[DECLARATION OF JUDGE RAFAEL NIETO-NAVIA]

[SEPARATE OPINION OF JUDGE SHAHABUDDEEN]

[DECLARATION OF JUDGE LAL CHAND VOHRAH]

LA CHAMBRE D'APPEL

Composée comme suit :
M. le Juge Claude Jorda, Président
M. le Juge Lal Chand Vohrah
M. le Juge Mohamed Shahabuddeen
M. le Juge Rafael Nieto-Navia
M. le Juge Fausto Pocar

Assistée de : M. Agwu U. Okali

Arrêt rendu le : 31 mars 2000

Jean-Bosco BARAYAGWIZA

c/

LE PROCUREUR

Affaire nº ICTR-97-19-AR72

ARRÊT

(DEMANDE DU PROCUREUR EN RÉVISION OU RÉEXAMEN)

Le Conseil de la Défense :

Mme Carmelle Marchessault
M. David Danielson

Le Bureau du Procureur :

Mme Carla Del Ponte
M. Bernard Muna
M. Mohamed Othman
M. Upawansa Yapa
M. Sankara Menon

M. Norman Farrell
M. Mathias Marcussen

I. INTRODUCTION

1. La Chambre d'appel du Tribunal criminel international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994 (respectivement la « Chambre d'appel » et le « Tribunal »), est saisie de la « Demande du Procureur en révision ou réexamen de l'arrêt rendu par la Chambre d'appel le 3 novembre 1999, dans l'affaire *Jean-Bosco Barayagwiza c/ Le Procureur* et requête en sursis d'exécution » déposée par le Procureur le 1^er^ décembre 1999 (« Demande en révision »).
2. L'arrêt dont on demande la révision a été rendu par la Chambre d'appel le 3 novembre 1999 (« Arrêt »). Par cet Arrêt, il est fait droit à l'appel interjeté par Jean-Bosco Barayagwiza (« Appelant ») contre la décision de la Chambre de première instance II rejetant l'exception préjudicielle qu'il avait présentée contestant la légalité de son arrestation et de sa détention. La Chambre d'appel a rejeté l'acte d'accusation à l'encontre de l'Appelant avec arrêt définitif des poursuites et a ordonné la remise en liberté immédiate de l'Appelant. De plus, à la majorité des voix (le Juge Shahabuddeen exprimant une opinion dissidente) la Chambre d'appel a donné pour instruction au Greffier de prendre les dispositions nécessaires pour la remise de l'Appelant aux autorités du Cameroun, d'où il avait été initialement transféré au quartier pénitentiaire du Tribunal.
3. La Chambre d'appel a ordonné le sursis à exécution de l'Arrêt à la lumière de la Demande en révision. L'Appelant est donc toujours détenu par le Tribunal.

II. RAPPEL DE LA PROCÉDURE

4. L'Appelant a déposé en premier une demande en révision de l'Arrêt. Le 5 novembre 1999, il a demandé à la Chambre d'appel de réviser le point 4 du dispositif de l'Arrêt, qui donne pour instruction au Greffier de prendre les dispositions nécessaires pour la remise de l'Appelant aux autorités du Cameroun. Le Procureur a répliqué, demandant à être entendu sur le même point ; puis l'Appelant a retiré sa requête.
5. Suite à cette série d'écritures, le gouvernement du Rwanda a déposé une demande d'autorisation de comparaître à titre d'*amicus curiae* afin d'être entendu par la Chambre sur la question de la remise de l'Appelant aux autorités du Cameroun. Cette demande a été présentée conformément à l'article 74 du Règlement de procédure et de preuve (« Règlement »).
6. Le 19 novembre 1999, le Procureur a déposé une « Notification d'intention de déposer une demande en révision de l'arrêt rendu le 3 novembre 1999 » (« Notification d'intention du Procureur »), informant la Chambre de son intention de déposer sa propre demande en révision de l'Arrêt en application de l'article 25 du Statut du Tribunal et à défaut une « demande en réexamen ». Le 25 novembre, la Chambre d'appel a ordonné qu'il soit sursis à l'exécution de l'Arrêt en attente du dépôt de la demande en révision du Procureur. Elle a également ordonné que la remise en liberté immédiate de l'Appelant soit subordonnée à l'instruction donnée au Greffier de prendre les dispositions nécessaires pour qu'il soit remis aux autorités du Cameroun. Le même jour, la Chambre a reçu les objections de l'Appelant à la Notification d'intention du Procureur.
7. La Demande en révision du Procureur a été déposée le 1^er^ décembre 1999, dans le délai de 7 jours. Les annexes y afférentes ont été déposées le lendemain. Le 8 décembre 1999, la Chambre d'appel a rendu une ordonnance maintenant en vigueur le sursis à l'exécution ordonné le 25 novembre 1999 et fixant un calendrier de dépôt des écritures des parties. Le Procureur a eu 7 jours pour déposer copie de toutes déclarations relatives à des faits nouveaux qu'il n'avait pas encore déposées. Il n'a pas respecté ce délai mais a déposé, le 16 février 2000, des déclarations supplémentaires accompagnées d'une requête aux fins de report des délais. L'Appelant s'est opposé à cette requête.
8. L'ordonnance du 8 décembre 1999 prévoyait en outre que la Chambre entendrait les arguments des Parties sur la Demande en révision introduite par le Procureur et que les autorités rwandaises pourraient être

entendues en qualité d'*amicus curiae* sur la question des modalités de la libération de l'Appelant, si celle-ci venait à être abordée. Le gouvernement du Rwanda a déposé un mémoire y relatif le 15 février 2000.

9. Le 10 décembre 1999, l'Appelant a déposé quatre requêtes : contestant la compétence de la Chambre d'appel pour procéder à la révision ; s'opposant à la demande d'autorisation du gouvernement de la République rwandaise de comparaître à titre d'*amicus curiae* ; demandant des précisions relatives à l'ordonnance du 8 décembre 1999 et demandant l'autorisation d'être entendu au cours de l'audience relative à la Demande en révision du Procureur. Le Procureur a déposé ses réponses le 3 février 2000.
10. Le 17 décembre 1999, la Chambre d'appel a rendu une ordonnance portant calendrier clarifiant les délais fixés dans son ordonnance précédente du 8 décembre 1999 et, le 6 janvier 2000, l'Appelant a déposé sa réponse à la Demande en révision du Procureur.
11. Entre-temps, par lettre datée du 16 décembre 1999, l'Appelant a demandé le retrait du conseil qui lui avait été commis d'office, M. J.P.L. Nyaberi. Le Greffier a rejeté la demande le 5 janvier 2000, ce que le Président du Tribunal a confirmé le 19 janvier 2000. L'Appelant a ensuite déposé une requête auprès de la Chambre d'appel insistant pour que son conseil lui soit retiré et que d'autres conseil et co-conseil soient commis pour le représenter dans le cadre de la Demande en révision du Procureur. La Chambre d'appel y a fait droit par ordonnance datée du 31 janvier 2000. En raison du changement de conseil, l'Appelant a eu jusqu'au 17 février 2000 pour déposer une nouvelle réponse à la Demande en révision introduite par le Procureur, ladite réponse devant remplacer la précédente datée du 6 janvier 2000. Le Procureur a bénéficié de quatre jours supplémentaires pour répliquer, le cas échéant, à une nouvelle réponse. Les deux documents susmentionnés ont été dûment déposés.
12. L'audience relative à la Demande en révision s'est tenue à Arusha le 22 février 2000.

III. Textes applicables

A. Le Statut

Article 25: Révision

S'il est découvert un fait nouveau qui n'était pas connu au moment du procès en première instance ou en appel et qui aurait pu être un élément décisif de la décision, le condamné ou le procureur peut saisir le Tribunal international pour le Rwanda d'une demande en révision de la sentence.

B. Le Règlement

Article 120: Demande en révision

S'il est découvert un fait nouveau qui n'était pas connu de la partie intéressée lors de la procédure devant une Chambre ou dont la découverte n'avait pu intervenir malgré toutes les diligences effectuées, la défense ou, dans l'année suivant le prononcé du jugement définitif, le Procureur peut soumettre à la même Chambre, dès lors qu'elle peut être reconstituée ou, à défaut, à la Chambre appropriée du Tribunal, une demande en révision du jugement.

Article 121: Examen préliminaire

Si la Chambre qui a statué sur l'affaire convient que le fait nouveau, s'il avait été établi, aurait pu être un élément décisif de la décision, la Chambre révise le jugement et prononce un nouveau jugement après audition des parties.

IV. ARGUMENTS DES PARTIES

A. Arguments du Procureur

13. Le Procureur invoque l'article 25 du Statut et les articles 120 et 121 du Règlement comme étant le fondement juridique de la Demande en révision. Le Procureur fonde la Demande en révision principalement sur des faits nouveaux qu'il aurait découverts . Il affirme qu'en vertu de l'article 25, pour

qu'une Chambre d'appel fasse droit à un recours en révision et réexamine une décision, deux conditions essentielles doivent être remplies, à savoir la découverte de faits nouveaux qui n'étaient pas connus au moment du procès en première instance mais qui auraient pu avoir une influence décisive sur la décision. Le Procureur déclare que les faits nouveaux qu'il invoque intéressent la décision dans sa totalité et rendent celle-ci susceptible de révision et de réexamen sur tous les plans.

