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## News from the International Criminal Tribunals

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## NEWS FROM THE INTERNATIONAL CRIMINAL TRIBUNALS

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### Part I—International Criminal Tribunal for the former Yugoslavia (ICTY)\*

by Cecile E.M. Meijer\*

#### General

Among the highlights of the year 2001 is the June 28 transfer of former Yugoslav President Slobodan Milošević to the UN Detention Unit in The Hague, The Netherlands. During both his brief initial appearance on July 3, 2001, and the August 30 status conference, Milošević labeled the Tribunal false and illegal. He has so far declined to appoint an attorney to represent him, and the Trial Chamber has entered a plea of not guilty on his behalf. In accordance with Rule 74 of the Rules of Procedure and Evidence, the Registrar appointed three lawyers as *amici curiae* in the case on September 6. In its order inviting the Registrar to make the appointment, the Trial Chamber emphasized that the role of the *amici* was to assist the court and not to represent Milošević. So far, the current amended indictment has charged Milošević with violations of the laws or customs of war and crimes against humanity committed in Kosovo. In addition, a separate indictment charges Milošević with crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws or customs of war in Croatia during the early years of the Balkan War. Press reports indicate that Chief Prosecutor Carla Del Ponte is preparing another indictment that will incorporate charges of genocide in Bosnia. A starting date for Milošević's trial on the Kosovo charges has been tentatively set for February 12, 2002.

On an institutional level, several significant developments have taken place this year. Hans Holthuis assumed his responsibilities as the new Registrar of the ICTY in January 2001. Beginning March 1, 2001, His Excellency Mohamed El Habib Fassi Fihri (Morocco) replaced Judge Mohamed Bennouna (Morocco), who left the Tribunal, as a permanent judge on the ICTY for the remainder of Judge Bennouna's term, which ends November 16, 2001. Since the term of all permanent judges expires on that same date, the UN General Assembly elected fourteen new permanent judges for a term of four years, beginning November 17, 2001. Judge Florence Mumba (Zambia) will be the only woman serving in this capacity. Professor Theodor Meron will succeed Judge Patricia Wald as the permanent judge from the United States. The UN General Assembly also elected 27 *ad litem* judges, and from this pool, the UN Secretary-General appointed six *ad litem* judges (five of whom are women) who were each subsequently assigned to new trials that began in September 2001. Two judges from the International Criminal Tribunal for Rwanda joined the Appeals Chamber common to both tribunals.

#### Appeals Chamber

So far this year, the Appeals Chamber has issued three judgments on the merits in ICTY cases: *Čelebići*, *Jelisić*, and *Kupreškić et al.* The appeals judgement in *Kupreškić et al.* was rendered on October 23, 2001, and will be discussed in Volume 9, Issue 2 of the *Human Rights Brief*. The Appeals Chamber also rendered several Interlocutory Appeals decisions, as well as two judgments in contempt cases.

#### Čelebići Judgement

On February 20, 2001, the Appeals Chamber pronounced its judgement in *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić, and Esad Landžo (aka "Zenga")*, commonly

known as the *Čelebići* case (Case No. IT-96-21-A). The indictment had charged the four accused with grave breaches of the Geneva Conventions (Article 2 of the ICTY Statute) and violations of the laws or customs of war (Article 3 of the ICTY Statute) for alleged criminal actions, which included murder, torture, and inhuman treatment committed against Bosnian Serb detainees in a prison camp near Čelebići. The accused were held accountable on the basis of personal and/or superior responsibility, in accordance with Articles 7(1) and 7(3) of the ICTY Statute. In November 1998, the Trial Chamber acquitted Delalić but found the other three guilty on various counts, and subsequently sentenced them to 7, 20, and 15 years of imprisonment, respectively.

The defendants (individually and jointly) and the Prosecution appealed on numerous grounds. The grounds of appeal included matters relating to Articles 2 and 3 of the ICTY Statute, superior (command) responsibility, and multiple convictions based on the same facts.

