law system, in which all relevant evidence is admitted.

The Trial Chamber denied the Defence request.[104] A review of the Tribunal's Rules showed that 'there is no blanket prohibition on the admission of hearsay evidence'.[105] Moreover, although the Tribunal was not bound by national rules of evidence, the Chamber's survey of national practices regarding admissibility of evidence in common and civil law systems demonstrated that the prohibition on the admission of hearsay evidence was not a universal tenet of criminal procedure that the Tribunal would be required to apply.[106]

101 The Defence envisaged that witnesses would give evidence 'through a live television link with the courtroom which will enable all persons concerned to see, hear and communicate with the witness, even though he is not physically present'. *Ibid.*

102 *Ibid*, at reg. pg. no. 9155.

103 *Ibid*, at reg. pg. no. 9154.

104 See *Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on Hearsay, reg. pg. nos. 11597-11588 (5 Aug. 1996).

105 *Ibid*, at reg. pg. no. 11593.

106 *Ibid*, at reg. pg. nos.11591-11590.

Some restrictions on the admissibility of hearsay evidence were found by the Chamber in the text of Rule 89(C), which provides that the Chamber may admit 'any relevant evidence which it deems to have probative value'. The necessity for probative value 'implicitly require[d] that reliability be a component of admissibility'.[107] Moreover, Rule 89(D), which allows the Chamber to 'exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial', provided further protection against prejudice to the Defence.[108] In sum, the Chamber held that

> ... in deciding whether or not hearsay evidence that has been objected to will be excluded, the Trial Chamber will determine whether the proffered evidence is relevant and has probative value, focusing on its reliability. In doing so, the Trial Chamber will hear both the circumstances under which the evidence arose as well as the content of the statement. The Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognised by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate.[109]

(c) Motion to Dismiss Charges

At the end of the Prosecutor's presentation of his case-in-chief, the Defence filed a motion to dismiss the charges contained in certain counts of the indictment. The Chamber held that the test to be applied in adjudicating the motion to dismiss was 'whether as a matter of law there is evidence, were it to be accepted by the Trial Chamber, as to each count charged in the indictment which could lawfully support a conviction of the accused'.[110] Because the Prosecutor's evidence met this threshold, the Chamber denied the Defence motion.

(d) Disclosure of Defence Witness Statements

An important matter considered by the Chamber was the Prosecutor's motion seeking production of prior statements of Defence witnesses and permission to question Defence witnesses regarding such statements. The issue arose when a Defence witness, during cross-examination by the Prosecutor, indicated that he had earlier made a statement to Defence counsel. The Prosecutor sought disclosure of the statement. Defence counsel claimed that the statement was subject to a legal professional privilege, whereas the Prosecutor contended that it was not subject to such privilege and that, in any event, the privilege had been waived by the act of the witness testifying before the Tribunal.

107 *Ibid*, at reg. pg. no. 11590.
108 *Ibid*, at reg. pg. no. 11589.
109 *Ibid*, at reg. pg. no. 11589. Judge Stephen filed a separate opinion on the motion, in which he essentially agreed with the Chamber's conclusions based on his reading of the Tribunal's Rules. See *Ibid*, Separate Opinion of Judge Stephen on the Defence Motion on Hearsay, reg. pg. nos. 11617-11614.
110 *Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion to Dismiss Charges, reg. pg. nos. 12785-12784, at 12784 (13 Sept. 1996).

Initially, the Chamber orally granted this motion, but upon reconsideration at the behest of the Defence, it reversed itself.[111] Judges Stephen and Vohrah, who constituted the majority on the final decision, and Judge McDonald, who dissented from the decision, each filed separate opinions.

Judge Stephen's opinion began by emphasizing the different disclosure obligations of the Prosecutor and the Defence under the Tribunal's Rules. While the Prosecutor was obliged to disclose considerable material, including witness statements, to the accused, the Defence (with the exception of reciprocal disclosure situations) had 'no disclosure obligation at all unless an alibi or a special defence is sought to be relied upon and then only to a quite limited extent, never involving disclosure of witness statements'.[112] These Rules, Judge Stephen found, resulted from the fact that the Prosecutor carried the burden of proof and the accused was not obliged to afford any assistance in making out the Prosecution case.

Turning to the issue of privilege, Judge Stephen noted that the Tribunal's Rules, which included a lawyer-client privilege, did not explicitly provide for any privilege for the work-product of attorneys. In such cases, Rule 89(B) directed the Chamber to 'apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law'. Because the Tribunal's proceedings were 'basically adversarial' in character, Judge Stephen found that the rules of evidence commonly used in adversarial systems would be 'of strong persuasive authority when it becomes necessary to determine what should be done in instances not legislated for by the International Tribunal's own Rules, as long as they are otherwise consistent with the International Tribunal's Statute and Rules'.[113] The judge's review of the law in the relevant jurisdictions led him to the conclusion that 'with the exception of the United States Federal Courts, there is in such of the common law systems as have been referred to a clearly expressed privilege against [the disclosure sought by the Prosecutor] and no suggestion that it is temporary only, ending once a witness gives evidence'.[114] Judge Stephen further noted that civil law systems also gave effect to a legal professional privilege. For these reasons, Judge Stephen held that he would 'uphold the objection of the Defence to the production of the witness statement in question'.[115]

Judge Vohrah agreed fully with Judge Stephen's analysis.[116] Judge Vohrah made two supplementary points in support of the decision reached: (i) the Defence had reasonably proceeded on the assumption that its witness statements would not be

111 See *Tadic*, Case No. IT-94-1-T, Decision on Prosecution Motion for Production of Defence Witness Statements, reg. pg. nos. 15376-15374 (27 Nov. 1996).
112 *Ibid*, Separate Opinion of Judge Stephen on Prosecution Motion for Production of Defence Witness Statements, reg. pg. nos. 15341-15331, at 15338.
113 *Ibid*, at reg. pg. no. 15337.
114 *Ibid*, at reg. pg. no. 15335.
115 *Ibid*, at reg. pg. no. 15331.
116 See *Ibid*, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, reg. pg. nos. 15330-15324 (27 Nov. 1996).

disclosed, so that requiring their release at this stage of the proceedings would be unfair; and (ii) the principle of equality of arms in criminal proceedings was intended, because of the Prosecutor's more extensive resources, to bring the Defence into parity with the Prosecutor and was not a basis to compel the disclosure of Defence witness statements.

Judge McDonald disagreed with the conclusion of the majority. In her view, the Trial Chamber had 'both the explicit and inherent power' to order the production of Defence witness statements and the exercise of such power would 'not violate any rights or privileges of the accused or his legal counsel'.[117]

4. Looking Forward – the Tadic Judgement

As the above discussion demonstrates, the Trial Chamber charged with conducting the first truly international war crimes trial has had to face many complicated and controversial issues, relating both to substantive matters such as jurisdiction and primacy and to procedural matters such as the protection of witnesses, the presentation and admissibility of evidence and the Defence's disclosure obligations. In deciding the final outcome of the *Tadic* case, the Trial Chamber will no doubt have to face even more difficult questions relating to the application of the mostly untested laws of war to the realities of a complex modern-day conflict.

B. *Prosecutor v. Blaskic*, Case No. IT-95-14-T

Initially indicted along with five others in November 1995, Tihomir Blaskic was the subject of an additional indictment issued on 22 November 1996.[118] The indictments allege that from May 1992 to April 1994, members of the armed forces of the Croatian Defence Council (HVO) of the Croatian Community of Herceg-Bosna committed serious violations of international humanitarian law against the Bosnian Muslim civilian population in central Bosnia. It is asserted that, at all relevant times, Blaskic held the rank of Colonel in the HVO and commanded the HVO forces in central Bosnia. He is therefore charged with grave breaches of the Geneva Conventions, violations of the laws or customs of war and/or crimes against humanity.

1. Conditions of Detention and Provisional Release

Blaskic voluntarily surrendered to the Tribunal and appeared for the first time before Trial Chamber I on 3 April 1996. Relying on the unique circumstances leading to his

117 *Ibid*, Separate and Dissenting Opinion of Judge McDonald on Prosecution Motion for Production of Defence Witness Statements, reg. pg. nos. 15373-15342, at 15372 (27 Nov. 1996).