14. Le Procureur rejette l'argument de la Défense (paragraphe 27 *infra*), selon lequel il ne peut invoquer l'article 25 du Statut qu'après le prononcé d'une sentence portant condamnation . Pour le Procureur, les mots « le condamné » ou « le Procureur » signifient tout simplement que les deux parties peuvent déposer une demande en révision en vertu de l'article 25 du Statut et non pas que ce droit ne leur serait ouvert qu'après le prononcé d'une sentence portant condamnation. Le Procureur soutient que rien dans les textes ne stipule qu'une demande en révision ne peut être introduite qu'après le prononcé d'un jugement définitif.
15. Les faits nouveaux que le Procureur cherche à introduire et sur lesquels il fonde sa Demande en révision sont, selon lui, de deux ordres: les faits nouveaux qui n'étaient pas connus ou ne pouvaient être connus du Procureur au moment des exposés devant la Chambre d'appel d'une part et, de l'autre, les faits qui, « quoiqu'ils aient pu certainement être découverts par le Procureur » à l'époque, sont des faits nouveaux dans la mesure où le Procureur ne pouvait pas savoir qu'ils faisaient partie d'un litige portant sur les faits ou concernant les questions sur lesquelles la Chambre d'appel a statué par la suite. Dans son argumentation, le Procureur invoque les articles 121, 107, 115, 117 et 5 du Règlement et l'article 14 du Statut. Le Procureur soutient que la question de savoir si un fait constitue un fait nouveau relève à la fois des faits et du droit et requiert que la Chambre d'appel applique aux faits le droit tel qu'il existe afin de dire si la condition requise est réunie ; ce qui ne veut pas dire qu'un fait survenu antérieurement au procès en première instance ne peut pas être considéré comme un fait nouveau, ou un « fait impossible à découvrir malgré l'exercice de toute la diligence voulue ».
16. Le Procureur soutient que de nombreuses questions matérielles ont été soulevées d'office pour la première fois en appel par la Chambre d'appel sans qu'il y ait eu d'audience contradictoire ou décision judiciaire sur les faits par la Chambre de première instance , et fait valoir en conséquence que l'on ne peut reprocher au Procureur de n'avoir pu saisir dans toute sa plénitude la nature des faits demandés par la Chambre d'appel. Au demeurant, le Procureur soutient que les questions soulevées ne correspondaient pas entièrement aux décisions de fait prises par la suite par la Chambre d'appel et qu'à aucun moment il n'avait été demandé au Procureur de s'interroger sur le fondement matériel de l'application de la doctrine de l'abus de procédures judiciaires invoquée par la Chambre d'appel dans son arrêt. Le Procureur soutient en outre que pour appliquer cette doctrine il fallait tenir compte de l'intérêt public en allant au procès et, par là même, les faits s'inscrivant dans le cadre des intérêts de la justice internationale sont des faits nouveaux sur la demande en révision. Le Procureur soutient qu'il ne lui a pas été donné l'occasion de présenter ces faits devant la Chambre d'appel.
17. A propos de l'application de la doctrine de l'abus de procédure, le Procureur soutient que la solution qui consiste à rejeter l'acte d'accusation avec arrêt définitif des poursuites est arbitraire, d'autant plus que le retard allégué, contrairement aux conclusions figurant dans l'Arrêt, n'est pas entièrement le fait du Procureur. Les nouveaux faits ont trait à l'application de cette doctrine et à la solution que la Chambre d'appel a donnée dans l'arrêt.
18. Le Procureur soutient qu'en vertu des pouvoirs propres à la Chambre d'appel en tant qu'organe judiciaire, celle-ci peut également réexaminer l'arrêt, réformer ou annuler ses ordonnances antérieures, faisant valoir que l'exercice d'un tel pouvoir est de la plus haute importance pour le fonctionnement normal de tout tribunal. Il affirme que ce pouvoir implicite a été reconnu par les deux Tribunaux et il cite à l'appui plusieurs décisions qui corroborent cette affirmation. Il soutient qu'un organe judiciaire peut réformer ou annuler une ordonnance antérieure si un changement des circonstances de la cause le justifient et, également, si un réexamen de la question l'amène à conclure qu'une ordonnance jurisprudence du droit du Tribunal qu'une Chambre ne reviendra pas sur ses décisions s'il ne survient aucun fait nouveau pour justifier une telle mesure ou si les faits invoqués maintenant auraient pu l'être antérieurement, s'il existe des faits ou des arguments que la Chambre ignorait au moment où elle rendait la première décision et que la partie intéressée ne pouvait porter à la connaissance de celle-ci au moment de la prise de la première décision, toute Chambre d'appel a le pouvoir intrinsèque de faire droit à une demande en révision. Le Procureur demande à la Chambre d'appel d'exercer son pouvoir inhérent dans les cas où une décision

judiciaire extrêmement importante a été prise sans qu'elle ait eu pleine connaissance de tous les arguments juridiques sur les questions jugées pertinentes et sur la base de faits incomplets.

19. Le Procureur admet que quand bien même un jugement définitif devient *res judicata* et est régi par le principe *non bis in idem*, l'arrêt n'était pas un jugement définitif sur le fond de l'affaire.
20. Le Procureur soutient que l'on ne pouvait pas, en toute logique, s'attendre à ce qu'il ait pu prévoir tous les faits et arguments qui se sont avérés des éléments pertinents qui ont pu avoir une influence décisive sur la décision de la Chambre d'appel.
21. Il soutient que les nouveaux faits présentés auraient pu être des éléments décisifs de l'Arrêt en ce sens que s'ils figuraient dans le dossier d'appel ils auraient certainement influencé les conclusions de la Chambre d'appel, à savoir que : a) la période de détention préventive était indûment prolongée ; b) il y a eu violation de l'article 40 *bis* à cause du retard excessif mis à inculper l'Appelant ; c) il y a eu violation de l'article 62 et du droit de l'Appelant à une comparution initiale dans les meilleurs délais ; et d) le Procureur n'a pas respecté l'obligation qui lui est faite de diligenter la procédure engagée contre l'Appelant. Par ailleurs, ces faits auraient pu modifier les constations consignées dans la Conclusion et auraient pu être des éléments décisifs de la réparation préconisée par la Chambre d'appel.
22. Le Procureur soutient qu'il n'y a aucune commune mesure entre la décision extrême de la Chambre d'appel de rejeter l'acte d'accusation avec arrêt définitif de poursuites et les violations présumées des droits de l'Appelant et qu'en outre, cette décision est contraire au mandat du Tribunal, qui est de promouvoir la réconciliation nationale au Rwanda par le biais de procès publics au fond. Il déclare que le Tribunal doit tenir compte des principes du droit, des droits de l'accusé et, particulièrement, des intérêts de la justice réclamée par les victimes et l'ensemble de la communauté internationale.
23. Le Procureur allègue que la Chambre d'appel a violé l'article 5 en ce sens qu'elle a outrepassé son rôle et a obtenu des éléments qui à l'origine ne faisaient pas partie du dossier de première instance. Le Procureur soutient qu'en agissant de la sorte, la Chambre d'appel a excédé les pouvoirs qui lui sont reconnus en vertu des dispositions des articles 98, 115 et 117 A), avec comme conséquence le préjudice matériel que le Procureur en a subi et dont la réparation consiste, pour la Chambre d'appel, d'ordonner la révision de l'Arrêt, dans toutes ses dispositions.
24. Le Procureur soutient que son aptitude à continuer les poursuites et les enquêtes dépend du Gouvernement du Rwanda et que tant que l'Appelant n'est pas jugé le Gouvernement du Rwanda « n'y est pour rien ».
25. Enfin, le Procureur soutient que la révision de la décision se justifie sur la base des nouveaux faits, qui prouvent que le Procureur a déployé de sérieux efforts en vue du transfert de l'Appelant, qu'il a agi avec la diligence voulue et que tout retard éventuel n'a pas fondamentalement compromis les droits de l'Appelant et ne justifierait donc pas le rejet, de manière partiale, de l'acte d'accusation établi par le Procureur .
26. En conséquence, le Procureur demande à la Chambre d'appel, à titre de réparation de fond, soit de réviser soit de réexaminer l'Arrêt en application des pouvoirs qui lui sont propres, autrement dit d'annuler l'Arrêt et de rétablir l'acte d'accusation. Sinon, s'il n'est pas fait droit à ces requêtes, le Procureur demande que la Chambre d'appel déclare que la décision de rejeter l'acte d'accusation ne s'accompagnerait pas de l'arrêt définitif des poursuites.

B. Arguments de la défense

27. L'Appelant soutient que les parties ne peuvent invoquer l'article 25 qu'après que l'accusé ait été déclaré « coupable ». Dans ces conditions, la Chambre d'appel n'a pas compétence pour connaître de la Demande en révision puisque l'Appelant n'a pas, entre-temps, été déclaré «coupable». L'Appelant soutient que les articles 120 et 121 doivent être interprétés conformément à ce principe et il maintient que ces deux dispositions réglementaires s'appliquent à la révision de la décision après que le procès ait eu lieu et qu'elles cadrent donc avec l'article 25, qui s'applique également au droit de tout « condamné » à la révision de sa sentence.
28. L'Appelant soutient que la Chambre d'appel n'a pas le « pouvoir inhérent » de réviser une décision finale. Il affirme qu'en fait ce que demande le Procureur à la Chambre d'appel c'est de modifier le Statut en lui demandant d'user de son pouvoir inhérent seulement si elle conclut que l'article 25 du Statut et de l'article 120 du Règlement de procédure et de preuve ne trouvent pas application en l'espèce. . L'Appelant soutient que la Chambre d'appel ne peut pas, de sa propre initiative, légiférer.