#### *Grounds Pertaining to Articles 2 and 3 of the ICTY Statute*

The Tribunal examined the grounds of appeal pertaining to the grave breaches provision of Article 2 of the ICTY Statute, in particular relating to the requirements that the armed conflict be international in character, and that the victims be "protected persons" within the meaning of the Geneva Conventions. First, the Tribunal rejected the argument that the armed conflict in Bosnia and Herzegovina at the time relevant to the indictment was not of an international character. The Appeals Chamber confirmed that the "overall control" test as enunciated in the 1999 *Tadić* appeals judgement was the proper test to apply in determining whether the armed conflict was international in character. Further, it found "no cogent reasons in the interests of justice to depart from this precedent," which is the principle for the use of precedents set forth in the *Aleksovski* appeals judgement. The Tribunal also opined that the Trial Chamber's legal reasoning was consistent with the conclusions in *Tadić*, despite the fact that the Trial Chamber judgement was rendered in 1998, making it impossible to apply formally the "overall control" test set forth in the 1999 *Tadić* Appeals Judgement.

Second, the Appeals Chamber looked at the criteria for the status of protected persons within the meaning of Article 4 of the Fourth Geneva Convention, as a prerequisite for the applicability of Article 2 of the ICTY Statute. The appellants claimed that the Trial Chamber erred in concluding that the Čelebići camp detainees, although Bosnian Serbs, were not nationals of Bosnia "for the purposes of the category of persons protected under Geneva Convention IV." Again, the Appeals Chamber agreed with the *Tadić* ruling on this point of law, and held that "[i]n today's ethnic conflicts, the victims may be 'assimilated' to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically." Again, applying the *Aleksovski* principle, the court found no reasons to depart from this ruling. Furthermore, it found that the Trial Chamber's legal reasoning, for purposes of the application of interna-

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tional humanitarian law before the ICTY, was consistent with the reasoning in *Tadić*. Consequently, the Bosnian Serb detainees were rightly regarded as protected persons for purposes of Article 2 of the ICTY Statute.

The appellants' grounds of appeal relating to Article 3 of the ICTY Statute, *i.e.*, violations of the laws or customs of war, centered around three issues: (1) whether violations of Common Article 3 of the Geneva Conventions are included in Article 3 of the ICTY Statute; (2) whether Common Article 3 imposes individual criminal responsibility; and (3) whether Common Article 3 is applicable to international armed conflicts. The Tribunal restated the applicable law enunciated largely in the 1995 *Tadić* Jurisdiction Decision and determined that there were "no cogent reasons in the interests of justice" to depart from these rulings in the present case. Furthermore, it concluded that the Trial Chamber had applied the correct legal standards in answering all three questions in the affirmative.

#### *Superior Responsibility*

The court next addressed the appeal grounds pertaining to superior, or command, responsibility. First, the Appeals Chamber affirmed the Trial Chamber's finding that the principle of superior responsibility under Article 7(3) of the ICTY Statute applies equally to persons with *de jure* and *de facto* authority who have effective control over their subordinates. Second, the Tribunal dealt with a Prosecution argument regarding the requirement that a superior-subordinate relationship exist. The Trial Chamber had ruled that this relationship can be exercised in a direct or indirect way, as long as there is effective control of the superior over the subordinate in the sense of the "material ability to prevent or punish criminal conduct." On appeal, the Prosecution argued that this threshold of control included situations in which a superior was someone who "may exercise a substantial degree of influence over the perpetrator or over the entity to which the perpetrator belongs." The Appeals Chamber rejected this proposition, stating that exercising substantial influence as a means of control was not a rule of customary law because it was insufficiently supported by case law and state practice.