118 See Indictment, *Kordic and Others*, Case No. IT-95-14-I, reg. pg. nos. 155-143 (9 Nov. 1995); Indictment, *Blaskic*, Case No. IT-95-14-T, reg. pg. nos. 2205-2199, 2178-2169 (22 Nov. 1996).

detention in the Hague, Blaskic filed a number of motions before the President of the Tribunal asking for modification of his conditions of detention.[119]

In a decision rendered on 3 April 1996, the President of the Tribunal granted the relief sought by the accused.[120] The central question considered in the President's decision was whether Blaskic was entitled to some form of detention other than incarceration, such as house arrest (*arrêt domiciliaire*). Although neither the Tribunal's Statute nor its Rules explicitly provide for house arrest, the President noted that they did not prohibit it either. In his view, house arrest

> ... would constitute a middle-of-the road measure between what is regarded by the Rules as the norm, namely detention on remand (Rule 64) and the exception, i.e. provisional release (Rule 65). It would be an intermediate measure only because it would be milder than incarceration, whilst it would be harsher than provisional release, for house arrest is a form of detention.[121]

The appropriateness of house arrest, the President held, depended on several factors. As an initial matter, he was required to consider the risk that the detainee would escape as well as the likelihood that he might tamper with or destroy evidence, endanger possible witnesses or continue his criminal behaviour. The President inferred from the practice of national courts that house arrest was particularly appropriate when the accused was seriously mentally or physically ill; aged; prison conditions were likely to jeopardize the defendant's life or mental health; or there were special circumstances warranting house arrest as a measure rewarding particular behaviour of the accused. Applying these factors to the case before him, with particular emphasis on the defendant's voluntary surrender, the President granted the relief sought by Blaskic. He ordered Blaskic's transfer as soon as practicable from the United Nations Detention Unit to a residence designated by the Dutch authorities in consultation with the Registrar of the Tribunal.[122]

Blaskic's motion for provisional release met with less success; it was denied by Trial Chamber I on 25 April 1996.[123] The Chamber was guided by the principle that it could order provisional release only in exceptional circumstances 'since the Rules had incorporated the principle of preventive detention of accused persons justified by the extreme gravity of the crimes for which they were being prosecu-

119 Blaskic's motions were filed pursuant to Rule 64 which states: 'Upon his transfer to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country, or by another country. The President may, on the application of a party, request modification of the conditions of detention of an accused.'

120 See *Blaskic*, Case No. IT-95-14-T, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, reg. pg. nos. 1832-1817 (3 April 1996).

121 *Ibid*, at reg. pg. no. 1824.

122 In subsequent decisions the President defined more precisely the conditions of Blaskic's detention, such as the frequency and circumstances of spousal and family visits. See e.g., *Blaskic*, Case No. IT-95-14-T, Decision on the Motion of the Defence Seeking Modification to the Conditions of Detention of General Blaskic, reg. pg. nos. 1854-1852 (17 April 1996); *Blaskic*, Case No. IT-95-14-T, Decision on the Motion of the Defence Seeking Modification to the Conditions of Detention of General Blaskic, reg. pg. nos. 1875-1873 (9 May 1996).

123 *Blaskic*, Case No. IT-95-14-T, Decision Rejecting a Request for Provisional Release, reg. pg. nos. 6/1870*bis*-1/1870*bis* (1 May 1996).

ted'.[124] As indicated in the Chamber's earlier decision in the *Djukic* case,[125] provisional release could be contemplated 'only in very rare cases in which the conditions of the accused, notably the accused's state of health, was not compatible with any form of detention'. The Chamber found that there were no exceptional circumstances justifying the provisional release of Blaskic. The Chamber took the view that the guarantees offered by the accused were not sufficient to ensure that, if released, he would appear before the Tribunal. Nor was the Chamber convinced that the accused would not pose a danger to any victim, witness or other person or otherwise discourage witnesses from appearing.

On 11 December 1996, the defendant renewed his request for provisional release. In its decision of 20 December 1996 rejecting the motion, Trial Chamber I considered thoroughly the issue whether the length of preventive detention could infringe the right of an accused to be tried without delay. It concluded that the reasonableness of the length of preventive detention must be 'evaluated in the light of the circumstances of each case'. Based on the jurisprudence of the European Court and the Commission of Human Rights, the Chamber concluded that the following criteria were relevant to the analysis: (i) the effective length of the detention; (ii) the length of the detention in relation to the nature of the crime; (iii) the physical and psychological consequences of the detention on the detainee; (iv) the complexity of the case and the investigations; and (v) the conduct of the entire procedure. In light of these factors and considering the already privileged conditions of detention of the accused, the Chamber ruled that he was not entitled to provisional release.[126]

2. *Protection of Witnesses and Disclosure of Evidence*

As in the *Tadic* case,[127] the issue of the protection of witnesses and victims was a central aspect of the *Blaskic* case. The issue of protective measures in the *Blaskic* case initially arose in the context of the Prosecutor's obligation to disclose evidence to the accused. Trial Chamber I issued two decisions addressing these intertwined issues and subsequently rendered a third decision dealing only with protective measures.

In its first decision, handed down on 17 June 1996, the Chamber considered the Prosecution's request for additional time to comply with its Rule 66(A) obligation to make available to the Defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material that accompanied the indictment and prior statements obtained from the accused and Prosecution witnesses.[128] The basis

124 *Ibid*, at reg. pg. no. 3/1870*bis*.
125 See *infra* text accompanying note 181.
126 See *Blaskic*, Case No. IT-95-14-T, Order Denying a Motion for Provisional Release, reg. pg. nos. 8/3047*bis*-1/3047*bis* (14 Dec. 1996).
127 See *supra* text accompanying notes 83-92.
128 See *Blaskic*, Case No. IT-95-14, Decision on the Prosecutor's Motion Requesting Protective Measures for Witnesses and Victims, reg. pg. nos. 1917-1914 (17 June 1996).

of the Prosecution motion was that it needed more time to present a motion requesting protective measures for witnesses and disclosing full witness statements would undermine the effectiveness of future protective measures. The Prosecution indicated its willingness to transmit to the Defence witness statements in which all identifying information had been expunged.

The Trial Chamber partially granted the relief sought by the Prosecution. Like Trial Chamber II in *Tadic*,[129] Trial Chamber I viewed the request for protective measures as requiring it to balance the right of the accused to a fair trial against the need to protect victims and witnesses. It also agreed with Trial Chamber II that 'the International Tribunal must interpret its provisions within its own context and determine where the balance lies ... within its unique legal framework'.

The Chamber believed that the Prosecution's motion to keep secret identifying information about its witnesses fell under Rule 69(A), which authorized the Chamber, in the pre-trial stage, to order protective measures in 'exceptional circumstances'. In the Chamber's view, such 'exceptional circumstances' existed in the case before it because: the accused occupied a high command position in the HVO army; and had been charged with responsibility for serious war crimes committed by personnel under his command; and because the Prosecutor was encountering many difficulties since the majority of the witnesses lived or were required to move through territory under the control of the HVO. The Chamber emphasized that protective measures would not, at the pre-trial stage, prejudice the rights of the accused so long as they were granted only for a definite period of time. Thus, while allowing the Prosecution to temporarily withhold from the Defence the names and other identifying data of witnesses and victims, the Chamber ordered that this information be disclosed to the Defence in sufficient time before the trial and at the latest by 1 September 1996 unless, prior to that date, the Chamber had ordered additional measures of protection.

The Chamber's second decision on protective measures and disclosure of evidence was rendered in response to motions by the Prosecution for the non-disclosure of specific witness statements (on the ground that, even though the names and other identifying data had been removed, the statements in themselves identified the witnesses based on the events and locations described) and its prayer for anonymity for eighty-seven witnesses and a general non-disclosure order.[130] As an initial matter, the Chamber explained its earlier oral rejection of the Prosecution's request that the motions be heard *ex parte*. For the Chamber, holding such a hearing *ex parte* was contrary to the accused's right to be present for the entire duration of his trial, including the pre-trial stage. 'The right of the accused to be present at his trial obviously includes every one of its stages, commences from the time the indictment is

129 See *supra* text accompanying notes 83-92.

130 See *Blaskic*, Case No. IT-95-14-T, Decision of Trial Chamber I on the Applications of the Prosecutor Dated 24 June and 30 August 1996 in respect of the Protection of Witnesses, reg. pg. nos. 2034-2024 (3 Oct. 1996).

served, and must be respected both during the preliminary proceedings and the trial itself before the appropriate court.'

With regard to the Prosecutor's request for witnesses' protection, the Chamber reiterated its previous conclusion that a balance must be struck between security for the Prosecution witnesses and fairness for the Defence. The Prosecutor had again, to some extent, demonstrated the existence of an 'exceptional' situation that would warrant witness protection measures. However, the Prosecutor was unable to recommend any protective measures to the Tribunal 'other than the extension of the *status quo*, which [was] the equivalent of a denial of justice to the Defence, and a mere suggestion of further investigations which threatened to postpone the start of the trial indefinitely'.[131] In order to put an end to this 'procedural imbroglio' the Chamber ordered the Prosecutor to make available to the accused the full statements of the witnesses within a specific period of time. The Chamber also set a trial date of 8 January 1997.[132]

Subsequently, the Prosecutor filed a more limited protective measures application, seeking anonymity for two witnesses. In its third decision on the issue, which was rendered on 5 November 1996, Trial Chamber I granted in part the relief sought by the Prosecutor.[133]

While its first two decisions on protective measures hinted that non-disclosure of the identity of witnesses to the accused would almost certainly undermine his right to a fair trial and that anonymity could be granted only at the pre-trial stage, Trial Chamber I's third decision seemed to accept some elements of Trial Chamber II's *Tadic Protective Measures Decision*,[134] and opened up the possibility that anonymity could be granted at the trial stage in some circumstances. Chamber I's decision began with a forceful statement of the paramount nature of the accused's fair trial right. The Chamber agreed with Judge Stephen's statement, in his dissenting opinion in the *Tadic Protective Measures Decision*, that the Tribunal's Rules did not 'give support of anonymity of witnesses at the expense of fairness of the trial and the rights of the accused spelt out in Article 21'.[135] It further stated that:

> The philosophy which imbues the Statute and the Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of

131 *Ibid*, at reg. pg. no. 2027.