29. L'Appelant soutient que la Décision était définitive et sans appel et qu'il doit, de ce fait, être relaxé d'autant plus qu'aucune disposition légale n'autorise la Chambre à réviser la Décision.
30. L'Appelant maintient que le Procureur a fait fi des conditions légales dans lesquelles des faits nouveaux peuvent être invoqués et qu'il n'a présenté aucun élément nouveau pour justifier sa demande en révision de la Décision. En dépit des pièces jointes fournies par le Procureur et qu'il tient pour des faits nouveaux, l'Appelant soutient que le Procureur n'est pas parvenu à produire le moindre élément de preuve comme quoi il a rempli les deux conditions requises à cet effet par le Règlement, à savoir que le fait nouveau était inconnu de la partie intéressée et qu'il ne pouvait avoir été découvert en dépit de l'exercice de toute la diligence due.
31. L'Appelant soutient que la Chambre d'appel doit rejeter la requête du Procureur tendant à qualifier les « faits anciens » de « faits nouveaux » afin de tenter d'inventer une nouvelle définition se limitant aux faits de la cause. l'Appelant maintient que dans ses conclusions l'Arrêt est conforme à la vérité et qu'elle est corroborée en tous points par la documentation de l'affaire.
32. L'Appelant soutient que l'argument du Procureur selon lequel l'applicabilité de la doctrine de l'abus de procédures judiciaires ne lui avait pas été notifiée avant l'Arrêt est sans fondement. En effet, l'Appelant soutient que cette question avait été exposée de façon circonstanciée dans sa requête déposée le 24 février 1998 et que dans une affaire pénale, dès lors qu'une une partie a dûment soulevé une question et que l'autre feint de les ignorer, elle le fait à ses risques et périls.
33. En ce qui concerne les allégations du Procureur selon lesquelles l'Arrêt de la Chambre d'appel est injustifiable au regard de l'objectif avoué de la résolution 955 de l'ONU, qui est de favoriser la réconciliation nationale au Rwanda, l'Appelant demande instamment à la Chambre « de rejeter avec la dernière énergie la notion selon laquelle les droits individuels d'une personne accusée d'une infraction pénale grave, sous prétexte de réaliser la réconciliation nationale*,* devraient être moindres que ceux reconnus à un accusé inculpé de crime moins grave ».

V. LA requête DEVANT LA CHAMBRE

34. Avant de procéder à l'examen de la Demande en révision, la Chambre note qu'à l'audience consacrée à cet examen, le 22 février 2000 à Arusha, Procureur Mme Carla Del Ponte a fait une déclaration concernant la réaction du Gouvernement rwandais face à l'Arrêt. Elle a déclaré à ce propos que : « le gouvernement du Rwanda a réagi très dur à la décision du 3 novembre ». Par la suite, le Procureur général du Rwanda , comparaissant devant la Chambre d'appel en tant que représentant du Gouvernement du Rwanda et à titre d'amicus curiae, a déclaré sans ambages que le peuple rwandais allait cesser toute coopération avec le Tribunal si la Chambre d'appel opposait à la Demande en révision du Procureur une fin de non-recevoir. Pour sa part, la Chambre d'appel tient à souligner que le Tribunal est un organe judiciaire indépendant, dont les décisions sont exclusivement fondées sur la justice et le droit et que si un quelconque gouvernement décidait pour une raison ou une autre de ne pas coopérer avec le Tribunal, ce dernier en saisirait le Conseil de sécurité.
35. La Chambre note également que, pendant l'audience sur sa Demande en révision, le Procureur a fondé ses arguments sur la prétendue culpabilité de l'Appelant, et s'est déclaré prête à démontrer ceci devant la Chambre. La force avec laquelle elle a exprimé cette position nous oblige à réaffirmer qu'il appartient à la Chambre de première instance de juger de la culpabilité d'un accusé, selon le principe fondamental de la présomption d'innocence, tel qu'incorporé dans l'article 3 du Statut du Tribunal.
36. La demande du Procureur présente deux voies à la Chambre. En premier lieu elle demande une révision de l'Arrêt, en application de l'article 25 du Statut. En outre et à défaut de cela, elle demande que la Chambre réexamine l'Arrêt en vertu des pouvoirs qui lui sont reconnus en tant qu'organe judiciaire.

A. REVISION

1. Général

37. Le mécanisme prévu dans le Statut et le Règlement et applicable à une Chambre d'appel aux fins de révision d'une décision antérieure n'est pas un concept nouveau inventé spécifiquement pour les besoins de ce Tribunal. En fait, il s'agit là d'une facilité qui existe tant au niveau international qu'au niveau de

nombreuses instances nationales, quoique souvent les critères et les conditions préalables à remplir avant que l'on puisse procéder à une révision de décision varient d'un cas à l'autre.

38. L'article 61 du Statut de la Cour internationale de justice confère également à la Cour le pouvoir de réviser un arrêt si elle venait à découvrir un fait de nature à exercer une influence décisive et qui, avant le prononcé de l'arrêt, était inconnu de la Cour et de la partie intéressée au moment où l'arrêt avait été rendu, et à la condition que cela ne soit pas dû à la négligence. De même, l'article 4 du Protocole 7 de la Convention européenne pour la protection des droits de l'homme et des libertés fondamentales prévoit la possibilité de former un recours en révision s'il existe, entre autres, « des éléments de preuve établissant l'existence de faits nouveaux ou de faits nouvellement révélés ». Enfin, sur ce sujet, la Commission du droit international a déclaré qu'une telle disposition constituait « une garantie indispensable contre une éventuelle erreur de fait concernant des éléments dont ne disposait pas l'accusé et qui, par conséquent, n'auraient pas été portés à l'attention de la Cour au moment du procès lui-même ou de toute procédure de recours ultérieure ».
39. Dans les juridictions nationales, la possibilité du recours en révision revêt diverses formes, soit en tant que droit spécifique de réviser un arrêt d'un tribunal, soit grâce à une autre voie concourant à obtenir le même résultat. La législation prévoyant un droit spécifique de réviser un arrêt est plus répandue dans les pays de droit romain, bien qu'une fois de plus, les critères exacts à réunir avant qu'une cour n'entreprenne la révision d'un arrêt puissent différer de ceux prévus par les règles statutaires de ce Tribunal.
40. Toutes ces dispositions ne sont rappelées ici que pour illustrer le fait que, bien que le vocable utilisé puisse différer d'un cas à l'autre, il va sans dire que le principe du recours en révision des arrêts ne constitue nullement en soi une pratique exceptionnelle et le mécanisme par lequel la Chambre d'appel a été une fois de plus saisie de cette question tire son origine d'une pluralité de sources.
41. Pour en revenir à la procédure qui nous préoccupe, il ressort clairement du Statut et du Règlement que pour qu'une Chambre d'appel puisse procéder à un examen en révision d'un arrêt, elle doit se convaincre que les quatre critères suivants sont réunis: l'existence d'un fait nouveau ; ce fait nouveau ne doit pas avoir été connu de la partie intéressée au moment du procès en première instance ; la non-découverte du fait nouveau ne doit pas être dû au manque de diligence de la part de la partie intéressée qui, en plus, doit rapporter la preuve que le fait nouveau aurait pu être un élément décisif de la décision prise en première instance.
42. La Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie a insisté sur la distinction qu'il y a lieu de faire entre les faits authentiquement nouveaux qui peuvent justifier une révision d'un arrêt et des éléments de preuve supplémentaires que l'on présente pour corroborer un fait. Lors de l'examen de l'application de l'article 119 du Règlement du Tribunal pénal international pour l'ex-Yougoslavie (qui reflète l'article 120 du Règlement), la Chambre d'appel a conclu que:

    > Lorsqu'un demandeur souhaite présenter un fait nouveau qui n'a été découvert qu'après le procès, malgré toutes les diligences effectuées durant celui-ci pour le découvrir, l'article applicable est l'article 119. Dans ce cas, l'Appelant ne demande pas l'admission d'éléments de preuve supplémentaires concernant un fait examiné lors du procès, mais celle d'un fait nouveau. C'est à la Chambre de première instance qui a rendu le jugement définitif qu'il revient d'étudier une demande en révision, c'est donc à celle-ci qu'il conviendrait d'adresser la demande. Dans pareil cas, la Chambre de première instance a pour tâche de réviser le jugement et de décider si le fait nouveau, s'il avait été avéré, aurait pu constituer un élément décisif.

    En outre, la Chambre d'appel a déclaré:

    > --- qu'il existe une distinction entre un fait et la preuve de ce fait. La simple découverte *a posteriori* de la preuve d'un fait connu au moment du procès ne constitue pas en soi un fait nouveau au sens de l'article 119 du Règlement.

