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## News From the International Criminal Tribunals

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## NEWS FROM THE INTERNATIONAL CRIMINAL TRIBUNALS

### Part I\*

by Cecile E.M. Meijer and Amardeep Singh\*\*

#### General

In the year 2000, the International Criminal Tribunal for the former Yugoslavia (ICTY) handed down, as of late October 2000, seven judgements. The Trial Chamber rendered two judgements after trials on the merits (Blaškić and Kupreškić), and one judgement on allegations of contempt (Simić *et al.*), in addition to numerous interlocutory decisions and orders. Additionally, the Appeals Chamber rendered two judgements on the merits in the Aleksovski case and the Furundžija case, as well as a sentencing judgement and a judgement on allegations of contempt in the Tadić case.

Two new judges assumed their duties at the ICTY this year: Judge Fausto Pocar of Italy replaced Judge Antonio Cassese and was sworn in on February 8, 2000, and Judge Liu Daqun of China was sworn in on April 3, 2000, replacing Judge Wang Tieya. They will serve the remainder of their predecessors' terms of office, both of which end on November 16, 2001.

In February, France signed an agreement with the ICTY regarding the enforcement of ICTY sentences on French territory. In March, Spain became the seventh state to sign such an agreement with the ICTY. Under this agreement, however, Spain will consider only those cases where the sentence is no longer than the maximum possible sentence for any crime under Spanish criminal law, which currently is 30 years. Each agreement will enter into force after France and Spain, respectively, have notified the ICTY that it has satisfied the necessary domestic implementing legislation. The other states that have signed such agreements are Italy, Finland, Norway, Sweden, and Austria. In September 2000, Finland for the first time received two convicted persons from the ICTY—Aleksovski and Furundžija—who will serve their sentences in Finland. Most recently, Duško Tadić was moved from the UN Detention Unit in The Hague to a German prison, following *exequatur* proceedings (necessary to execute an ICTY judgement in Germany) and an ad hoc agreement for this particular case between the ICTY and the government of Germany.

#### The Appeals Chamber

##### Aleksovski Judgement

On March 24, 2000, the Appeals Chamber rendered its written decision in *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, following an appeal by Zlatko Aleksovski and by the prosecution against the Trial Chamber's judgement and imposed sentence. Among the main issues decided was the question of precedent, i.e., the weight to be accorded to the Tribunal's past judgements. Additionally, for the first time the Appeals Chamber lengthened a sentence imposed by the Trial Chamber.

Aleksovski, a Bosnian-Croat, was accused of mistreating Bosnian-Muslim prisoners at the Kaonik prison in Bosnia-Herzegovina while he was a warden of the prison. His indictment included allegations, *inter alia*, of beatings, forced labor, and allowing prisoners to be used as human shields. On May 7, 1999, in its oral pronouncement of the judgement, the Trial Chamber had found Aleksovski guilty of violations of the laws or customs of war, specifically "outrages against personal dignity," as recognized by Article 3 of the Tribunal's Statute (violations of the laws or customs of war). The Trial Chamber did not, however, find him guilty of "inhuman treatment" and "willfully causing great suffering or serious injury to body or health" as

recognized by Article 2(b) and Article 2(c) of the ICTY Statute (grave breaches of the Geneva Conventions), respectively. Aleksovski's acquittal on these two counts was based on the fact that the Trial Chamber's majority did not consider the

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Bosnian-Muslim victims as protected persons, because the conflict at the relevant time and place was not deemed to be of an international character. The Trial Chamber sentenced Aleksovski to two and one half years imprisonment. He was immediately set free, however, because the sentence was less than time already served. The written judgement had been rendered on June 25, 1999.

Aleksovski raised four grounds of appeal, all of which were rejected. One of the Appellant's grounds of appeal concerned the question whether the prosecution must demonstrate that the perpetrator of a crime as defined under Article 3 of the Tribunal's Statute was "motivated by a contempt toward [an] other person's dignity in racial, religious, social, sexual or other discriminatory sense." The Appeals Chamber referred, *inter alia*, to the 1995 *Tadić Appeal on Jurisdiction* decision, in which the Tribunal identified the general requirements for prosecuting under Article 3 of the ICTY Statute and stated that proving discriminatory intent or motivation is not among these requirements. The Appeals Chamber furthermore examined in this respect the text and purpose of relevant provisions in the Geneva Conventions and Additional Protocols, the commentaries by the International Criminal Tribunal for Rwanda (ICTR), customary international law relating to this issue, as well as pertinent ICTY jurisprudence. As a result, the Appeals Chamber rejected this ground of appeal, finding that "it is not an element of offences under Article 3 of the Statute, nor of the offence of outrages upon personal dignity, that the perpetrator had a discriminatory intent or motive."