132 The Prosecutor immediately filed an application for leave to appeal against the Chamber's decision. Applying the test established in the case of *Delalic and Others*, the Appeals Chamber rejected the application because it did not fall within its interlocutory appellate jurisdiction. *Blaskic*, Case No. IT-95-14-A, Decision on Application for Leave to Appeal (Protection of Victims and Witnesses), reg. pg. nos. 31-26 (14 Oct. 1996). For a detailed discussion of the conditions for the grant of leave to appeal to be granted, see *infra* text accompanying notes 143-146.

133 *Blaskic*, Case No. IT-95-14-T, Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, reg. pg. nos. 2156-2142 (6 Nov. 1996).

134 See *supra* text accompanying notes 87–90.

135 *Blaskic*, Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, at reg. pg. no. 2147.

> the trial itself; after that time forth, however, the right of the accused to an equitable trial must take precedence and requires that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.[136]

Despite these statements, the Chamber did not reject the holding in the *Tadic Protective Measures Decision* that anonymity at the trial stage could be granted in certain circumstances. It also agreed with the five-part test set out in the *Tadic Protective Measures Decision* for granting the protective measure of anonymity. It suggested, however, that it would apply the requirements for anonymity in a more stringent manner than had been employed in the *Tadic Protective Measures Decision*. The Chamber held that, before it would apply the five-part *Tadic* test, the Prosecutor would have to prove that there existed 'exceptional circumstance[s]' justifying the grant of anonymity for witnesses. Chamber II had held in the *Tadiç Protective Measures Decision* that the situation of armed conflict in the former Yugoslavia constituted an exceptional circumstance *'par excellence'*.[137] While not disagreeing with that conclusion, Chamber I held that the situation of 'enduring armed conflict' no longer existed in Bosnia and therefore could not be considered as an 'exceptional circumstance' warranting anonymity. The Chamber did not deny the application for anonymity. Rather, it granted to the Prosecutor the option of presenting additional evidence within a definite period of time in order to supplement his request.

On 27 November 1996, the Prosecution moved to postpone the trial asserting that it needed the delay to locate other potential witnesses to replace the witnesses who were not willing to testify without the protection of anonymity. Pursuant to this motion and a subsequent motion by the Defence, Blaskic's trial has been delayed until the spring of 1997. In the meantime, the Chamber has pending before it several Defence motions on procedural and substantive issues.

C. Prosecutor v. Mucic, Delic, Delalic and Landzo, Case No. IT-96-21-T

The indictment against Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, which was confirmed on 21 March 1996, is the first one to deal with atrocities committed against Bosnian-Serb victims. The accused are charged with grave breaches of the Geneva Conventions and/or violations of the laws or customs of war for killing, torturing and sexually assaulting Bosnian Serbs who were detained in a former facility of the Yugoslav Army in central Bosnia, known as Celebici camp.[138] Delalic, Mucic and Delic were allegedly responsible for the running of Celebici camp and are charged with command responsibility for failing to take the

136 *Ibid*, at reg. pg. no. 2151.
137 See *supra* text accompanying note 89.
138 See Indictment, *Prosecutor v. Delalic, Mucic, Delic and Landzo* (hereinafter *Delalic and Others*), Case No. IT-95-21-I, reg. pg. nos. 1733-1720 (21 March 1996).

necessary measures to prevent the crimes or to punish the perpetrators. Delic and Landzo are charged with individual responsibility for having committed the crimes described.

All the accused have been arrested, transferred to the Hague and have made their first appearances before Trial Chamber II of the Tribunal.[139] Each of the four accused has pleaded not guilty to the charges against him. A plethora of preliminary motions were filed in the case requesting the Chamber to rule on issues concerning separate trials, defects in the form of the indictment and requests for particulars, provisional release and the disclosure and transmittal of evidence.

1. Separate Trials

Acting pursuant to Rule 73(A)(iv), which expressly allows applications for separate trials, Mucic and Delalic both filed such motions. In accordance with the Trial Chamber's order, the two other defendants, Landzo and Delic, filed responses to the separate trial motions.

On 25 September 1995, Trial Chamber II issued a decision denying the motions.[140] The Chamber first observed that the defendants had been jointly charged with a variety of crimes in one indictment under Rule 48. This Rule allows multiple defendants to be charged in the same indictment if the acts alleged are part of the same 'transaction'. Rule 2 defines the 'transaction' requirement as meaning '[a] number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan'.[141] It found that the acts alleged by the Prosecutor fell within this description so that the joint indictment was proper.

In the Chamber's view, given that the transaction test was met, a separate trial would be justified only if it was necessary 'to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice'.[142] None of the defendants were able to demonstrate such a conflict of interests. With respect to the interests of justice criterion, the Chamber concluded that granting separate trials in the case would be contrary to the interests of justice because it would lead to

139 Mucic was arrested by Austrian authorities on 18 March 1996 and surrendered to the custody of the Tribunal on 9 April 1996. He appeared for the first time before Trial Chamber II on 11 April 1996. Delalic was also apprehended on 18 March by German police at the Tribunal's request. He was remanded into its custody on 8 May 1996 and made his first appearance before Chamber II on 9 May 1996. Finally, Delic and Landzo were both apprehended by Bosnia on 22 May 1996 and were transferred to the Hague, where they made their first appearance before Trial Chamber II on 18 June 1996. All of the accused persons are currently being detained in the custody of the Tribunal pending their trial, which is scheduled to start in the spring of 1997.

140 *Delalic and Others*, Case No. IT-96-21-I, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, reg. pg. nos. 1415-1409 (25 Sept. 1996).

141 ICTY Rules, Rule 2.

142 *Delalic and Others*, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, at reg. pg. no. 1413.

three or more separate trials, greater delay in the proceedings and the inevitable and unnecessary repetition of evidence.

On 4 October 1996, Delalic applied for leave to appeal the Trial Chamber's decision. The Appeals Chamber bench seized of the case rejected the request.[143] Delalic's application marked the first invocation of Rule 72(B)(ii), which allows for interlocutory appeals in cases where 'leave is granted by a bench of three Judges of the Appeals Chamber, upon serious cause being shown, within seven days following the impugned decision'. Accordingly, the Appeals Chamber bench seized of Delalic's motion sought to provide guidelines for its application. The purpose of the Rule, stated the bench, is 'to create a "filter" for appeals relating to matters other than jurisdiction' in order to avoid the Appeals Chamber 'being flooded with unimportant or unnecessary appeals which unduly prolong pre-trial proceedings'.[144] In order for an appeal to be admissible under Rule 72(B)(ii), the appellant is required to meet a three-part test.

First, the application must fall within the Tribunal's interlocutory appellate jurisdiction. It must relate to one of the preliminary motions enumerated in Rule 73, i.e., objections based on defects in the form of the indictment; applications for the exclusion of evidence obtained from the accused or having belonged to him; applications for severance of crimes joined in one indictment or for separate trials; and objections based on the denial of a request for assignment of counsel.[145] Second, the request could not be 'frivolous, vexatious, manifestly ill-founded, an abuse of the process of court or so vague and imprecise as to be unsusceptible of any serious consideration'. Third, the request had to show 'serious cause'. In the bench's view, this meant that the accused

> ... either shows a grave error which would cause substantial prejudice to the accused or is detrimental to the interests of justice, or raises issues which were not only of general importance but are also directly material to the future development of trial proceedings, in that the decision by the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber.[146]

Applying these criteria to Delalic's application, the bench ruled that it complied with the first and second conditions, but failed to meet the third. The accused had not shown a grave error in the decision that would cause him substantial prejudice or was detrimental to the interests of justice, nor had he demonstrated that there was a serious issue as to the necessity of ordering separate trials.

143 *Delalic and Others*, Case No. IT-96-21-A, Decision on Application for Leave to Appeal (Separate Trials), reg. pg. nos. 29-20 (14 Oct. 1996).

144 *Ibid*, at reg. pg. no. 23.

145 In this regard, the judges noted that 'although Rule 73 only addresses preliminary motions by the accused, it follows from the principle of equality of arms based on the fundamental concept of fair trial, that on any of the matters listed in Rule 73(A) also the Prosecutor is entitled to appeal against a decision by a Trial Chamber rendered upon submission by the accused of a preliminary motion pursuant to Rule 73(A)'. *Ibid*, at reg. pg. no. 22.