43. La Chambre d'appel voudrait également faire observer ici que bien que le fond de la question soit différente, dans l'affaire *Le Procureur c. Drazen Erdemovi}*, la Chambre d'appel a cru devoir rappeler aux deux parties que « la procédure d'appel du Tribunal international n'a pas pour vocation de permettre aux

parties de remédier à leurs propres erreurs ou négligences durant le procès ou le prononcé de la sentence ». La Chambre d'appel confirme qu'elle note et adopte ces observations et le test établi dans l'affaire *Le Procureur c. Dusko Tadi}* en vue de l'examen de l'affaire dont elle est actuellement saisie .

44. La Chambre d'appel prend acte des arguments présentés par les deux parties en ce qui concerne les critères ainsi que les différences qui émergent. Elle note en particulier que le Procureur classe les nouveaux faits qu'il soumet en deux catégories (voir paragraphe 15 plus haut), tandis que l'Appelant, à son tour, demande à la Chambre d'appel de rejeter cet argument par lequel le Procureur tente de qualifier de « faits nouveaux » des « faits anciens » (voir paragraphe 31 plus haut). Lors de l'examen des « faits nouveaux » présentés par le Procureur, la Chambre d'appel applique le test défini ci-dessus et confirme qu'elle considère, ainsi que l'a fait valoir le Procureur, que l'on ne peut déclarer qu'un « fait nouveau » ne satisfait pas aux critères tout simplement parce qu'il est survenu avant le procès. La considération primordiale est que le fait nouveau en question satisfasse aux critères applicables établis par la Chambre d'appel. Si un fait nouveau satisfait à ces critères et aurait pu avoir un effet décisif sur la décision, alors la Chambre d'appel peut réviser l'arrêt.

<u>2. La compétence</u>

45. L'Appelant soutient que la Demande en révision du Procureur est irrecevable, car en vertu de l'article 25 du Statut seul le Procureur ou un condamné peut saisir le Tribunal d'une demande en révision de la sentence. La référence à un condamné, selon l'Appelant, signifie que cet article ne s'applique qu'après qu'une condamnation ait été prononcée. D'après le conseil de l'Appelant :

    > L'article 120 du Règlement n'est pas écrit pour mettre en révision avant la condamnation, mais bien, après qu'il y ait un procès en bonne et due forme.

    Puisqu'il n'y pas eu de procès dans cette affaire, il n'y a pas lieu de demander une révision.

46. Le Procureur répond que la référence au « condamné ou le Procureur », dans l'article en question sert uniquement a démontrer que l'une ou l'autre des deux parties peut demander une révision, et non pas qu'il faille qu'il y ait une condamnation avant que cet article ne puisse s'appliquer. Si la révision d'une décision n'était possible qu'après une condamnation, aucune injustice découlant d'un acquittement injustifié ne pourrait être corrigée. A l'appui de son interprétation, le Procureur compare l'article 25 avec l'article 24, qui se réfère également aux personnes condamnées et au Procureur comme ayant une légitimité pour introduire des recours en appel. Il souligne qu'il est incontesté que le Procureur pourra faire appel contre une décision d'acquittement, ce qui ne serait pas le cas si l'interprétation soutenue par l'Appelant était retenue.
47. L'article 24 (qui a trait à la procédure d'appel) et l'article 25 du Statut parlent expressément d'un condamné. Toutefois, l'article 72D du Règlement ainsi que des décisions concordantes des deux Tribunaux prouvent que l'exercice du droit d'appel est également possible entre autres dans le cas de rejet d'exceptions préjudicielles pour défaut de compétence présentées devant une Chambre de première instance.De tels appels portent sur des questions préjudicielles et, par définition, ne donnent pas lieu à un recours qui n'est envisageable qu'après une condamnation. En conséquence, la Chambre d'appel estime que l'intention qui l'animait n'était pas de procéder à une interprétation restrictive du Règlement dans les sens suggéré par l'Appelant, à savoir que l'exercice du droit à une demande en révision ne peut être enclenché que dans le cas où une peine de condamnation a été prononcée contre l'accusé. La Chambre d'appel n'acceptera pas cette interprétation restrictive du Règlement donnée par l'Appelant. En effet, si, comme le soutient l'Appelant, il ne peut y avoir de révision que si une condamnation a été prononcée, il s'ensuivrait également alors qu'il ne peut y avoir d'appel d'une décision d'acquittement pour la même raison. Or, les recours contre les décisions d'acquittement ont été autorisés par la Chambre d'appel du TPIY. La logique de l'Appelant, on le voit, n'est pas fondée. De plus, dans cette affaire, l'Appelant a bien utilise lui-même le mécanisme des appels interlocutoires, qui n'aurait pas prospéré si les arguments qu'il invoque à présent étaient acceptés par la Chambre.
48. La Chambre d'appel s'accorde donc avec la logique du Procureur. L'inclusion de la référence au "Procureur" et au "condamné" dans le texte de l'article indique que chacune des parties peut demander la

révision d'un jugement, et non pas que la disposition ne peut trouver application qu'après qu'une condamnation ait été prononcée.

49. La Chambre considère important de souligner que seul un jugement définitif peut être révisé en vertu des articles 25 du Statut et 120 du Règlement. Les parties ont présenté des arguments sur le caractère définitif ou non de l'Arrêt dans le contexte de la demande de réexamen. La Chambre souligne qu'un jugement définitif, au sens des articles susmentionnés, consiste en une décision qui met fin à la procédure : ce n'est qu'une telle décision qui est susceptible de révision. Il est évident que l'Arrêt du 3 novembre relève de cette catégorie, puisqu'il a rejeté l'acte d'accusation contre l'appelant avec arrêt définitif des poursuites.
50. La Chambre d'appel est donc compétente pour réviser son Arrêt en vertu des articles 25 du Statut et 120 du Règlement.

3. Le Fond

51. S'agissant de la présente Demande en révision, la Chambre d'appel commence par confirmer son Arrêt du 3 novembre 1999 sur la base des faits sur lesquels il était fondé. En tant que jugement de la Chambre d'appel, l'Arrêt ne peut être modifié que s'il est découvert un fait nouveau qui n'était pas connu au moment du procès en première instance ou en appel et qui aurait pu être un élément décisif de la décision. Aux termes de l'article 25 du Statut, dans un tel cas, les parties peuvent saisir le Tribunal d'une demande en révision de la sentence, comme c'est le cas actuellement devant la Chambre.
52. La Chambre d'appel confirme que lors de l'examen des faits que le Procureur lui a présentés comme des « faits nouveaux », elle applique les critères définis dans les dispositions pertinentes du Statut et du Règlement, tels que rappelés plus haut. La Chambre considère d'abord si le Procureur a présenté des faits nouveaux qui n'étaient pas connus lors de la procédure devant la Chambre, et qui auraient pu constituer des éléments décisifs de la décision, selon l'Article 25 du Statut. Elle considère ensuite la condition introduite par l'article 120 du Règlement que le fait nouveau ne soit pas connu de la partie intéressée ou dont la découverte n'avait pu intervenir malgré toutes les diligences effectuées. Si la Chambre est satisfaite, elle révise alors sa décision a la lumière de ces faits nouveaux.
53. En considération de ces questions, la détention de l'Appelant peut-être divisée en trois périodes. La première, à savoir la période ou l'Appelant était soumis à la procédure d'extradition, commence avec son arrestation par les autorités camerounaises le 15 avril 1996, et se termine le 21 février 1997 avec la décision de la Cour d'Appel du Centre de Cameroun rejetant la demande d'extradition du gouvernement rwandais. La deuxième, la période de décision sur le transfert, va du 21 février 1997, avec la requête en vertu de l'article 40 aux fins de la détention provisoire de l'Appelant, jusqu'à son transfert au Quartier pénitentiaire du Tribunal le 19 novembre 1997. La troisième période commence avec l'arrivé de l'Appelant au Quartier pénitentiaire le 19 novembre 1997, et se termine avec sa comparution initiale le 23 février 1998.

(a) Première période (15.4.1996 – 21.2.1997)

54. La Chambre d'appel considère que plusieurs éléments soumis par le Procureur à l'appui de sa demande en révision sont des éléments de preuves plutôt que des faits. Les éléments présentés relatifs à la première période sont constitués par les comptes-rendus des audiences devant les juridictions camerounaises : le 28 mars 1996 ; le 29 mars 1996 ; le 17 avril 1996 et le 3 mai 1996. Il se déduit raisonnablement de la lecture du compte-rendu du 3 mai 1996 que la requête du Tribunal a été discutée lors de cette audience. L'Appelant s'est adressé à la cour en s'opposant à la demande en extradition présentée par le Rwanda et a déclaré que « c'est le tribunal international qui est compétent ». La Chambre d'appel considère que cet élément montre que l'Appelant était informé de la nature des crimes pour lesquels il était recherché par le Procureur. Ceci est un fait nouveau pour la Chambre d'Appel. L'Arrêt en effet se fonde sur le fait que :

> l'Appelant a été détenu pendant une durée totale de 11 mois avant d'être informé de la nature générale des chefs d'accusation que le Procureur avait retenus contre lui.

Les informations actuellement devant la Chambre démontrent que, au contraire, l'Appelant connaissait la nature générale des accusations portées contre lui le 3 mai 1996 au plus tard. Il a donc passé un maximum de 18 jours en détention sans être informé des raisons pour ceci.

55. La Chambre d'appel considère qu'un tel délai viole le droit de l'Appelant d'être informé sans délai des accusations portées contre lui. Cependant, cette violation est d'un ordre différent de celle identifiée dans l'Arrêt ou l'Appelant aurait passé 11 mois sans aucune information.