The Appeals Chamber addressed at length the *mens rea* standard for superior responsibility, especially the requirement that the superior "knew or had reason to know" that subordinates had committed or were about to commit unlawful acts. The Prosecution, raising the issue "as a matter of general significance to the Tribunal's jurisprudence," alleged that the Trial Chamber erred in its interpretation of this standard. Without arguing for a strict liability standard, however, the Prosecution questioned whether, aside from actual knowledge on the part of the commander, the standard included scenarios in which the superior did not have the needed information "due to dereliction of his duty." The Appeals Chamber upheld the Trial Chamber's interpretation that a superior is criminally responsible on the basis of superior responsibility "only if information was available to him which would have put him on notice of offences committed by subordinates." In other words, for a commander to have "reason to know" of possible unlawful acts by subordinates, it suffices to demonstrate that the superior had "some general information in his possession" putting him on notice of such acts. The information may be oral or written and does not need to have "the form of specific reports submitted pursuant to a monitoring system." Moreover, the information does not need to specify the illegal actions. Finally, in order to incur criminal liability under superior responsibility, the information only needs to be in the superior's possession, meaning

it "needs to have been provided or available" to him; it is not necessary that he "actually acquainted himself with the information." In addition, the Appeals Chamber ruled that the assessment of the *mens rea* in connection to Article 7(3) of the ICTY Statute "should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question."

#### *Cumulative Convictions*

The Tribunal also addressed the important issue of whether cumulative charges and cumulative convictions based on the same facts are lawful. The Appeals Chamber was brief in ruling that cumulative charging is permitted.

The Appeals Chamber gave a critical ruling on the possibility of multiple convictions based on the same underlying facts. The court held that an accused may be convicted under different provisions of the ICTY Statute for the same conduct, provided that "each statutory provision involved has a materially distinct element not contained in the other," *i.e.*, "if it requires proof of a fact not required by the other." The Tribunal based this holding on "reasons of fairness" to the accused and "the consideration that only distinct crimes may justify multiple convictions." The Appeals Chamber further held that when this first test fails, the court must decide based on the principle that "the conviction under the more specific provision should be upheld."

The court applied this two-prong test to the crimes for which the Trial Chamber had convicted the defendants (willful killing, willfully causing great suffering or serious injury to body or health, torture and inhuman treatment under Article 2 of the ICTY Statute, and murder, cruel treatment, and torture under Article 3 of the ICTY Statute). It concluded with respect to each set of double convictions that the first prong failed because the particular convictions under Article 2 required that the acts had been committed against protected persons, which required proof of facts that were not required for proving the status of an "individual not taking an active part in the hostilities" under Article 3 of the Statute. Moreover, the convictions based on Article 3 of the Statute (*e.g.*, murder) did not require a materially distinct element that was not required for a conviction under Article 2 of the Statute (*e.g.*, willful killing). The Appeals Chamber majority continued its analysis by applying the second prong of the test. It held that because the crimes under Article 2 of the Statute require an additional element and, at least with respect to willful killing and willfully causing great suffering or serious injury to body or health, apply more specifically to the case, the convictions under Article 2 of the ICTY Statute (the grave breaches provision) must be upheld and the convictions under Article 3 of the Statute (violations of the laws or customs of war) be dismissed. The issue of what consequences this decision would have on the imposed sentences was left to the Trial Chamber, and the Appeals Chamber remitted a possible adjustment of sentences to a newly constituted Trial Chamber.

Both Presiding Judge David Hunt (Australia) and Judge Bennouna dissented in a joint Separate and Dissenting Opinion. In particular, they disagreed with the majority on the manner in which the first prong of the test should be applied, and what elements should be weighed in the "different elements" test. Both judges opined that the test should only take into account "the substantive elements which relate to an accused's conduct, including his mental state." Thus, the *actus reus* and *mens rea* of the specific offense charged should be considered, but not the legal prerequisites and contextual elements. Similarly, the judges argued that the second prong test should reflect specificity, *i.e.*, "the crime which more specifically describes *what the accused actually did* in the circumstances of the particular case." In other words, all elements of the crime and

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the concrete circumstances of the case should be included when determining what provision most fits the criminal conduct. In their dissenting opinion, both judges also disagreed with the majority's wording in the disposition, i.e., their simple dismissal of certain charges. They opined that in cases carrying potential cumulative convictions, the disposition should read "[n]ot guilty on the basis that a conviction on this charge would be impermissibly cumulative."