146 *Ibid.*

2. Defects in the Form of the Indictment and Requests for Particulars

All the defendants raised challenges to the validity of the indictment based on defects in its form. In addition, some of the defendants requested particular information relevant to the indictment.

On 25 April 1996, Mucic submitted a motion contending that the indictment against him was not sufficiently precise and seeking particulars with regard to the allegations concerning command responsibility and further details of certain acts he was alleged to have committed. The Prosecutor opposed the motion on the ground that the indictment fully complied with the requirements of the Statute and provided the accused with sufficient notice of the nature of the crimes with which he was charged and of the facts supporting these charges.

Trial Chamber II denied the accused's motion on 26 June 1996.[147] At the outset, the Chamber noted that Mucic's request for particulars appeared to lie 'somewhere between an objection, under Rule 73(A)(ii), that the indictment is too vague, and a request for further discovery'.[148] With regard to the vagueness of the indictment, Trial Chamber II relied on the precedents established in the *Tadic* and *Djukic* decisions regarding objections based on the form of the indictment.[149] It was necessary that each count of the indictment against Mucic give him sufficient warning of the nature of the crimes with which he was charged and set out the factual basis of the charges. Tested against this standard, the Chamber concluded that the indictment against Mucic was not vague.

The Chamber noted, however, that even where the indictment was not impermissibly vague the defendant nonetheless could be entitled to further particulars. It recalled that the device of a motion for particulars was well known in several common law jurisdictions and had been specifically endorsed in its decision on the form of the indictment in the *Tadic* case. The essential standard for deciding on a motion for particulars was whether such particulars were necessary in order for the accused to prepare his defence and to avoid prejudicial surprise. This issue was, in turn, linked to pre-trial discovery.[150] In light of the extensive pre-trial discovery permitted by the Tribunal's Rules, the Chamber examined Mucic's specific requests and concluded that none of them justified further information.

The accused Delalic also presented a motion based on defects in the form of the indictment, contending that the indictment was vague, undefined and contradictory

147 *Delalic and Others*, Case No. IT-96-21-T, Decision on the Accused Mucic's Motion for Particulars, reg. pg. nos. 701-693 (26 June 1996).

148 *Ibid*, at reg. pg. no. 699.

149 See *supra* text accompanying notes 96-98 and *infra* text accompanying note 178.

150 The Chamber stated that:

> A request for particulars is not, and may not be used as, a device to obtain discovery of evidentiary matter. The request may be directed only to the sufficiency of the indictment and is not a substitute for pre-trial discovery. The amount of pre-trial discovery available to the defence is, however, relevant in deciding whether to grant such a request.

Delalic and Others, Decision on the Accused Mucic's Motion for Particulars, at reg. pg. no. 696.

and that it was unfounded. He sought the invalidation of the indictment or, alternatively, an order for the Prosecution to submit a more precise indictment. Finally, Delalic challenged the indictment on the ground that it used multiple legal classifications for the same actions, which without any basis multiplied his responsibility. The Prosecutor opposed the motion, arguing that the accused's challenge to the factual basis of the indictment raised questions of evidence that were not appropriate for consideration at the pre-trial stage. The Prosecutor also maintained that the indictment complied with the requirements of the Tribunal's Statute and Rules.

The motion was denied in all respects on 2 October 1996.[151] With respect to the factual challenges, the Chamber ruled that 'disagreement on facts is not a sufficient basis on which to rest a claim that the indictment is defective'.[152] As regards the allegations of vagueness, the Trial Chamber recalled the precedents established in the *Djukic*, *Tadic* and *Mucic* cases and concluded that there had been no showing that the indictment was defective. Finally, the Chamber recalled its holding in *Tadic* that issues concerning the cumulative nature of the charges against the accused were relevant only to the penalty imposed if the accused was ultimately found guilty of the charges in question.[153] It therefore declined to consider Delalic's cumulativeness challenge.[154]

The two other accused, Landzo and Delic, also filed motions challenging the indictment on the grounds of vagueness and cumulative charges. Following the reasoning of its previous decisions, Trial Chamber II rejected these motions.[155]

3. Provisional Release

Motions for provisional release were filed by three of the accused. All of these motions were rejected by the Trial Chamber. The Chamber first ruled on Delalic's motion.[156] Because the other provisional release decision rendered essentially ap-

151 *Delalic and Others*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalic Based on the Form of the Indictment, reg. pg. nos. 1590-1576 (2 Oct. 1996).

152 *Ibid.* at reg. pg. no. 1586.

153 See *supra* text accompanying notes 96-98.

154 Delalic's subsequent application for leave to appeal was rejected. A bench of the Appeals Chamber ruled that the request failed to show a 'serious cause' that would permit an interlocutory appeal. See *Delalic and Others*, Case No. IT-96-21-A, Decision on Application for Leave to Appeal (Form of the Indictment), reg. pg. nos. 21-17 (15 Oct. 1996).

155 See *Delalic and Others*, Case No. IT-96-21-T, Decision on Motion by the Accused Esad Landzo Based on Defects in the Form of the Indictment, reg. pg. nos. 1807-1803 (15 Nov. 1996); *Delalic and Others*, Case No. IT-96-21-T, Decision on Motion by the Accused Hazim Delic Based on Defects in the Form of the Indictment, reg. pg. nos. 1816-1810 (15 Nov. 1996). Delic's subsequent application for leave to appeal was rejected by a bench of the Appeals Chamber because it failed to comply with the 'serious cause' condition. *Delalic and Others*, Case No. IT-96-21-A, Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment), reg. pg. nos. 34-22 (6 Dec. 1996).

156 *Delalic and Others*, Case No. IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic, reg. pg. nos. 1523-1504 (1 Oct. 1996) (hereinafter *Delalic Provisional Release Decision*).

plies the test that was elaborated with respect to Delalic's application for provisional release, the analysis herein will be confined to the decision on Delalic's motion.

Rule 65(B) sets out the situations in which a Trial Chamber can order provisional release. Such release may be granted only in exceptional circumstances and if the Chamber is satisfied that the accused will appear for trial and will not pose a danger to any victim, witness or other person. In addition, the Rule requires that the Tribunal's host country be heard with regard to any proposed provisional release.

In applying these criteria to Delalic's motion, the Chamber concentrated on the requirement of 'exceptional circumstances'. The factors relevant to a determination of exceptional circumstances were identified by the Chamber as whether there was a reasonable suspicion that the accused committed the crime or crimes charged, his alleged role in the said crime or crimes and the length of his pre-trial detention.

As regards the reasonable suspicion requirement, the Chamber held that this should be evaluated 'according to the circumstances and facts as known at the time of the review'.[157] The Chamber proceeded to review the evidence provided by the parties and concluded that, although it did 'illustrate vulnerable aspects of the Prosecution's case, it [was] not sufficient to overcome the Prosecutor's showing that there existe[d] a reasonable suspicion that the accused committed the offences charged'. The Chamber's holding in this regard seems to conflate the Rule 65(B) 'reasonable suspicion' test for provisional release with the Rule 47(A) 'reasonable grounds for belief' test, the latter being the standard that must be met at the time of confirmation.[158]

The Chamber next examined the accused's alleged role in the crimes charged. It noted that, '[a]s a general principle, the greater the accused's role in an alleged crime, the more difficult it will be to prove his entitlement to release'.[159] In light of the defendant's allegedly significant role in the numerous crimes specified in the indictment, the Chamber believed that this element did not support a finding of exceptional circumstances.

Finally, with regard to the length of detention, the Chamber ruled that pre-trial detention could not extend beyond a reasonable period of time. It followed an approach similar to that of Trial Chamber I in the *Blaskic* case,[160] and held that the exact length of time after which detention was no longer lawful depended on the circumstances of each case. The Chamber observed that the European Court of Human Rights had elaborated several factors to be considered in determining the legality of detention. It found that these factors were applicable in deciding whether the duration of the detention of an accused constituted an exceptional circumstance pursuant to the Tribunal's Rules. In Delalic's case, taking into consideration the difficulties inherent in investigating a case thousands of kilometres away, the Cham-

157 *Ibid*, at reg. pg. no. 1510.
158 See *supra* text accompanying notes 6-13.
159 *Delalic Provisional Release Decision*, at reg. pg. no. 1509.
160 See *supra* text accompanying notes 123-126.

ber considered that a four-month detention was not an exceptional circumstance justifying his release. Because there was no exceptional circumstances justifying the issuance of a provisional release order, the Chamber dealt very briefly with the risk of flight of the accused and the danger he might pose to victims and witnesses. The Chamber was neither satisfied that Delalic would appear for trial nor convinced that he would not constitute a danger to any person.[161]

4. Language and Disclosure of Evidence

In addition to the motions discussed above, the accused Delalic filed a number of preliminary motions relating to the language and disclosure of evidence.[162]

With respect to Delalic's concerns regarding the language in which evidence was transmitted to him, on 25 September 1996, Trial Chamber II rendered a decision setting out guidelines for the languages in which evidence should be provided to the accused.[163] The Chamber first held that, in order to meet the requirements of Article 21 of the Statute, which provides that all persons shall be equal before the Tribunal and that the accused has the right to be informed of the charges against him in detail in a language that he understands, all evidence submitted by either party at trial had to be made available in the language of the accused. This was, of course, in addition to the requirement that evidence be submitted in one of the working languages of the Tribunal. Moreover, the Chamber held that all material that accompanied the indictment at the time of confirmation (which the Prosecution was required to make available to the Defence pursuant to Rule 66(A)) had to be in the language of the accused, irrespective of whether it would be offered at trial.