The prosecution's cross-appeals were more successful. The first ground of cross-appeal contested the non-applicability of Article 2 of the ICTY Statute, and asserted that the Trial Chamber applied the incorrect test in determining the nature of the armed conflict. The prosecution argued the Trial Chamber should have applied the "overall control" test. The prosecution also contended that the Trial Chamber used the wrong test in determining the victims' status as protected persons.

Before discussing these contentions, however, the Appeals Chamber considered the issue of what weight must be given to its decisions and those of the Trial Chambers in subsequent cases. The Appeals Chamber held that "in the interests of certainty and predictability, the Appeals Chambers should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice." In reaching this decision, the Appeals Chamber discussed the jurisprudence of various common law and civil law countries and concluded that domestic courts gen-

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erally follow past decisions unless a clear injustice would occur in doing so. Furthermore, the Appeals Chamber recognized that the Tribunal's Statute is silent on the question of the binding force of previous decisions. The Appeals Chamber nonetheless stated that the right of appeal constitutes part of the right to a fair trial and that "an aspect of the fair trial requirement is the right of an accused to have like cases treated alike."

The Appeals Chamber continued that "the legal principle," or *ratio decidendi*, should be followed, and that "the obligation to follow that principle only applies in similar cases, or substantially similar cases," i.e., "the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision." The Appeals Chambers further held that the "*ratio decidendi* of its decisions is binding on Trial Chambers;" decisions of Trial Chambers, however, "have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive."

Having pronounced on this issue, the Appeals Chamber returned to the prosecution's first ground of cross-appeal, applying the aforementioned conclusions. First, the Appeals Chamber addressed the issue of what test to apply when determining whether a war is international in character. The Appeals Chamber noted that it had developed in the *Tadić* case the less stringent "overall control" test, under which it suffices that a "group is under the 'overall control' of a State." The Appeals Chamber found that there was no "cogent reason to depart" from the principle set forth in the *Tadić* decision. The Appeals Chamber thus held that the "overall control" test was applicable in the *Aleksovski* case and that the Trial Chamber should have used this test.

Second, the Appeals Chamber concluded that because the conflict at the relevant place and time was international in nature, the victims were protected persons within the meaning of Article 4 of the Fourth Geneva Convention. This article defines protected persons as those persons who are "in the hands of a Party to the Conflict or Occupying Power of which they are not nationals." Moreover, the *Aleksovski* Appeals Chamber confirmed the *Tadić* finding and stated that "in certain circumstances, Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors." In contrast to the Trial Chamber's majority holding that the Bosnian Muslim victims were not protected persons, the Appeals Chamber quoted the less stringent criterion of *Tadić*, i.e., "allegiance to a Party to the conflict." In following *Tadić*, the Appeals Chamber further stated it "considers that this extended application of Article 4 meets the object and purpose of Geneva Convention IV, and is particularly apposite in the context of present-day inter-ethnic conflicts." The Appeals Chamber declined, however, to reverse the acquittal on the two counts of grave breaches.

Another significant decision by the Appeal Chambers dealt with its capacity to lengthen a sentence imposed by the Trial Chamber. The prosecution appealed Aleksovski's sentence on several grounds, including that the sentence imposed by the Trial Chamber was too short. Specifically, the prosecution argued that the Trial Chamber failed to give due weight to the gravity of Aleksovski's offenses, and failed to impose a sentence long enough to deter others from future violations.