#### *Jelisić Judgement*

On July 5, 2001, the Appeals Chamber rendered its judgement in *Prosecutor v. Goran Jelisić* (Case No. IT-95-10-A), following appeals filed against the Trial Chamber's oral judgement of October 19, 1999 and its written judgement of December 14, 1999. The Trial Chamber had found Jelisić guilty of 31 counts of violations of the laws or customs of war (murder, cruel treatment, and plunder) and crimes against humanity (murder and inhumane acts), following a guilty plea. It had sentenced Jelisić (who called himself the "Serb Adolf") to 40 years' imprisonment. Because Jelisić had not pleaded guilty to genocide, a trial on this count followed. The Trial Chamber acquitted him on this count halfway through the trial, however, pursuant to Rule 98bis(B) of the Rules of Procedure and Evidence.

Both the Prosecution and Jelisić appealed. Among the most significant grounds of appeal were the Prosecution's appeal of various aspects of Jelisić's acquittal for genocide, as well as the latter's appeal contesting the sentence. The Appeals Chamber made important pronouncements on the meaning of intent to commit genocide, and furthermore held that the Trial Chamber had erred in its interpretation of Rule 98bis(B). Nonetheless, the majority considered it inappropriate, given the circumstances of the case, to remit the case for further proceedings, and declined to reverse Jelisić's acquittal on the genocide count. As for Jelisić's appeal against the sentence, the Appeals Chamber unanimously affirmed the 40-year sentence.

One of the Prosecution's grounds for appeal dealt with the *mens rea* required for genocide. In this realm, the Appeals Chamber made pivotal determinations *vis-à-vis* the specific intent of the perpetrator, stating that: (1) specific intent requires that, by performing one of the prohibited acts mentioned in Article 4 of the ICTY Statute, the perpetrator "seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such;" (2) proof of this specific intent may be direct or indirect (inferred from certain facts and circumstances); and (3) a plan or policy to commit genocide is not a "legal ingredient" of the crime, but can be an important factor in proving specific intent.

Another critical issue before the Tribunal was the interpretation of Rule 98bis(B) of the Rules of Procedure and Evidence, which requires a Trial Chamber to enter, *proprio motu*, a judgement of acquittal "if it finds that the evidence is insufficient to sustain a conviction" on a particular charge. In particular, the Appeals Chamber examined the standard for determining whether there is sufficient evidence. The Tribunal looked at previous ICTY case law and concluded that the Trial Chamber had used an incorrect standard. Quoting from the February 2001 appeals judgement in the *Čelebići* case, the Appeals Chamber held that the proper test was "whether there is evidence (if accepted) upon which a reasonable Tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question." In other words, it is not determinative whether a trier of fact would come to a certain conclusion beyond reasonable doubt, but whether it could come to such a conclusion.

The Appeals Chamber then deliberated whether the Trial

Chamber, applying the correct test, was "entitled to conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction, beyond reasonable doubt, for genocide." The Trial Chamber had found that Jelisić did not have the specific intent to destroy in whole or in part the Muslim population in the relevant location. The Appeals Chamber disagreed, however, and considered that both the available evidence and the record, as well as the evidence cited and discussed by the Trial Chamber in its judgement, "could have provided the basis for a reasonable Chamber to find beyond a reasonable doubt that the respondent had the intent to destroy the Muslim group" in the relevant location. In short, the Trial Chamber had employed an incorrect test in applying Rule 98bis(B), and had wrongly terminated the proceedings at the mid-trial point.