Finally, the Chamber dealt with the issue of discovery *other* than that mandated by Rule 66(A). The Chamber observed that no provision of the Tribunal's Rules entitled the accused to receive all discovery evidence from the Prosecution in his language. 'The guarantee of Article 21(4)(a) [does] not extend to all material, but only to evidence which form[s] the basis of the determination by the Trial Chamber of the charges against the accused.'[164] This right was fully protected by ensuring that all evidence submitted at trial was provided in the language of the accused.[165]

161 Delalic applied for leave to appeal on 8 October 1996 seeking to challenge the decision on the grounds of errors in fact and in law. A bench of the Appeals Chamber rejected the application holding, as in the *Blaskic* case, that provisional release did not fall within the Tribunal's appellate interlocutory jurisdiction. *Delalic and Others*, Case No. IT-96-21-A, Decision on Application for Leave to Appeal (Provisional Release), reg. pg. nos. 37-31 (15 Oct. 1996).

162 Delalic also requested the amendment of the Tribunal's Directive on Assignment of Defence Counsel to provide for the reimbursement of costs to an accused who chose his legal counsel, rather than having one appointed by the Tribunal. The Chamber took the view that this subject-matter fell within the scope of the functions of the Registrar and directed her to respond to this motion on its behalf. The authors have not been able to determine the status of this request.

163 *Delalic and Others*, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, reg. pg. nos. 1480-1472 (27 Sept. 1996).

164 *Ibid*, at reg. pg. no. 1476.

165 *Ibid.*

On 26 September 1996, Trial Chamber II rendered a decision on Delalic's motion for full disclosure of evidence by the Prosecutor.[166] This ruling is of great interest because concerns have been raised in several cases regarding the Prosecution's failure to fulfil its disclosure obligations.

The Chamber noted that the Prosecutor's disclosure obligations under Rule 66(A) required the disclosure of three types of documents: (i) copies of supporting material that accompanied the indictment; (ii) all prior statements obtained by the Prosecutor from the accused; and (iii) all prior statements obtained by the Prosecutor from his witnesses. Once the Prosecution determined that it intended to call an individual as a witness at trial, it was obliged to disclose *as soon as practicable* any statement taken prior to the time that the witness testified at trial. The Chamber specified that (ii) and (iii) were 'continuing obligations', so that the Prosecutor was required to supplement his initial submissions.

The Chamber then turned to Rule 66(B), which provides that the Prosecutor must, at the request of the defence, allow it access to 'any books, documents, photographs and tangible objects in his custody or control'. This Rule covered three categories of documents: (i) those that are *material* to the preparation of the defence; (ii) those that are intended to be used by the Prosecution as evidence at trial; and (iii) those that were obtained from or belonged to the accused. The Chamber relied primarily on American case law to find guidelines for interpreting the phrase 'material to the preparation of the Defence'. In the Chamber's view, this term covered material

> ... significantly helpful to an understanding of important inculpatory or exculpatory evidence; it is material if there is a strong indication that ... it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal'.[167]

In the Chamber's view, Delalic had failed to show that particular evidence material to his defence was being withheld. Accordingly, it denied his motion for disclosure.

With respect to the procedural aspect of discovery, the Chamber ruled that the Prosecution was initially responsible for deciding what evidence in its possession might be material to the Defence. The Trial Chamber would only become involved if the Prosecutor and the Defence could not agree on whether certain items were material.

D. *Prosecutor v. Djukic*, Case Nos. IT-96-19 and IT-96-20-T

On 30 January 1996, General Djorde Djukic and Colonel Aleksa Krsmanovic were arrested by the Bosnian authorities. On 7 February 1996, pursuant to Rule 40,[168] the

166 See *Delalic and Others*, Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, reg. pg. nos. 1455-1452 (27 Sept. 1996).

167 *Ibid*, at reg. pg. no. 1447.

168 The Prosecutor relied upon the following provisions of Rule 40: 'In case of urgency, the Prosecutor may request any State (i) to arrest a suspect provisionally ... (iii) to take all necessary measures

Prosecutor requested Bosnia to arrest provisionally Djukic and Krsmanovic, who were identified as *suspects*, and to take all necessary measures to prevent their escape. On the same day, the Higher Court of Sarajevo ordered that they be held in custody pending an investigation into charges of genocide and crimes against civilians pursuant to Bosnia's criminal code.

1. Transfer and Detention

On 12 February 1996, the Prosecutor filed an application before a Judge of the Tribunal for the transfer to and detention in the Hague of the two individuals. He argued that Djukic and Krsmanovic could provide evidence on the siege of Sarajevo, which was the subject of the Tribunal's indictment against Karadzic and Mladic.[169] The Prosecutor asserted that Djukic and Krsmanovic should be kept in custody because, in view of the seriousness of the investigation, there was a reasonable apprehension that otherwise they would escape.[170] The same day, Judge Stephen ordered the transfer of Djukic and Krsmanovic to the Hague and their detention there. In making this order, Judge Stephen acted pursuant to Rule 90 *bis* which allows for the temporary transfer of otherwise detained persons whose appearance as a witness is required by the Tribunal.[171]

It appears that the Prosecutor officially informed Djukic and Krsmanovic of the reasons justifying their transfer to the Hague some ten days after such transfer. At that time, they were also informed of the right to challenge the basis of their transfer or detention before a judge of the Tribunal.

The two cases took different turns in March 1996. Although Krsmanovic was never indicted, his detention as a witness was extended until 4 April 1996.[172] The Colonel's counsel challenged the grounds of his client's detention and requested his immediate release. He argued that Krsmanovic could not be considered to be a witness because he was not prepared to cooperate with the Prosecutor. The Prosecutor confirmed that the Colonel's presence as a witness was no longer required.

After having heard the parties, Trial Chamber I ruled that Krsmanovic's motions were well founded because he was no longer required as a witness. The Chamber noted that the Prosecutor had indicated that the evidence currently in his possession did not permit the indictment of Krsmanovic for crimes within the jurisdiction of the

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 29 of the Statute.'

169 See *supra* text accompanying notes 65-70.

170 See Application for a Transfer Order and Order for Detention of General Djorde Djukic and Colonel Aleksa Krsmanovic, *Misc.1*, Case No. IT-96-19, reg. pg. nos. 5-1 (12 Feb. 1996).

171 See *Misc.1*, Case. No. IT-96-19, Transfer Order for General Djorde Djukic and Colonel Aleksa Krsmanovic, reg. pg. nos. 7-6 (12 Feb. 1996); *Misc.1*, Case. No. IT-96-19, Order for Detention of General Djorde Djukic and Colonel Aleksa Krsmanovic, reg. pg. nos. 9-8 (12 Feb. 1996).

172 *Misc.1*, Case No. IT-96-19, Order for Extension of Detention of Colonel Aleksa Krsmanovic, reg. pg. nos. 220-218 (29 Feb. 1996).

Tribunal. The Chamber did not however release Krsmanovic. Rather, it ordered that he be remanded to the custody of the Bosnian authorities, which had transferred him to the Hague.[173]

Counsel for General Djukic also filed a motion seeking his immediate release and return to the Republika Srpska. He argued that Djukic's arrest by the Bosnian authorities was illegal and infringed fundamental principles of international law and the laws of the former Yugoslavia. Trial Chamber I denied the relief sought by Djukic. The Chamber found that it was not competent, *at that stage* of the proceedings, either to rule on the legality of a decision taken by a national court or to revise the orders rendered by a judge of the Tribunal pursuant to Rule 90 *bis*.[174]

The Chamber's refusal, in the *Djukic* case, to consider the legality of the national court order pursuant to which he was arrested, raises some concerns regarding the extent to which the Tribunal will allow challenges to detention. The Chamber's strict limitation of the defendant's right to challenge the legal grounds of his transfer and detention may be explained by the fact that on 29 February, the day before the second decision was rendered, Djukic was indicted. The Chamber presumably took into account that, as an accused, Djukic would be entitled to challenge the legality of his transfer and detention at the pre-trial stage.