The Appeals Chamber agreed that the Trial Chamber erred in its sentencing determination of two and one half years and found support for its authority to review the sentence in the *Tadić* sentencing judgement (see below). Citing *Tadić*, the *Aleksovski* Appeals Chamber held that an Appeals Chamber "should not intervene in the exercise of the Trial Chamber's discretion with regard to sentence unless there is a 'discernible

error'" in its length. In this case the Appeals Chamber found that the Trial Chamber erred by "giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature." The Appeals Chamber stated that Aleksovski's offenses were especially grave because as the prison's highest official, he not only failed to prevent or punish abuses against prisoners, but participated in them, and aided and abetted in their commission. Consequently, the Appeals Chamber lengthened Aleksovski's term of imprisonment from two and one half years, to seven years. As

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a result of the Appeals Chamber's decision, Aleksovski was re-imprisoned after being set free by the Trial Chamber.

The Appeals Chamber rejected the prosecution's argument that the short length of the Trial Chamber's sentence was faulty on grounds of deterrence. In so doing, the Appeals Chamber quoted a portion of the *Tadić* sentencing judgement, stating, "this factor [deterrence] must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal." The Appeals Chamber maintained, "[a]n equally important factor is retribution" as a means of expressing "the outrage of the international community at these crimes."

***Tadić* Sentencing Judgement**

In a decision on two sentencing judgement appeals by Duško Tadić, the Appeals Chamber addressed many pressing issues regarding sentencing of those found guilty by the Tribunal. The issues before the Chamber included whether a punitive distinction exists between a war crime and a crime against humanity. The Appeals Chamber's *Judgement in Sentencing Appeals* of January 26, 2000, is the result of a joinder of two appeals against sentencing judgements by the Trial Chamber: the first of July 14, 1997, and the second of November 11, 1999, on additional counts.

Tadić appealed the sentencing judgments on a total of nine grounds. Of these, four are of particular significance. First, Tadić alleged that the Trial Chamber erred in holding that, all things being equal, crimes against humanity should attract a higher sentence than war crimes. The majority of the Appeals Chamber, in a contested holding, disagreed with the Trial Chamber's holding on this point. The Appeals Chamber determined there exists "in law no distinction between the seriousness of a crime against humanity and that of a war crime." The Appeals Chamber reasoned that neither the Statute of the Tribunal, nor its Rules of Procedure and Evidence contained such distinction between the two crimes. The Appeals Chamber also referred to Article 8(1) of the Statute of the International Criminal Court to assert that, in its view, that article does not articulate a difference in penalty for the two types of crimes.

In a strong dissent, Judge Cassese argued that where an act may be considered both a crime against humanity and a war crime, a greater criminal penalty should attach to the crime against humanity. Judge Cassese pointed out that a crime against humanity, unlike a war crime, requires the additional element of knowledge by the perpetrator that his or her actions are part of a "widespread or systematic practice." This additional element, according to Judge Cassese, requires that, all things being equal, a greater criminal penalty attached to a crime against humanity than to a war crime (this issue was revisited in the *Furundžija* appeal, as noted below).

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Second, Tadić argued he deserved credit for the whole time he served in Germany awaiting trial on the same charges, and not just for the time he served in that country after the Tribunal requested Germany to defer the proceedings. According to Rule 101(D) of the Tribunal's Rules of Procedure and Evidence, credit must be given for time a person "was detained in custody pending surrender to the Tribunal or pending trial or appeal." Yet the Appeals Chamber held that despite the wording of this article, "fairness requires" that Tadić be given credit for the entire time served in Germany because he was held there for proceedings involving "substantially the same criminal conduct as that for which he now stands convicted at the International Tribunal."

Third, Tadić maintained that the calculation of his minimum sentence should begin on the date the Trial Chamber pronounced its sentence and not when his appeal is being determined. The Appeals Chamber agreed, holding that the starting point of any minimum sentence should commence on the date of sentencing by the Trial Chamber. The Appeals Chamber reasoned that starting the calculation of a minimum sentence after an appeal is completed could discourage convicted persons from using the right to appeal, because such a rule would fail to recognize the considerable time they spend imprisoned while awaiting a decision on appeal. Such a result would also deprive the Appeals Chamber of "the opportunity to hear appeals on substantial questions of law." The Appeals Chamber held, however, that when calculating the minimum term, no credit was due pursuant to Rule 101(D) of the Rules of Procedure and Evidence.