(b) Deuxième période (21.2.1997 – 19.11.1997)

56. En ce qui concerne la deuxième période, celle relative à la décision sur le transfert, plusieurs éléments sont soumis à l'examen de la Chambre en tant que faits nouveaux. Ils consistent en les annexes 1 à 7, 10 et 12 à la Demande en révision. La Chambre considère que les suivants sont pertinents :
    1. Le rapport du juge Mballe de la Cour suprême de Cameroun. Dans son rapport, M. le juge Mballe explique que la requête du Procureur en vertu de l'article 40 *bis* était transmise immédiatement au Président de la République pour qu'il signe un décret-loi autorisant le transfert de l'accusé. Pour lui, si le décret-loi n'a pu être signé que le 21 octobre 1997 cela est dû à la pression exercée par les autorités rwandaises sur le Cameroun en vue de l'extradition des détenus a Kigali. Il ajoute que cette procédure d'extradition, mi- politique mi- juridique, n'était de toute façon pas celle qui aurait dû être suivie.
    2. Une déclaration de David Scheffer, « *ambassador-at-large for war crimes issues* » des Etats Unis. M. Scheffer décrit son intervention dans l'affaire de l'Appelant entre septembre et novembre 1997. Dans sa déclaration, M. Scheffer explique que la signature du décret-loi présidentiel était retardée par les élections prévues pour octobre 1997. M. Bernard Muna du bureau du Procureur aurait demandé à M. Scheffer d'intervenir pour accélérer le transfert. D'après M. Scheffer, suite à cette demande, l'ambassade des Etats-Unis a fait plusieurs démarches auprès du Gouvernement du Cameroun à ce sujet entre septembre et novembre 1997. M. Scheffer aurait également écrit au Gouvernement le 13 septembre 1997. La bonne disposition des autorités camerounaises d'effectuer le transfert aurait été signalée à l'ambassade des Etats Unis vers le 24 octobre 1997.
57. La Chambre d'appel estime qu'il y a un fait nouveau pertinent qui ressort de ces éléments. Dans son Arrêt, la Chambre a constaté sur les preuves alors produites devant elle que « le Cameroun était disposé à transférer l'Appelant », rien ne démontrant le contraire. Or, les éléments suscités, par contre, démontrent que le Cameroun n'était pas prêt a son transfert avant le 24 octobre 1997. Ce fait est nouveau. La requête en vertu de l'article 40 *bis* a été soumise à un processus d'extradition à tort, alors qu'aux termes de l'article 28 du Statut obligation est faite à tous les Etats de coopérer avec le Tribunal. Le Président du Cameroun avait les élections en perspective, ce qui ne pouvait l'encourager à donner suite à une telle requête. Et c'est l'intervention des Etats-Unis, en l'occurrence M. Scheffer, qui a conduit finalement au transfert.
58. Le fait nouveau que le Cameroun n'était pas prêt à transférer l'Appelant avant la date à laquelle il a été effectivement remis au Quartier pénitentiaire du Tribunal aurait eu un impact important sur l'Arrêt s'il avait été connu à l'époque. En effet, dans son Arrêt, la Chambre d'appel tirait ses conclusions sur la négligence du Procureur en partie du fait que rien n'empêchait le transfert de l'Appelant sauf l'inaction du Procureur :

    > Il ressort également du dossier que le Procureur n'a entrepris de faire transférer l'Appelant au Quartier pénitentiaire du Tribunal qu'après que ce dernier a formé sa demande d'habeas corpus, **De même, le Procureur n'a pas prouvé que des efforts dans ce sens auraient été vains. Rien dans le dossier n'indique que le Cameroun n'était pas disposé à transférer l'Appelant**. Au contraire, il semblerait que l'Appelant ait simplement été oublié.

    La Chambre d'appel avait considéré que les droits de l'Appelant avaient été violés par le Procureur durant sa détention au Cameroun. Toutefois, les faits nouveaux montrent que durant cette deuxième période les violations n'étaient pas imputables au Procureur.

(c) Troisième période (19.11.1997 – 23.2.1998)

59. Dans sa Demande en révision, le Procureur a présenté peu d'éléments touchant la troisième période, à savoir la détention à Arusha. Cependant, le 16 février 2000 il a déposé des éléments supplémentaires à ce sujet, accompagnés d'une requête aux fins de report des délais à lui impartis pour déposer des faits nouveaux. Ayant examiné la requête du Procureur, ainsi que le mémorandum du Greffier y relatif, et la

réponse écrite de l'Appelant, déposée le 28 février 2000, la Chambre d'appel décide d'accueillir ces éléments supplémentaires.

60. Les éléments présentés par le Procureur consistent en une lettre du Greffier au Procureur en date du 11 février 2000, avec annexes. Un fait pertinent en ressort. La lettre et ses annexes indiquent que Me. Nyaberi, conseil de la défense, est entré en pourparlers avec le greffe pour fixer la date de la comparution initiale. Plusieurs dates provisoires ont été discutées. Des problèmes de disponibilité des juges et du conseil de la défense sont intervenus. L'annexe C à la lettre du Greffier indique que Me. Nyaberi a consenti à ce que la comparution initiale ait lieu le 3 février 1997. Ceci n'a pas été contesté par la défense lors de l'audience.
61. L'acquiescement du conseil de la défense à la remise de la comparution initiale au 3 février 1997 est un fait nouveau pour la Chambre d'appel. Lors de la procédure devant la Chambre, seule les vacances judiciaires ont été offertes en explication de la période de 96 jours intervenue entre le transfert de l'Appelant et sa comparution initiale, ce qui a été rejeté par la Chambre. Il n'y avait aucune suggestion que l'Appelant avait consenti à ce calendrier, dans une mesure quelconque. Comme rappelé par la Chambre d'appel :

    Rien ne prouve que l'occasion a été donnée à l'Appelant de comparaître devant un juge indépendant lors de sa détention provisoire et ce dernier soutient de surcroît que cette possibilité lui a été refusée.

62. La décision de la Chambre d'appel sur la période de détention à Arusha est basée sur un délai de 96 jours entre le transfert de l'Appelant et sa comparution initiale. Le fait nouveau à cet égard, l'acquiescement du conseil de la défense qu'une audience se tienne le 3 février 1997, ramène ce délai à vingt jours : du 3 au 23 février. La Chambre considère que ce délai demeure substantiel, et que les droits de l'Appelant ont également été violés. Cependant, la Chambre d'appel conclut que la période durant laquelle ces violations ont eu lieu est moins étendue qu'il ne le paraissait au moment où l'Arrêt a été rendu.

(d) Est-ce que les faits nouveaux étaient connus du Procureur ?

63. L'article 120 du Règlement introduit une condition qui n'est pas précisée dans l'article 25 du Statut qui traite des demandes en révision. Selon l'article 120, une partie ne peut soumettre une demande en révision à la Chambre que si le fait nouveau « n'était pas connu **de la partie intéressée** lors de la procédure devant une Chambre **ou dont la découverte n'avait pu intervenir malgré toutes les diligences effectuées** » (*accentuation ajoutée*).
64. Les faits nouveaux identifiés dans les deux premières périodes n'étaient pas connus de la Chambre lors de l'Arrêt, mais il se peut qu'ils étaient connus du Procureur ou au moins que leur découverte aurait pu intervenir. En ce qui concerne la deuxième période, le Procureur n'ignorait pas que le Cameroun n'était pas prêt à transférer l'Appelant, d'autant plus que c'est son adjoint, M. Muna, qui a sollicité l'intervention de M. Scheffer pour faciliter le processus. Mais il n'était évidemment pas connu de la Chambre au moment du procès en appel. Au contraire, les éléments devant la Chambre l'ont conduite à la constatation inverse, ce qui a joué un rôle important sur sa conclusion que « le Procureur a failli à l'obligation de due diligence à lui faite dans l'exercice des poursuites en l'espèce. »
65. Dans les circonstances tout à fait exceptionnelles de cette affaire, et face à une possible erreur judiciaire, la Chambre interprète la condition posée par l'article 120 du Règlement, que le fait ne soit pas connu *de la partie intéressée* lors de la procédure devant la Chambre ou dont la découverte n'avait pu intervenir malgré toutes les diligences effectuées, comme ayant un caractère non-peremptoire. En adoptant cette position, la Chambre tient compte du fait que le Statut lui-même ne s'est pas prononcé sur ce point.
66. Cette manière d'aborder la question n'est pas sans précédent. En effet, d'autres tribunaux de révision, saisis de faits qui à l'évidence auraient bouleversé une décision antérieure, ont estimé que l'intérêt de la justice leur dictait de prendre lesdits faits en considération, même lorsque les conditions habituellement requises de la diligence due et de la non-disponibilité antérieure de ces faits ne sont pas strictement réunies. Quand bien même il n'est pas dans l'intérêt de la justice d'encourager les parties à procéder de manière moins diligente, « les tribunaux ne peuvent pas fermer les yeux sur l'injustice sous prétexte qu'il est facile d'abuser de la justice. »

67. La Chambre d'appel d'Angleterre et du Pays de Galle, dans l'affaire *Hunt and Another c. Atkin,* avait eu à examiner une situation qui n'est pas trop différente de celle dont la Chambre d'appel est actuellement saisie. Dans cette affaire, une ordonnance sanctionnatrice avait été rendue contre un cabinet d'avocats pour avoir suivi une certaine ligne de conduite. Il est apparu que les avocats en question étaient en possession d'informations qui justifiaient leur conduite dans une certaine mesure, mais qu'ils avaient négligé de produire plus tôt quand ils en avaient eu l'occasion, en dépit des enquêtes de la cour. Comme dans la présente espèce, la partie demanderesse (les avocats) a affirmé que les enquêtes du tribunal étaient peu claires et qu'elle ne savait pas au juste la nature des éléments de preuve à présenter. Le juge a abordé la question de la manière suivante :

> J'espère que l'on ne m'en voudra pas d'adopter un point de vue très simpliste face à cette situation.Je crois que la question que je dois me poser est la suivante : si, à la dernière occasion, ces avocats avaient produit une déclaration sous serment en bonne et due forme et contenant toutes les informations que l'on me fait tenir à présent, aurais-je édicté, comme je l'ai fait, une ordonnance par rapport aux coûts ? Je sais que c'est là une approche très simpliste, mais je pense que c'est sans doute nécessaire dans la présente situation.