The saga of Djukic's and Krsmanovic's arrest as *suspects*, their subsequent transfer to and detention in the Hague as *witnesses* and Djukic's subsequent indictment by the Prosecutor raises another important issue: the need for clear rules regarding the circumstances in which a person can be transferred to and detained by the Tribunal. At the time that Djukic and Krsmanovic were transferred to the Hague, the Tribunal's Rules did not allow for the transfer and detention of a *suspect*, but did allow for the transfer and detention of certain types of *witnesses*. Accordingly, the Prosecutor had to rely on the latter provision to bring Djukic and Krsmanovic to the Tribunal. While the Tribunal's reliance on the 'detained witness' Rule was dictated by its practical needs, it is somewhat disturbing because a person has different and defined rights depending on whether he is a witness, a suspect or an accused. To the Tribunal's credit, it responded quickly to the obvious gap in its Rules, which were amended to provide for the transfer and provisional detention of suspects for a maximum period of 90 days.

2. *Indictment and Preliminary Motions*

The indictment against Djukic alleges that he was a member of the Main Staff of the Bosnian-Serb army, which was responsible for the planning, preparation and execution of the Bosnian-Serb military operation in Bosnia. From May 1992 to December

173 *Misc.1*, Case No. IT-96-19, Order for Transfer to the Required State, reg. pg. nos. 3/271*bis*-1/271*bis* (29 March 1996).

174 *Misc.1*, Case No. IT-96-19, Decision, reg. pg. nos. 212-210 (28 Feb. 1996); *Misc.1*, Case No. IT-96-19, Decision, reg. pg. nos. 246-244 (1 March 1996).

1995, the Prosecutor asserted that Bosnian-Serb military forces, on a widespread and systematic basis, deliberately or indiscriminately fired on civilian targets in Sarajevo in order to kill, injure, terrorize and demoralize the population. By his acts and omissions in relation to the shelling of civilians in Sarajevo, Djukic allegedly committed a crime against humanity and violated the laws or customs of war.[175]

At his initial appearance on 1 March 1996 before Trial Chamber I, Djukic pleaded not guilty to all counts of the indictment. Pursuant to Rule 73(A)(i), Djukic immediately moved to dismiss all charges against him for lack of jurisdiction. He argued that the Prosecutor had to present, prior to the indictment, a proposal to a Trial Chamber for deferral by Bosnia. Because the Prosecutor had not complied with this requirement, the indictment issued was invalid. Acting under Rule 73(A)(ii), Djukic also objected to the form of the indictment on the grounds that it was too vague and that its general nature would permit anyone to be brought before the Tribunal, not just persons whose individual responsibility could be established. Furthermore, Djukic contended that the indictment was erroneous, imprecise and ambiguous in that it made general allegations about the shelling of civilian targets in Sarajevo without specifying the date and time of the attacks or the identity of those who carried them out. In these circumstances, Djukic argued, he was not able to adequately prepare his defence. He requested the Chamber to declare the indictment null and void.

On 26 April 1996, Trial Chamber I denied the relief requested in Djukic's two motions.[176] With regard to the deferral argument, the Chamber held that the Prosecutor had discretion to assess the timing for submitting a proposal in this respect to the Tribunal. However, the Chamber cautioned the Prosecutor that, in exercising this discretion, he should be careful not to prejudice the rights of the accused, because

> ... two trials being held simultaneously for the same crimes against the same accused is likely to prejudice the rights of that accused as stated in Article 14 of the International Covenant on Civil and Political Rights and reiterated in Article 21 of the Statute of the Tribunal, particularly in paragraph 4 (b) of that Article according to which the accused has the right 'to have adequate time and facilities for the preparation of his defence...'[177]

With regard to the level of precision required by an indictment, the Chamber recalled that defendants appearing before the Tribunal were charged with serious crimes and were entitled to receive all necessary information. Applying the test established by Trial Chamber II in its decision on the form of the indictment in *Tadic*,[178] the Chamber concluded that the indictment against Djukic was not sufficiently precise because it did not identify particular acts or omissions of Djukic in the preparation or planning of the offences with which he was charged. The Cham-

175 See Indictment, *Prosecutor v. Djukic*, Case No. IT-96-20-I, reg. pg. nos. 53-51 (29 Feb. 1996).
176 See *Djukic*, Case No. IT-96-20-T, Decision on Preliminary Motions of the Accused, reg. pg. nos. 11/243*bis*-1/243*bis* (26 April 1996).
177 *Ibid.* at reg. pg. no. 8/243*bis*.
178 See *supra* text accompanying notes 96-98.

ber did not dismiss the indictment. Instead, it invited the Prosecutor, if he intended to maintain the charges against Djukic, to modify the indictment as necessary.

3. Motion to Withdraw Indictment and Provisional Release

Djukic's health rapidly deteriorated in the course of his detention. On 19 April 1996, pursuant to Rule 51(A),[179] the Prosecutor filed a motion before the confirming judge for the withdrawal of the indictment. The Prosecutor took the view that, given the medical condition of the accused, it would be unjust and inhumane to force him to stand trial. A trial under such circumstances, the Prosecutor contended, would be inherently unfair because the accused would not be able to participate fully in his defence. The confirming judge denied the Prosecutor's application reasoning that he had no jurisdiction over the matter any longer because the 'trial' had started when Djukic entered his plea. Under the Tribunal's Rules, the leave of the Trial Chamber was therefore required to withdraw the indictment.[180]

The Prosecutor then brought the matter before Trial Chamber I which, after a closed hearing, rejected his application to withdraw the indictment.[181] The Chamber ruled that nothing in the Statute or the Rules authorized the withdrawal of an indictment for health reasons so that there was no basis for allowing the Prosecutor to withdraw the indictment. The Chamber added that, because the Prosecutor had established reasonable grounds for believing that the accused had committed the crimes with which he was charged, the withdrawal could be granted only if it was demonstrated that relevant evidence was missing or that evidence which might exonerate the accused had come to light. Nevertheless, in light of Djukic's failing health, the Chamber ordered his provisional release and authorized him to leave the territory of the Netherlands to join his family without delay.

On 24 April 1996, the Prosecutor filed a notice of appeal of the judge's and the Chamber's decisions, arguing that they both erred in law in interpreting Rule 51(A). However, before the appeal could be heard, the case ended with the death of Djukic.

E. *Prosecutor v. Lajic*, Case No. IT-95-8-I

The indictment against Goran Lajic and twelve other individuals was confirmed on 21 July 1995.[182] It alleges that the accused persons are criminally responsible for the

179 Rule 51(A) states: 'The Prosecutor may withdraw an indictment, without leave, at any time before its confirmation, but thereafter only with leave of the Judge who confirmed it or, *if at trial*, only with leave of the Trial Chamber' (emphasis added).

180 *Djukic*, Case No. IT-96-20-T, Decision Declining Jurisdiction to Withdraw an Indictment, reg. pg. nos. 192-191 (19 April 1996).

181 *Djukic*, Case No. IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, reg. pg. nos. 5/220*bis*-1/220*bis* (24 April 1996).

182 *Prosecutor v. Sikirica and Others*, Case No. IT-95-8-I, Review of Indictment, reg. pg. nos. 236-234 (21 July 1995); Indictment, *Sikirica and Others*, Case No. IT-95-8-I, reg. pg. nos. 229-209 (26 June 1995).

confinement in inhumane conditions of more than 3,000 Bosnian Muslims and Bosnian Croats in a camp in Bosnia, and for a series of crimes committed against persons in the camp. Lajic, who allegedly held the position of a guard in the camp, is accused of wilfully killing and beating the detained civilians and is charged with grave breaches of the Geneva Conventions, violations of the laws or customs of war and/or crimes against humanity.

Arrest warrants for Lajic were issued on 1 August 1996 and were sent to Bosnia and to the Bosnian-Serb administration in Pale. An arrest warrant was subsequently transmitted to Interpol and a wanted notice was issued thereupon. On 18 March 1996, a man named Goran Lajic, who was born on the same day as the individual indicted by the Tribunal, was arrested by German authorities. On 2 April 1996, Lajic appeared before the Nuremberg District Court in Germany and agreed to be surrendered to the Tribunal. At his initial appearance on 17 May 1996 before Trial Chamber I, Lajic pleaded not guilty on all counts. He asserted that he had never seen the camp described in the indictment and that he was not the person whose arrest the Prosecutor was seeking.

The Prosecutor pursued his investigations and requested the police of the Netherlands to prepare a photograph album to be shown to ten potential witnesses. Nine of the ten witnesses were unable to identify the accused as being the person referred to in the indictment. The Prosecutor therefore concluded that there was not sufficient evidence to conclude that the person arrested was the Goran Lajic named in the indictment He requested the Chamber to withdraw the charges against the person detained in the Hague, without prejudice to the charges against the Lajic referred to in the indictment. On 17 June 1996, Trial Chamber I granted the relief sought by the Prosecutor and ordered the immediate release of the person named Lajic who was then being detained in the Hague.[183]

Although at first glance, the *Lajic* case appears to be a simple instance of misidentification, it demonstrates the difficult circumstances under which the Tribunal labours. The Tribunal relies to a great extent on information voluntarily provided by states and other entities, often against their own nationals. Even more interestingly, the case raises the issue of the Tribunal's liability for such mistakes. On 9 July 1996, Lajic's counsel notified the Prosecutor of his client's claim of US$ 3,000,000 for damages incurred in relation to his arrest and detention. The outcome of this claim is not yet known.