Despite the fact that most of the Prosecution's grounds for appeal succeeded, the Tribunal did not grant the Prosecution's request for a retrial as a remedy. The Appeals Chamber majority considered a retrial not "in the interests of justice" given the exceptional circumstances of the case, and declined to reverse the acquittal on genocide and remit the case to the Trial Chamber. On this point, Judge Mohamed Shahabuddeen (Guyana) and Judge Wald both dissented.

Judge Shahabuddeen expressed his doubts about whether such "exceptional circumstances" existed. In his view, the majority's reasons for not remitting the case were either insufficient or addressed the "concept of judicial economy" rather than the merits of the case. In addition, reasons of public interest could be advanced to order a retrial, particularly in a case concerning the crime of genocide.

Judge Wald's dissent focused on the Tribunal's authority to "decline . . . to reverse the acquittal," for which she found no support in the ICTY Statute and Rules of Procedure and Evidence, nor in the jurisprudence of national jurisdictions. Instead, Judge Wald proposed to remand the case to the Trial Chamber, giving the prosecutor the choice to proceed with a retrial or to withdraw the genocide charge.

Jelisić appealed his sentence on several grounds. For example, he claimed that the Trial Chamber erred in the exercise of its discretion by giving insufficient weight to his cooperation with the Prosecution, his guilty plea, or his youth at the time of the crimes. Of the totality of the arguments put forward by Jelisić, the Appeals Chamber only accepted the challenge that the Trial Chamber erred in finding him guilty of two murders where the indictment had charged him with, and he had pleaded guilty to, one murder. Nonetheless, the Tribunal unanimously affirmed his 40-year prison sentence.

#### *Interlocutory Appeals*

The Appeals Chamber decided a particularly interesting interlocutory appeal on May 25, 2001, when it issued its *Decision on Interlocutory Appeal by the Accused Zoran Zigić Against the Decision of Trial Chamber I Dated 5 December 2000 in the Kvočka et al.* (Case No. IT-98-30/1-AR73.5) dealing with the relationship between the International Court of Justice (ICJ) and the ICTY. Appellant Zoran Zigić, one of the defendants in the *Kvočka et al.* case, requested that the ICTY proceedings be suspended while an ICJ decision was pending on the same or related issues. He claimed that the relationship between the ICJ as the UN's principal judicial organ and the ICTY "could be seen as a relationship between the Security Council and the International Court of Justice as set out in the United Nations Charter." Like the Trial Chamber had done before it, the Appeals Chamber dismissed the interlocutory appeal.

With respect to the question of whether the ICTY is bound by an ICJ decision on a particular question of law, the Appeals

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Chamber quoted from the *Čelebići Appeals Judgement*, which stated that the “Tribunal is an autonomous international-judicial body” and that there is “no hierarchical relationship” between the ICJ and the ICTY. In the present case, the Tribunal ruled that there was no legal basis to depart from the conclusion of the *Čelebići* case. It further held that the law did not require the ICTY to wait for an ICJ decision because ICJ decisions do not constitute binding precedent on the ICTY. Furthermore, while acknowledging the significance of ICJ decisions on general questions of international law, the Appeals Chamber held that the ICTY “has its own competence” and “would consider any decisions of the International Court of Justice, subject to its competence to make its own findings.” This could potentially result in different rulings by the two courts.