Fourth, Tadić contended that the Trial Chamber, in accordance with Article 24(1) of the ICTY Statute, should have given greater weight to the general sentencing practices in the former Yugoslavia. In arguing that his sentence on particular counts ranging from 6 to 25 years was too long, Tadić pointed out that in the former Yugoslavia the most severe term of imprisonment that a court could impose was 20 years. The Appeals Chamber held that while Yugoslav practice should be taken into account by the Tribunal, it is not controlling in sentencing determinations. In support of this proposition, the Appeals Chamber relied, *inter alia*, on Rule 101(A) of the Tribunal's Rules of Procedure and Evidence, which allows the Tribunal to sentence a convicted person to imprisonment for the remainder of his life.

Finally, the Appeals Chamber reduced the higher end of Duško Tadić's prison sentence from 25 to 20 years, considering the higher sentence "excessive." Looking at the ICTY and ICTR jurisprudence, the Appeals Chamber opined that sentences generally need to reflect the "relative significance of the role of the Appellant" and that Tadić ranked low in comparison to others in the command structure. As a result of this Appeals Chamber decision, Tadić's minimum term of ten years imprisonment must be calculated from July 14, 1997, the date of the first sentencing judgement by the Trial Chamber, and time previously served will not apply to this minimum term. Taking into account the time Tadić served prior to this appeals judgement, his imprisonment will end no earlier than July 14, 2007. On October 31, 2000, Tadić was transferred to Germany to complete the remainder of his sentence.

### Furundžija Judgement

On July 21, 2000, the Appeals Chamber, in *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, rendered a decision on an

appeal by Furundžija against the Trial Chamber's judgement and sentence of December 10, 1998. The Trial Chamber had found Furundžija guilty of two counts of violations of the laws or customs of war (Article 3 of the ICTY Statute). Specifically, Furundžija was convicted and sentenced to ten years imprisonment for torture as a co-perpetrator, and to eight years concurrently for outrages upon personal dignity, including rape, as an aider and abetter. The Appellant raised five grounds of appeal, including allegations of judicial bias. In addition, the Appeals Chamber briefly considered the issue of whether crimes against humanity should be punished more harshly than war crimes. All grounds of appeal failed and the Appeals Chamber affirmed the imposed sentences.

Of particular importance is the fourth ground of appeal which, reminiscent of the *Pinochet* case, stated that Judge Mumba, Presiding Judge in the case before the Trial Chamber, should have recused herself in accordance with Rule 15(A) of the Rules of Procedure and Evidence, because of her previous membership on the UN Commission on the Status of Women (UNCSW). Without actually claiming that Judge Mumba had been biased, Appellant alleged that she "should have been disqualified as an appearance was created that she had sat in judgement in a case that could advance and in fact did advance a legal and political agenda which she helped to create whilst a member of the UNCSW."

Addressing this issue for the first time, the Appeals Chamber articulated principles for the interpretation and application of the impartiality requirement of Rule 15(A) of the Rules of Procedure and Evidence. In so doing, the Appeals Chamber determined that a judge "is not impartial if it is shown that actual bias exists." The Appeals Chamber further decided that an unacceptable appearance of bias includes a situation where "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." Quoting the Supreme Court of Canada, the Tribunal understood this to mean that a "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."

Applying this principle, the Appeals Chamber found no substance to this ground of appeal. The Tribunal reasoned that Judge Mumba served on the UNCSW as her country's representative, and not in a personal capacity. Moreover, the Appeals Chamber asserted that the UNCSW promotes UN goals and objectives, regardless of whether these coincided with the judge's personal convictions. Furthermore, the Appeals Chamber pointed to Article 13(1) of the ICTY Statute, requiring that judges be experienced in international law, including human rights law. The Appeals Chamber held that "the possession of experience in any of those areas by a Judge cannot, in the absence of the clearest contrary evidence, constitute evidence of bias or partiality."