F. *Prosecutor v. Erdemovic*, Case Nos. IT-95-18 and IT-96-22-T

On 2 March 1996, Drazen Erdemovic was arrested by the Federal Republic of Yugoslavia, charged with crimes under its criminal code and detained pending the

183 *Prosecutor v. Lajic*, Order for the Withdrawal of the Charges Against the Person Named Goran Lajic and for his Release, Case No. IT-95-8, reg. pg. nos. 4/634*bis*-1/634*bis* (17 June 1996).

completion of investigations. The Prosecutor requested Erdemovic's transfer to the Hague, based on his belief that Erdemovic was in possession of information relating to the fall of Srebrenica and the crimes alleged to have been committed on that occasion by Karadzic and Mladic, for which they had been indicted by the Tribunal. In addition, the Prosecutor asserted that he intended to call Erdemovic as a witness in the course of the Rule 61 proceedings scheduled in relation to Karadzic and Mladic. Pursuant to two orders issued by Judge Riad of the Tribunal on 28 March 1996, Erdemovic was transferred to the Hague, where he was detained as a witness.[184]

Some months later, the Prosecutor filed a deferral application. On 29 May 1996, Trial Chamber II requested the Government of the Federal Republic of Yugoslavia to order its national courts to defer to the Tribunal all investigations and criminal proceedings respecting serious violations of international humanitarian law alleged to have been committed by Erdemovic in Srebrenica in July 1995.[185] Erdemovic was indicted the same day.[186] As a member of the tenth sabotage detachment of the Bosnian-Serb army, Erdemovic allegedly participated with other members of his unit on or about 16 July 1995 in the killing of hundreds of unarmed Bosnian Muslim men near Srebrenica. He was charged with committing a crime against humanity and/or a violation of the laws or customs of war.

Shortly thereafter, on 31 May 1996, Erdemovic made his first appearance before Trial Chamber I. He pleaded guilty to one count charging a crime against humanity.[187]

The Trial Chamber ordered a psychological and psychiatric examination of the accused, entrusting this task to a commission of three experts, two designated by the Tribunal and the third selected from a list presented by the Defence. The commission of experts appointed by the Chamber concluded that 'in his current condition, the accused Drazen Erdemovic, because of the severity of the post-traumatic stress disorder ... can be regarded as insufficiently able to stand trial at this moment'. It proposed a second examination in six to nine months. At a status conference held on 4 July 1996, Trial Chamber I heard the parties regarding the experts' report and whether, in light of the medical report, Erdemovic should be permitted to testify in the Rule 61 hearing scheduled in respect of Karadzic and Mladic. Because Erde-

184 See *Prosecutor v. Karadzic and Mladic*, Case No IT-95-18, Transfer Order for Radoslav Kremenovic and Drazen Erdemovic, reg. pg. nos. 410-409 (28 March 1993); *Prosecutor v. Karadzic and Mladic*, Case No. IT-95-18, Order for Detention of Radoslav Kremenovic and Drazen Erdemovic, reg. pg. nos. 412-411 (28 March 1996). Radoslav Kremenovic, also detained by the Federal Republic of Yugoslavia, was likewise transferred to and detained in the Hague as a witness pursuant to Judge Riad's orders. Kremenovic was neither indicted nor called as a witness by the Prosecutor. He was remanded to the custody of the Federal Republic of Yugoslavia on 9 May 1996. *See Prosecutor v. Karadzic and Mladic*, Case No. IT-95-18, Order on the Application by the Prosecutor for an Order Ending Temporary Transfer and Remanding to the Authorities of the Requested State a Detained Witness Transferred to the Tribunal under Rule 90 *bis* Whose Presence No Longer Continues to Be Necessary, reg. pg. nos. 3/455*bis*-1/455*bis* (9 May 1996).

185 See *Erdemovic Deferral Decision*, at reg. pg. no. 132.

186 Indictment, *Prosecutor v. Erdemovic*, Case No. IT-96-22-I, reg. pg. nos. 106-103 (29 May 1996).

187 At that time, the Prosecutor abandoned the charge of violation of the laws or customs of war.

movic believed that cooperation with the Tribunal was in his interest, the Trial Chamber allowed him to testify in these proceedings.[188] In addition, Trial Chamber I postponed the sentencing of Erdemovic and ordered an additional medical report to be submitted by 1 October 1996.

In its second report, the commission of experts changed its view on Erdemovic's condition and opined that in 'his current condition, the accused, Drazen Erdemovic, [was] sufficiently able to stand trial' and that 'no additional measures need to be taken for the appearance of the accused'. The pre-sentencing hearing was thus scheduled.

Trial Chamber I passed sentence on Erdemovic on 29 November 1996.[189] Sentencing Erdemovic presented a great challenge for the Chamber. The Tribunal's Statute and Rules provide little guidance on the matter. Article 24(1) of the Statute simply states that the penalty imposed shall be limited to imprisonment and that, in determining the terms of imprisonment, the Trial Chamber 'shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia'. Nor was there a wealth of international precedents on which the Chamber could rely. The Nuremberg and Tokyo precedents, which were rendered fifty years ago, did not explicitly explain the rationale for the imposition of sentences. Finally, the Chamber was required to address complex issues raised by the Defence, such as the admissibility of the defence of superior orders, the impact of duress on a defendant's criminal liability, and whether these factors could be considered as mitigating circumstances in determining the sentence to be imposed on an accused.

At the time that he pleaded guilty, Erdemovic indicated that he had committed the killings with which he was charged under some type of duress.[190] Accordingly, the Chamber believed it necessary to address the delicate issue of the extent to which the accused's statement affected his plea.

The Chamber's evaluation of Erdemovic's plea required it to determine the availability of defences based on the obligation to obey the orders of a military superior, or physical and moral duress. The Chamber noted that these factors could mitigate the penalty imposed on a defendant and could also be regarded as a defence for the criminal conduct, which might go so far as to 'eliminate the *mens rea* of the offence and therefore of the offence itself'.[191] The plea would thus be invalidated. The Chamber disposed of the defence of superior orders by reference to Article 7(4)

188 For a detailed discussion of the Karadzic and Mladic Rule 61 proceedings, see *supra* text accompanying notes 64-71.

189 *Erdemovic*, Case No. IT-96-22-T, Sentencing Judgement, reg. pg. nos. 58/472*bis*-1/472*bis* (29 Nov. 1996).

190 In his words,
I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: 'If you're sorry for them, stand up, line up with them and we will kill you too. I am not sorry for myself but for my family, my wife and son who then had nine months and I could not refuse because then they would have killed me.
Ibid, at reg. pg. no. 54/472*bis*.

191 *Ibid*, at reg. pg. nos. 53/472*bis*-52/472*bis*.

of the Tribunal's Statute, which expressly provides that the fact that an accused person acted pursuant to an order of a superior should not relieve him of criminal responsibility. In respect of the defence of physical and moral duress, the Chamber noted that the Statute did not provide guidance in this regard. Based on its review of judicial precedents, the Chamber concluded that such a defence was permitted, even if the conditions of its application were particularly strict. The Chamber held that in the present case, there was insufficient proof of specific circumstances that would have fully exonerated the accused of his criminal responsibility. His guilty plea was therefore valid. [192]

Turning to the sentencing of Erdemovic, the Chamber first emphasized that the charge of crimes against humanity, to which the accused had pleaded guilty, was a very serious one. In the words of the Chamber:

> Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.[193]

The serious nature of the crime would, of course, justify a severe penalty. Indeed, the national and international sentencing practices reviewed by the Chamber allowed it to conclude that 'there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties when no mitigating circumstances are present'.[194]

Having specified the general principle, the Chamber noted that Article 24(1) of the Statute and Rule 101(A) suggested that it have 'recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia'. The Chamber did not read these provisions as requiring it to follow such general practice. Nor did it believe that the principle of *nullum crimen nulla poena sine lege* made it necessary for it to abide strictly by the sentencing practice of Yugoslav courts. In any event, the Chamber found that there were no decisions rendered by the courts of former Yugoslavia that could serve as precedents in the matter. It was therefore unable to draw significant conclusions as to the sentencing practice for crimes against humanity in that state. Accordingly, the Chamber concluded that although it could be guided by such practice, it was not bound to follow it.

The Chamber then examined the factors enabling the penalty to be tailored to the case in point and discussed *inter alia* mitigating and aggravating factors and the individual circumstances of the convicted person. The Chamber found that, although the Tribunal's Rules expressly provide for consideration of aggravating

192 *Ibid.* at reg. pg. no. 49/472*bis*.
193 *Ibid.* at reg. pg. no. 45/472*bis*-44/472*bis*.
194 *Ibid.* at reg. pg. no. 44/472*bis*.

circumstances, its Statute contains no reference or definition in this respect. Moreover, in the Chamber's view, 'when crimes against humanity are involved, the issue of the existence of any aggravating circumstances does not warrant consideration'.[195] As for the mitigating circumstances, in addition to the issue of superior orders, the Trial Chamber held that it could take into account that the accused surrendered voluntarily to the Tribunal, confessed, pleaded guilty, showed sincere and genuine remorse or contrition and stated his willingness to supply evidence with probative value against other individuals for crimes falling within the jurisdiction of the Tribunal.