Il a conclu qu'il n'aurait pas édicté la même ordonnance ; ainsi, il a admis la présentation de nouveaux éléments de preuve et ordonné l'ouverture d'un nouveau procès. La Chambre d'appel a confirmé sa décision.

68. Dans l'un des grands arrêts de la jurisprudence canadienne, en l'occurrence l'affaire *McMartin c. La Reine*, la Cour suprême a conclu ce qui suit :

> En tout état de cause, si les éléments de preuve fournis sont jugés suffisamment probants qu'ils pourraient raisonnablement influencer le verdict du jury, je ne pense pas qu'ils devraient être écartés au motif que la diligence raisonnable n'a pas été effectuée pour les obtenir au moment du procès ou avant le procès.

69. La Chambre d'appel ne cite pas ces exemples pour justifier ses actions au sens strict. Le Tribunal international est une institution unique en son genre, régie par son propre Statut et par les dispositions du droit pénal coutumier, dans les cas où celles-ci peuvent être discernées. Toutefois, la Chambre note que les problèmes que posent la Demande en révision ont été examinés par d'autres instances et que l'approche adoptée par la Chambre d'appel ici n'est pas étrangère à ces systèmes distincts et indépendants. Vouloir rejeter les faits présentés par le Procureur, compte tenu de leur influence sur l'Arrêt reviendrait tout simplement à détourner le regard de la réalité.
70. En ce qui concerne le troisième période, la Chambre d'appel remarque que, bien qu'un groupe des éléments présentés par le Procureur le 16 février 2000 lui était disponible avant cette date, selon le mémorandum du Greffier, l'annexe C en question ne fait pas partie de cette catégorie. Il faut en déduire que le fait de l'acquiescement du conseil de la défense n'était pas connu du Procureur lors de la procédure devant la Chambre d'appel.

4. Conclusion

71. La Chambre note que la réparation ordonnée pour les violations subies par l'Appelant se basait sur un cumul d'éléments :

> … ses droits fondamentaux ont été maintes fois violés. Chose sans doute pire, il apparaît que les manquements du Procureur en cette espèce relèvent de la négligence. Nous estimons qu'une telle conduite est déraisonnable et, vu les nombreuses violations constatées, nous concluons que la seule sanction possible de l'inaction du Procureur et du déni de droits qui en a résulté pour l'Appelant est de remettre ce dernier en liberté et de … rejeter les accusations portées contre lui.

Les faits nouveaux diminuent le rôle joué par les manquements du Procureur, ainsi que l'intensité de la violation des droits de l'Appelant. Le cumul des éléments étant ainsi réduit, la réparation ordonnée par la Chambre d'appel apparaît maintenant disproportionnée par rapport aux événements. Les faits nouveaux étant donc des faits qui auraient pu être des éléments décisifs de l'Arrêt, en particulier pour ce qui tient à la réparation qu'il ordonne, cette réparation doit être révisée.

72. Le Procureur a fait valoir qu'il a subi un « préjudice matériel » du fait du non-respect par la Chambre d'appel des dispositions pertinentes du Règlement et qu'en conséquence, il a droit à réparation conformément aux dispositions prévues à l'article 5 du Règlement. Etant donné que la Chambre d'appel estime que cette question est sans rapport avec la Demande en révision et qu'en tout état de cause, elle a décidé de réexaminer son Arrêt, elle ne s'attardera pas outre mesure sur la question.

B. REEXAMEN

73. L'argument fondamental sur lequel le Procureur s'est fondé pour demander le réexamen de la décision antérieure, par opposition à la révision, était le fait qu'il n'ait pas eu droit à une audience en bonne et due forme sur les questions qui avaient été tranchées dans le cadre de ladite décision. La Chambre d'appel n'ayant trouvé aucun fondement à cette argumentation, rejette en conséquence la demande en réexamen.

VI. CONCLUSION

74. La Chambre d'appel révise son Arrêt à la lumière des faits nouveaux présentés par le Procureur. Elle confirme que les droits de l'Appelant ont étés violés, et que leur violation demande réparation. Cependant, les violations souffertes par l'Appelant et les manquements du Procureur ne sont pas les mêmes que ceux qui ressortaient des faits sur lesquels l'Arrêt était fondé. En conséquence, la réparation ordonnée par la Chambre dans l'Arrêt, consistant en la fin des poursuites et la mise en liberté de l'Appelant, doit être modifiée.

VII.DISPOSITIF

75. Par ces motifs, LA CHAMBRE D'APPEL révise son Arrêt du 3 novembre 1999 et remplace son dispositif par le suivant :
    1. FAIT DROIT à l'Appel pour ce qui est de la violation des droits de l'Appelant dans la mesure ci-dessus précisée;
    2. REJETTE la demande de mis en liberté de l'Appelant;
    3. DECIDE que pour la violation de ses droits l'Appelant a un droit à réparation qui sera fixé au moment du jugement en première instance, de la manière suivante :
        a. Si l'Appelant est jugé non-coupable, une réparation financière lui sera due ;
        b. Si l'Appelant est jugé coupable, sa sentence sera réduite pour tenir compte de la violation de ses droits.

Le juge Vohrah et le juge Nieto-Navia joignent des déclarations au présent Arrêt.

Le juge Shahabuddeen joint une opinion individuelle au présent Arrêt.

Fait en anglais et en français, le texte en français faisant foi.

Claude Jorda, Lal Chand Vohrah Mohamed Shahabuddeen

President de la Chambre

Rafael Nieto-Navia Fausto Pocar

Fait à La Haye (Pays Bas), le trente et un mars 2000

[Sceau du Tribunal]

DECLARATION OF JUDGE RAFAEL NIETO-NAVIA

1. It is necessary to consider the role of the Tribunal in the context of its mandate in Rwanda as dispenser of justice and the effect, if any, of politics on its work in prosecuting those responsible for genocide and other serious violations of international humanitarian law.
2. This issue was raised specifically during the oral hearing on this matter, in Arusha, on 22 February 2000 by the Chief Prosecutor. It is expedient to set out the relevant section:

> "Let me just say a few words with respect to the government of Rwanda. The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999. It was a politically motivated decision, which is understandable. It can only be understood if one is cognisant with the situation, if one is aware of what happened in Rwanda in 1994. I also notice that, well, it was the Prosecutor that had no visa to travel to Rwanda. It was the Prosecutor who was unable to go to her office in Kigali. It was the Prosecutor who could not be received by the Rwandan authorities. In November, after your decision, there was no co-operation, no collaboration with the office of the Prosecutor. In other words, justice, as dispensed by this Tribunal was paralysed. It was the trial of Baglishima which had to be adjourned because the Rwandan government did not allow 16 witnesses to appear before this Court. In other words, they were not allowed to leave the territory of Rwanda. Fortunately, things have improved currently, and we again enjoy the support of the government. Why? Because we were able to show our good will, our willingness to continue with our work based on the mandate entrusted to us. However, your Honours, due account has to be taken of that fact. Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend on the government of Rwanda. That is the reality that we face. What is the reality? Either Barayagwiza can be tried by this Tribunal, in the alternative; or the only other solution that you have is for Barayagwiza to be handed over to the state of Rwanda to his natural judge, judex naturalis. Otherwise I am afraid, as we say in Italian, possiamo chiudere la baracca. In other words we can as well put the key to that door, close the door and then open that of the prison. And in that case the Rwandan government will not be involved in any manner"

3. The Prosecutor maintained that after the Decision in the instant case was rendered by the Appeals Chamber on 3 November 1999 (hereinafter "the Decision"), justice before the International Criminal Tribunal for Rwanda was effectively suspended as a result of action taken by the Rwandan government, who reacted essentially to what they viewed as an adverse decision of the Appeals Chamber.
4. It would be naïve to assert that the Tribunal does not depend on the co-operation of States for it to fulfil its duties. Indeed the Appeals Chamber itself has held that

> "The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal."

Without State co-operation, the work of the Tribunal would be rendered impossible.

5. In order to cater for this, and aware of the need to ensure effective and ongoing co-operation, Article 28 of the Statute compels States to co-operate with the Tribunal "in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". This is a general obligation

incumbent on all States but the Rwandan government is specially obliged, because the Tribunal was established "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda". In addition, being the territory in which most of the crimes alleged took place, the co-operation of the Rwandan government with the Tribunal in fulfilment of their obligations as prescribed by Article 28, is paramount.