In the fifth ground of appeal, Furundžija claimed that the sentence imposed by the Trial Chamber constituted "cruel and unusual punishment," and should be lowered to a maximum of six years. The Appeals Chamber disagreed with the Appellant and found that there does not yet exist a certain "penal regime" that should be followed in sentence determinations. It further found nothing in the ICTY's jurisprudence to support the argument that crimes resulting in a victim's death must be

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punished more harshly than other crimes. The Tribunal also followed the *ratio decidendi* in the *Tadić* Sentencing Judgement and confirmed that war crimes and crimes against humanity are equally grave offences and should be punished accordingly. In a Declaration appended to the judgement, Judge Vohrah disagreed, arguing, similar to Judge Cassese in the *Tadić* Sentencing Judgement, that “when all things are equal,” a crime against humanity is a more serious crime than a war crime, and that “ordinarily this additional gravity requires that the person convicted of a crime against humanity should receive a longer sentence than a person convicted of the same act as a war crime.”

#### Contempt cases

In 2000, the ICTY issued two important judgements in contempt of court proceedings. The Appeals Chamber issued an unanimous

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judgement against Milan Vujin, former counsel for Duško Tadić. In addition, Trial Chamber III rendered judgement on contempt of court allegations against Milan Simić and his counsel.

#### Tadić

The Appeals Chamber dealt with the issue of contempt proceedings against Mr. Milan Vujin, counsel in the *Tadić* case, as well as the source of the Tribunal’s authority to deal with such proceedings and punish those found guilty of contempt. The allegations of contempt date back to conduct during the time of preparations for the appeal in the *Tadić* case, in particular the preparations for an (ultimately unsuccessful) application in accordance with Rule 115 of the Tribunal’s Rules of Procedure and Evidence (the presentation of additional evidence to the Appeals Chamber). After receiving information from Mr. Vujin’s co-counsel that Vujin had possibly engaged in misrepresentations to the Tribunal, the Appeals Chamber issued a Scheduling Order on February 10, 1999, requiring Vujin to respond to allegations of contempt. Tadić and the prosecution appeared in the contempt proceedings as interested parties.

The Tribunal stated it was exercising its power to initiate contempt proceedings in accordance with Rule 77(E) of the Tribunal’s Rules of Procedure and Evidence, which states that the Tribunal may hold in contempt those “who knowingly and willfully interfere with its administration of justice.” Though there is no customary international law on this matter, the Appeals Chamber noted the concept of contempt is common to the major legal systems around the world. It concluded that it possessed “an inherent jurisdiction” to ensure that its basic judicial functions are “not frustrated” by conduct that obstructs the administration of justice.

Regarding the nature of the contempt allegations, on January 31, 2000, the Appeals Chamber held Milan Vujin in contempt of the Tribunal on different grounds. First, the Appeals Chamber found that Mr. Vujin had, in a submission to the Tribunal, knowingly misrepresented the date of a particular statement and



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View of the International Tribunal on War Crimes in Former Yugoslavia in session.

misrepresented that he had personally taken the statement. Second, Mr. Vujin falsely represented to the Tribunal that a suspect had committed a murder when the witness to whom he attributed this assertion had specifically told him that another person had committed the murder. Finally, the Appeals Chamber found that Mr. Vujin had manipulated witnesses by instructing them not to mention any names in statements, thus withholding evidence that may have exonerated Tadić. In making these findings, the Appeals Chamber applied the “beyond a reasonable doubt” standard.

The Appeals Chamber regarded the contempt as serious, especially where the lawyer’s conduct had been against his client’s interest, noting that it struck “at the very heart of the criminal justice system.” The Tribunal ordered Mr. Vujin to pay a fine of Dfl 15,000 to the Tribunal’s Registrar, and directed the Registrar to consider striking his name from the list of assigned counsel and report his conduct to his professional organization. The Appeals Chamber further ordered the publication of certain specified documents.

#### Simić et al.

On June 30, 2000, Trial Chamber III issued its written *Judgement in the Matter of Contempt Allegations against an Accused and his Counsel*. The Trial Chamber found Milan Simić, and his attorney Branislav Avramović, not guilty of threatening, bribing, and requesting a potential witness to commit perjury. The Trial Chamber determined these allegations had not been proved beyond a reasonable doubt. In a case that hinged on findings of fact rather than findings of law, the Trial Chamber found that the testimony of “Witness Agnes,” upon whom the charges of contempt solely relied, could not support a finding of contempt. 🌐

*\* Volume 8, Issues 2 and 3 of the Human Rights Brief will cover the remaining ICTY judgements of 2000 and the jurisprudence of the International Criminal Tribunal for Rwanda over that same period.*

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