The Chamber next looked at the purposes and functions of a penalty for a crime against humanity. The Chamber deemed the concepts of deterrence and retribution most important for an international criminal tribunal, and it saw 'public reprobation and stigmatisation by the international community which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity'.[196]

Having established the applicable law and principles, the Trial Chamber reviewed in great detail the specific circumstances that led the accused to commit the crime as he himself had related them. The Chamber assessed the probative value and possible mitigating character of the evidence provided. With regard to the gravity of the offence, the Chamber considered that the killing of approximately 1,200 unarmed civilians during a five-hour period was a crime of enormous proportions. The use of an automatic weapon was also noted. As regards mitigating circumstances, the Chamber took into account – in addition to cooperation with the Prosecutor, a mitigating circumstance expressly provided for in the Tribunal's Rules – the relative youth of the accused, his subordinate level in the military hierarchy, his remorse, his desire to voluntarily surrender, his guilty plea, his current family status and the gesture of help he had afforded to one of the witnesses. It also emphasized the lack of danger he presented, the series of traits characterizing a corrigible personality and the fact that the sentence pronounced was going to be served in a prison far from his own country, putting him in an inevitable state of isolation.

The Chamber decided that, in light of all the legal and factual elements that it reviewed, it was appropriate to sentence Erdemovic to a prison sentence of ten years, which was the maximum suggested by the Prosecutor.

On 23 December 1996, pursuant to Rule 108(A),[197] Erdemovic appealed the sentence imposed on him. The appeal is based on three grounds: (i) erroneous and incomplete establishment of facts which led to an erroneous application of law; (ii)

195 *Ibid*, at reg. pg. no. 39/472*bis*.
196 *Ibid*, at reg. pg. nos. 30/472*bis*-29/472*bis*.
197 Rule 108 (A) states: 'Subject to Sub-rule (B), a party seeking to appeal a judgement or sentence shall, not more than thirty days from the date on which the judgement or sentence was pronounced, file with the Registrar and serve upon the other parties a written notice of appeal, setting forth the grounds.'

erroneous application of law which influenced the validity of the sentence; and (iii) the decision on the penalty. This appeal has not yet been decided.

Conclusion

As the above examination indicates, in the first three years of its existence, the Tribunal has rendered an impressive number of rulings on procedural and substantive issues of international criminal law. A review of this jurisprudence shows the broad range of areas in which the Tribunal has had to operate and the extent to which it has been necessary for it to adapt and develop previously existing law in order to fulfil its mandate of rendering international justice.

The Tribunal's procedural accomplishments are significant. It has adopted the first full set of rules for the conduct of international criminal proceedings. The Tribunal's Rules of Procedure and Evidence include procedural innovations, such as the Rule 61 procedure which is triggered in cases where the Tribunal is unable to obtain custody of accused persons. They also include rules that reflect international standards in traditional areas of criminal procedure, such as the accused's right to have access to Prosecution documents. Finally, the Tribunal's Rules contain a handful of evidentiary provisions that cover matters such as the general criteria for admissibility and the grounds for exclusion of evidence. Moreover, the numerous decisions issued by the Tribunal's Chambers, which explain the working of these procedural mechanisms in an international setting, are an invaluable contribution to the maturation of this field of law.

Numerous significant and difficult substantive issues of international law have been addressed in the Tribunal's decisions to date. In order to rule on these issues, the judges of the Tribunal have often had to combine and interpret norms that have developed in disparate fields of international law and which are not always compatible. The decisions rendered by the Tribunal's Trial and Appeals Chambers show the breadth of the sources of law from which the judges draw and which they must attempt to reconcile.

The Tribunal has contributed to clarifying certain rules of general international law which had for too long not been the subject of any judicial pronouncement. One of the first petitions filed before the Tribunal in the *Tadic* case challenged the legality of its establishment by the Security Council. There was considerable question as to whether the Chamber could hear such a challenge. Dealing at length with this issue, the Tribunal's Appeals Chamber found that it had the right, under the principle of *compétence de la compétence*, to assess the legality of its establishment. In so doing, the Tribunal firmly asserted its independence *vis-à-vis* its 'creator', the Security Council. Such autonomy is vital for the Tribunal's credibility because it must be able to perform its judicial functions without fear of political pressure. The Appeals Chamber's decision on the legality of the establishment of the Tribunal is also re-

markable because it marks one of the first developments by a judicial body of standards for reviewing the actions taken by the Security Council under Chapter VII of the United Nations Charter.

The Tribunal's subject-matter jurisdiction was also questioned in the *Tadic* case. The Appeals Chamber painstakingly analysed the Tribunal's Statute and the corpus of relevant international humanitarian law to develop a systematic scheme for the assertion of the Tribunal's jurisdiction over the various categories of war crimes that are being prosecuted before it. Particularly innovative was the Tribunal's expansive reading of Article 3 of the Statute (violations of the laws or customs of war). The Appeals Chamber found that this Article encompassed all serious violations of customary and conventional international humanitarian law regardless of the nature of the conflict in which they were committed. Although the Chamber was cognizant of the difficulties faced in ascertaining the relevant norms, particularly where they are based on custom, it had the courage to venture into this area and thereby contribute to the evolution of the law of internal armed conflict. It is to be hoped that the Appeals Chamber's decision will prove to be a catalyst in efforts for the harmonization of the rules applicable in all types of armed conflicts.

The interaction between the Tribunal's work and that of national courts is a central issue in deciding on the feasibility of international justice. The issue of the extent to which the Tribunal could require national courts to defer to its jurisdiction – i.e., the 'primacy' of the Tribunal's proceedings over domestic ones – was raised in the *Tadic* and *Djukic* cases. The fullest explanation of the Tribunal's views is contained in the *Tadic Appeals Chamber Jurisdiction Decision*. Primarily practical concerns guided the Appeals Chamber's confirmation of the primacy of the Tribunal's jurisdiction over that of national courts. Such primacy was necessary to avoid easily foreseeable problems, such as forum shopping by indicted persons and spurious proceedings conducted to shield war criminals. The Tribunal's hands-on experience of dealing with this issue should serve as a guide to the General Assembly in the course of its work on the establishment of an international criminal court.

The Tribunal can be regarded as the defender of international human rights standards in two respects. It was created to vindicate the human rights of the thousands of civilians who were the victims of war crimes in the former Yugoslavia and, as the first truly international criminal tribunal ever, it must itself be exemplary in its observance of international human rights standards relating to the rights of accused persons. The tension between these two roles is perhaps best reflected in the Tribunal's numerous decisions on the protection of witnesses. When the Prosecutor sought to keep secret from the accused, throughout the course of trial, the identities of witnesses, against him, the Tribunal was forced to reconcile the need to protect witnesses and thereby facilitate their being heard, with the requirement that it fully respect the defendant's fair trial rights. In conducting this balance, both of the Tribunal's Trial Chambers felt it necessary to free themselves – at least theoretically – from the constraints imposed by other judicial bodies' interpretations of the fair trial

guarantees of the ICCPR and the European Convention on Human Rights. The difficulty inherent in finding an equilibrium between the protection of witnesses and the rights of the accused is reflected in the varying decisions rendered on this issue by the two Trial Chambers. Trial Chamber II, which was the first to deal with the issue, has permitted witness anonymity during trial under certain conditions. Trial Chamber I, on the other hand, has appeared more reluctant to order anonymity beyond the pre-trial stage, but has not ruled out the possibility.

In contrast to its treatment of protective measures, where the Tribunal felt it necessary to define its own course, it has closely followed the precedents set by other international judicial bodies in other areas. The Tribunal's decisions on issues such as provisional release of defendants and the conditions of detention of accused persons, for example, rely to a considerable extent on the standards articulated by the European Court of Human Rights.

Based on the one sentencing conducted by the Tribunal thus far – in the *Erdemovic* case – it appears that the Statute and Rules provide only limited guidance and the Tribunal will have to develop its own practice in this regard. As in the *Erdemovic* case, where the Trial Chamber seized of the case drew on principles of international humanitarian law, criminal law and human rights law to determine the appropriate sentence, the Tribunal will have to combine various bodies of law to develop its sentencing practice.

The International Criminal Tribunal for the Former Yugoslavia is still in its infancy. Certainly, its jurisprudence, which combines various strands of law, needs to be developed and tested further. It is beyond doubt that the Tribunal's accomplishments thus far are tremendous and its structure and jurisprudence provide a workable model for an eventual international criminal court. However, the well-known difficulties experienced by the Tribunal in obtaining custody of indictees also teach an important lesson for a future court. At the end of the road, any international criminal court must, in order to be successful, have an effective mechanism for arresting offenders and bringing them to trial.