6. This obligation of the Rwandan government is absolute. It is an obligation which cannot be overridden in particular circumstances by considerations of convenience or politics.
7. In my view, the Appeals Chamber, although mindful of this essential need for co-operation by the Rwandan government, is also mindful of the role the Tribunal plays in this process and therefore I refute most strenuously the suggestion that in reaching decisions, political considerations should play a persuasive or governing role, in order to assuage States and ensure co-operation to achieve the long-term goals of the Tribunal. On the contrary, in no circumstances would such considerations cause the Tribunal to compromise its judicial independence and integrity. This is a Tribunal whose decisions must be taken, solely with the intention of both implementing the law and guaranteeing justice to the case before it, not as a result of political pressure and threats to withhold co-operation being exerted by an angry government.
8. Faced with non co-operation by a State and having exhausted the facilities available to it to ensure co-operation, a clear mechanism has been provided in the Statute and Rules whereby the Tribunal may make a finding concerning the particular State’s failure to observe the provisions of the Statute or the Rules and thereafter may report this finding to the Security Council. It then falls to the Security Council to determine appropriate action to take against the State in question. The involvement of the Tribunal will cease at the point of referral to the Security Council and indeed its position is safeguarded further by the stipulation, as has been held, that "the finding by the International Tribunal must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding.". This mechanism ensures that clear separation in roles is maintained and more importantly that the independence of the Tribunal cannot be called into question. Its mandate is the prosecution of those responsible for serious violations of international humanitarian law and it must do so in an impartial and unbiased fashion. It must not qualify this independence under any circumstances.
9. The concept of "the separation of powers" plays a central role in national jurisdictions. This concept ensures that a clear division is maintained between the functions of the legislature, judiciary and executive and provides that "one branch is not permitted to encroach on the domain or exercise the powers of another branch." It ensures that the judiciary maintains a role apart from political considerations and safeguards its independence.
10. As a result, the judiciary holds a privileged position in national jurisdictions and is subjected to unceasing public scrutiny of its activities. This however is accepted as being a necessary component of its existence so that public confidence in the system can be maintained.
11. In consideration of this issue, I note the importance accorded to the principle by the United Nations, in appointing a Special Rapporteur on the Independence of Judges and Lawyers and by the General Assembly, in the promulgation of the 1985 UN Basic Principles on the Independence of the Judiciary. The Principles as a whole are of the utmost importance, but it serves now to highlight the following provisions:

> "1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary;
>
> 2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

The principle of the independence of the judiciary is overriding and should at all times take precedence faced with any conflict, political pressures or interference. The proposition put forward by the Prosecutor that political considerations can play a role in the Appeals Chamber’s decision making and actions is not acceptable.

12. Indeed it is important to note the remark made by Robert H. Jackson, Chief of Counsel for the United States at the International Military Tribunal, sitting at Nuremberg, in his opening speech before the Tribunal on 21 November 1945:

    "The United States believed that the law has long afforded standards by which a juridical hearing could be conducted to make sure that we punish only the right men and for the right reasons"

13. Political reasons are not the right reasons. The Tribunal is endowed with a Statute, which ensures that trials take place by means of a transparent process, wherein widely accepted international standards of criminal law are applied. Central to this process is the maintenance of human rights standards of the highest level, to ensure that the basic Rule of Law is upheld.
14. The basic human right of an accused to be tried before an independent and impartial tribunal is recognised also in the major human rights treaties and is one to which the Tribunal accords the utmost importance. Indeed the Appeals Chamber in a case before the ICTY, held in consideration of its function that:

    "For a Tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments"

15. It must not be forgotten that the Rwandan government itself has recognised the importance of impartial justice. In requesting the establishment of a Tribunal by the international community, the Rwandan government stated that it supported an international tribunal because of its desire to avoid "any suspicion of its wanting to organise speedy vengeful justice". Accordingly, this Tribunal's fundamental aim is to vindicate the highest standards of international criminal justice, in providing an impartial and equitable system of justice.
16. But now the government of Rwanda has suggested that the Tribunal should convict all the indictees who come before it. It is wrong. The accused can be acquitted if the Trial Chamber is not satisfied that guilt has been proven beyond a reasonable doubt. Alternatively, the accused can be released on procedural grounds, as was the case in the Decision. In the application of impartial justice the role of the Tribunal is not simply to convict all those who appear before it, but to consider a case upholding the fundamental principles of human rights.
17. By virtue of Resolution 955 of 1994, the Security Council stated:

    "Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace",

    This was subsequently reiterated by Resolution 1165 of 1998, when the Security Council stated that it "remain[ed] convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law will contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda and in the region". This aim can only be achieved by an independent Tribunal, mindful of the task entrusted to it by the international community.

18. Both Tribunals, ICTY and ICTR, find themselves in the midst of very emotive atmospheres and are charged with the duty to maintain their independence and transparency, as expected by the international community, preserving the norms of international human rights. The international community needs to be sure that justice is being served but that it is being served through the application of their Rules and Statutes, which are applied in a consistent and unbiased manner. I recall the words of the Zimbabwean Court in the Mlambo case, as cited in the Decision:

    "The charges against the applicant are far from trivial and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are charged with the commission

> of serious crimes. Yet that trial can only be undertaken if the guarantee under…. the Constitution has not been infringed."

Difficult as this may be for some to understand, these are the principles which govern proceedings before this Tribunal at all times, even if application of these principles on occasion renders results which for some, are hard to swallow.

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19. I wish to draw attention to the matter of r*es judicata,* which was referred to by both the Appellant and the Prosecutor in their written briefs. I wish to briefly discuss the applicability of this principle to the case in hand, noting that the Appeals Chamber has now reviewed its Decision.
20. The principle of *res judicata* is well settled in international law as being one of those "general principles of law recognized by civilised nations", referred to in Article 38 of the Statutes of the Permanent Court of International Justice ("PCIJ") and the International Court of Justice ("ICJ"). As such, it is a principle which should be applied by the Tribunal. The principle can be enunciated as meaning that, once a case has been decided by a final and valid judgement rendered by a competent tribunal, the same issue may not be disputed again between the same parties before a court of law.
21. The rationale behind the principle is that security is required in juridical relations. The determinative and obligatory character of a judgement prevents the parties from contemplating the possibility of not complying with the decision or alternatively from seeking the same or another court to decide in a different manner. At the same time it is understood that only final judgements are considered *res judicata*, as judgements of lower courts can generally take advantage of appellate proceedings.
22. The impact of the Appeals Chamber Decision is twofold. On the one hand the Appeals Chamber decided to allow an appeal against a decision of Trial Chamber II which dismissed a preliminary objection by the accused based on lack of personal jurisdiction, on the grounds *inter alia,* that the fundamental human rights of the accused to a fair and expeditious trial were violated as a result of his arrest and long detention in Cameroon before being transferred to the U.N. Detention Facilities in Arusha. On the other hand, the Decision "DISMISSE[D] THE INDICTMENT with prejudice to the Prosecutor." This rendered the Decision final and definitive, as stated by the Appeals Chamber in its decision today.
23. The International Court of Justice has held:

> "It is contended that the question of the Applicants' legal right or interest was settled by the [1962] Judgement and cannot now be reopened. As regards the issue of preclusion, the Court finds it unnecessary to pronounce on various issues which have been raised in this connection, such as whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term, --whether it ranks as a "decision" for the purposes of Article 59 of the Court's Statute, or as "final" within the meaning of Article 60. The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to its merits, whether or not it has in fact been dealt with in connection with the preliminary objection".

24. In domestic jurisdictions a preliminary objection on lack of competence, raised by a party before a court does not prevent the matter being brought before the competent court. However, some decisions on preliminary points which are primarily within the competence of the court acquire the force of *res judicata* on the question decided and the court is bound by its own decisions.
25. In this Tribunal, Article 25 of the Statute opens up the possibility for review of "final" decisions, if certain criteria are satisfied. The Appeals Chamber has clearly explained this in its decision today. It is clear to me that if the Statute provides for a "final" decision to be reviewed, when a Chamber acts pursuant to this provision, the principle of *res judicata* does not apply.
26. Some common law systems consider that dismissal of an indictment with prejudice bars the right to bring an action again on the same issue and is, therefore, *res judicata*. The instant case has not been litigated on the merits. What seems to be "final" is the issue of the prejudice to the Prosecutor, because the Prosecutor was barred from bringing the case before the Tribunal again. As I understood it, the Decision considered the finding of "prejudice to the Prosecutor" as a form of punishment due to the violations of fundamental human rights committed by the Prosecutor against the Appellant.

27. If the new facts brought before the Appeals Chamber under Article 25 mean that the Prosecutor is responsible for less extensive violations (as accepted by the Appeals Chamber today), she cannot be punished because of them, the dismissal cannot be with prejudice to her and hence the Decision must be amended. That is what we are deciding today.
28. Human rights treaties provide that when a stateviolates fundamental human rights, it is obliged to ensure that appropriate domestic remedies are in place to put an end to such violations and in certain circumstances to provide for fair compensation to the injured party.
29. Although the Tribunal is not a State, it is following such a precedent to compensate the Appellant for the violation of his human rights. As it is impossible to turn back the clock, I think that the remedy decided by the Appeals Chamber fulfills the international requirements.