#### Contempt Cases

In early 2001, the ICTY issued two appeals judgements in contempt of court proceedings. The first was rendered on February 27, 2001, when the Appeals Chamber issued its *Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin*, in *Prosecutor v. Dusko Tadić* (Case No. IT-94-1-A-AR77). This judgement followed an appeal by Milan Vujin, a former counsel in the *Tadić* case, who had been found guilty of contempt of court by the Appeals Chamber, ruling in the first instance, on January 31, 2000. The Appeals Chamber, dismissing the appellant’s appeal, upheld the Appeals Chamber’s judgement in first instance, and confirmed that Vujin should pay a fine of Dfl. 15,000 (Dutch Guilders) (approximately 6,250 USD). It further ordered that the Registrar “may consider” striking or suspending Vujin’s name for a certain period of time from the Registrar’s list of eligible counsel who may be assigned to suspects or accused (Rule 45(B) list of Defence Counsel), and reporting Vujin to the professional organization to which he belongs. On June 8, 2001, the Registrar issued his “Decision” in this matter, and ordered Vujin’s name be withdrawn from the Rule 45(B) list.

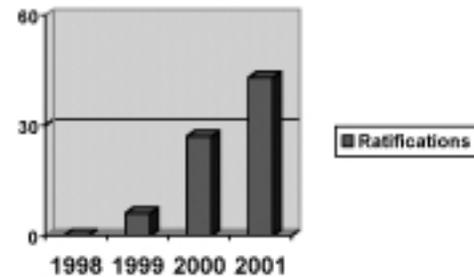
Judge Wald dissented on the issue of whether the Appeals Chamber had jurisdiction in the case. In her opinion, there was no basis in either the ICTY Statute or the Rules of Procedure and Evidence to create “a two-tiered system of appeal in cases such as the one before us, where a finding of contempt has been initially made by the Appeals Chamber.” Similarly, she concluded that creating a right to appeal an Appeals Chamber decision was not required in order to avoid violating certain human rights standards. She found support for this opinion in the practice of some states that have made reservations to Article 14(5) of the International Covenant on Civil and Political Rights and in Article 2 of the Seventh Protocol of the European Human Rights Convention.

The second case concerning contempt of court proceedings involved a former counsel in the *Aleksovski* case. The Trial Chamber had found Anto Nobile guilty of contempt of court in its decision of December 11, 1998, because his disclosure of certain information constituted a “knowing” violation of an order of protective measures by the Trial Chamber. In *Judgement on Appeal by Anto Nobile Against Finding of Contempt* of May 30, 2001 (Case No. IT-95-14/1-AR77), the Appeals Chamber allowed the attorney’s appeal and instructed the Registrar to repay him the Dfl. 4,000 (Dutch Guilders) (approximately 1,700 USD) imposed by the Trial Chamber in 1998. In particular, the Appeals Chamber did not accept the Prosecution arguments that the Trial Chamber should have found: (1) that Nobile had actual knowledge of the protective measures order; or (2) that there was willful blindness regarding the existence of the order on the part of Nobile. ☉

\* Volume 9, Issues 2 and 3 of the Human Rights Brief will cover the remaining ICTY judgements of 2001 and the jurisprudence of the International Criminal Tribunal for Rwanda over that same period.

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### ICC Ratifications



Last year the *Human Rights Brief* reported on the establishment of the International Criminal Court (ICC) and U.S. objections to the court (Volume 8, Issue 1). The ICC was established pursuant to the Rome Statute and is the first permanent tribunal to address the crime of genocide, crimes against humanity, and war crimes. During the past year there has been significant progress in the court’s formation.

The requisite number of countries has adopted the Rome Statute, thus enabling the establishment of the court. The requisite number of countries has not, however, ratified the ICC. As required under the Rome Statute, 60 countries must ratify the ICC for the court to enter into force. As of November 2001, 43 countries have ratified the Rome Statute.

Former President Bill Clinton signed the Rome Statute on the December 31, 2000 deadline, noting U.S. concerns would best be addressed from inside the process (signing the Rome Statute permitted the U.S. to continue negotiating at Preparatory Commission meetings in New York). Clinton did not, however, recommend Senate ratification. Under the current Bush administration, ratification remains an unlikely scenario. The American Servicemember’s Protection Act (ASPA) poses a particularly significant obstacle to U.S. involvement in the court. For more information on the ASPA, please refer to Legislative Watch on page 34.