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30. Finally, I wish to emphasise that the Appeals Chamber made its Decision, based on certain facts which were presented before it at that time. The new facts which are before the Appeals Chamber now, change its position. If these facts which the Appeals Chamber has concluded to be new facts and which are discussed in today's decision, had been before the Appeals Chamber when considering the Decision, it is my opinion that the Appeals Chamber would have reached a different decision at that time.

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

s/.______________________

Rafael Nieto-Navia

Dated this 31st day of March 2000
At The Hague,
The Netherlands.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. This is an important case: it is not every day that a court overturns its previous decision to liberate an indicted person. This is what happens now. New facts justify and require that result. But possible implications for the working of the infant criminal justice system of the international community need to be borne in mind. Because of this, and also because I agreed with the previous decision, I believe that I should explain why I support the present decision to cancel out the principal effect of the former.

(i) The limits of the present hearing

2. Except on one point, I was not able to agree with the grounds on which the previous decision rested. However, the points on which I differed are not now open for discussion. This is because the present motion of the Prosecutor has to be dealt with by way of review and not by way of reconsideration. Under review, the motion has to be approached on the footing that the earlier findings of the Appeals Chamber stand, save to the extent to which it can be seen that those findings would themselves have been different had certain new facts been available to the Appeals Chamber when the original decision was made; under that procedure, it is not therefore possible to challenge the previous holdings of the Appeals Chamber as incorrect on the basis on which they were made. By contrast, under reconsideration, the appeal would have been reopened, with the result that that kind of challenge would have been possible, as I apprehend is desired by the prosecution. To cover all the requests made by the prosecution, it is thus necessary to say a word on its motion for reconsideration. I agree that the motion should not be granted. These are my reasons:
3. Decisions rendered within the International Criminal Tribunal for the former Yugoslavia ("ICTY") on the competence of a Chamber to reconsider a decided point vary from the exercise of a relatively free power of reconsideration to a denial of any such power based on the statement, made in *Kordic,* "that motions to

reconsider are not provided for in the Rules and do not form part of the procedures of the International Tribunal". Where the decisions suggest a relatively free power of reconsideration, they concern something in the nature of an operationally passing position taken in the course of continuing proceedings; in such situations the Chamber remains seised of the matter and competent, not acting capriciously but observing due caution, to revise its position on the way to rendering the ultimate decision. In situations of more lasting consequence, it appears to me that the absence of rules does not conclude the issue as to how a judicial body should behave where complaint is made that its previous decision was fundamentally flawed, and more particularly where that body is a court of last resort, as is the Appeals Chamber. Not surprisingly, in *^elebici* the Appeals Chamber of the ICTY introduced a qualification in stating that "in the absence of particular circumstances justifying a Trial Chamber or the Appeals Chamber to reconsider one of its decisions, motions for reconsideration do not form part of the procedure of the International Tribunal". The first branch of that statement is important, including its non-reproduction of the *Kordic* words "that motions to reconsider are not provided for in the Rules": the implication of the omission seems to be that the fact that the Rules do not so provide is not by itself determinative of the issue whether or not the power of reconsideration exists in "particular circumstances". Alternatively, the omitted words were not intended to deny the inherent jurisdiction of a judicial body to reconsider its decision in "particular circumstances".

4. Circumscribed as they evidently are, it is hard, and perhaps not in the interest of the policy of the law, to attempt exhaustively to define "particular circumstances" which might justify reconsideration. It is clear, however, that such circumstances include a case in which the decision, though apparently *res judicata*, is void, and therefore non-existent in law, for the reason that a procedural irregularity has caused a failure of natural justice. An aspect of that position was put this way by the presiding member of the Appellate Committee of the British House of Lords:

   In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co Ltd v. Broome (No.2) [* 1972] 2 All ER 849, [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.

   However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

5. I understand this to mean that, certainly in the case of a court of last resort, there is inherent jurisdiction to reopen an appeal if a party had been "subjected to an unfair procedure". I see no reason why the principle involved does not apply to criminal matters if a useful purpose can be served, particularly where, as here, the decision in question has not been acted upon.
6. I have referred to unfairness in procedure because it appears to me that this is the criterion which is attracted by the posture of the Prosecutor's case. Was there such unfairness?
7. Whether a party was or was not "subjected to an unfair procedure" is a matter of substance, not technicality. If the party did not understand that an issue would be considered (which is the Prosecutor's contention), that could found a claim that it was disadvantaged. But, provided that that was understood and that there was opportunity to respond, I do not see that the procedure was unfair merely because a Chamber considered an issue not raised by the parties. The interests involved are not merely those of the parties; certainly, they are not interests submitted by them to adjudication on a consensual jurisdictional basis; they include the interests of the international community and are intended to be considered by a court exercising compulsory jurisdiction. In *Erdemovic* the Appeals Chamber raised, considered and decided issues not presented by the parties, observing that there was "nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties".

8. Further, a Chamber need not echo arguments addressed to it; its reasoning may be its own. When the present matter is examined, all that appears is that the Appeals Chamber in some cases used arguments other than those presented to it. The basic issue was one on which the parties had an opportunity to present their positions, namely, whether the rights of the appellant had been violated by undue delay so as to lead to lack of jurisdiction. For the reasons given below, I am satisfied that there is not any substance in the contention of the prosecution that it had no notice that certain questions would be determined. It is more to the point to say that the prosecution did not avail itself of opportunities to present its position on certain matters; in particular, it did not assist either the Trial Chamber or the Appeals Chamber with relevant material at the time when that assistance should have been given.
9. In short, there was no unfairness in procedure in this case. Accordingly, the previous decision of the Appeals Chamber cannot be set aside and the appeal reopened. It is thus not possible to accede to the Prosecutor's proposition, among others, that that decision was wrong when made and should for that reason be now changed.
10. For the reasons given in today's judgment, the procedure of review is nevertheless available. As mentioned above, the possibility of revision which this opens up is however limited to consideration of the question whether the same decision would have been rendered if certain new facts had been at the disposal of the Appeals Chamber, and, if not, what is the decision which would then have been given.

(ii) The Prosecutor's complaint that she had no notice of the intention of the Appeals Chamber to deal with the question of the legality of the detention between transfer and initial appearance

11. Before moving on, I shall pause over the question, alluded to above, as to whether the prosecution availed itself of opportunities to present its position on certain points. The question may be considered illustratively in relation to the issue of detention between the appellant's transfer from Cameroon to the Tribunal's detention unit in Arusha and his initial appearance before a Trial Chamber, extending from 19 November 1997 to 23 February 1998. The prosecution takes the position, which it stresses, that it had no opportunity to address this issue because it did not know that the Appeals Chamber would be dealing with it. That, if correct, is a sufficiently weighty matter to justify reconsideration, as it would show that the prosecution was subjected to an unfair procedure in the Appeals Chamber. So it should be examined.
12. The prosecution submitted that the issue of delay between transfer and initial appearance was not argued by the appellant in the course of the oral proceedings in the Trial Chamber and was not included in his grounds of appeal. Although, as will be seen, the appellant did include a claim on the point in his motion, I had earlier made a similar observation, noting that, in the Trial Chamber, "no issue was presented as to delay between transfer and initial appearance", that the "Trial Chamber was not given any reason to believe that there was such an issue", and, in respect of the appeal proceedings, that it "does not appear that the Prosecutor thought that she was being called upon to meet an argument about delay between transfer and initial appearance". But it seems to me that, apart from the action of the appellant, account has to be taken of the action of the Appeals Chamber and that the position changed with the issuing by the latter of its scheduling order of 3 June 1999; that order, referred to below, clearly raised the matter. After the order was made, the appellant went back to the claim which he had originally raised; equally, the prosecution gave its reaction. Thus, in the event, the Appeals Chamber did not pass on the matter without affording an opportunity to the Prosecutor to address the point.
13. To fill out this brief picture, it is right to consider the factual basis of the proposition that the appellant did include a claim on the point in his motion. As I noted at page 1 of a separate opinion appended to the decision of the Appeals Chamber of 3 November 1999, in paragraphs 2 and 9 of the motion the appellant complained of "continued provisional detention". Viewing the time when that complaint was made (three months after the transfer), he was thus also complaining of the detention following on his transfer, inclusive of delay between transfer and initial appearance. In fact, as I also pointed out, annexure DM2 to his motion spoke of "**98 days** of detention after transfer and before initial appearance" (original emphasis, but actually 96 days). Further, in paragraph 11 of his brief in support of that motion he referred to Articles 7, 8, 9 and 10 of the Universal Declaration of Human Rights, relating *inter alia* to protection of the law and to freedom from arbitrary arrest and detention. More particularly, he also referred to Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), stating that this required that "the accused should be brought before the court without delay". That was obviously a reference to paragraph 3 of

Article 9 of the ICCPR which stipulates that "[a] nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". It follows that, in his motion, the appellant did make a complaint on the matter to the Trial Chamber.

14. Now, how did the prosecution react to the appellant's complaint? The complaint having been made in the motion, and the motion being heard seven months after it was brought, it seems to me that, by the time when the motion was heard, the prosecution should have been in possession of all material relevant to the issue whether there was undue delay between transfer and initial appearance; it also had an opportunity at that stage to present all of that material together with supporting arguments. The record shows that it did not do so.
15. In the Trial Chamber, the prosecution did not file a response to the appellant's motion in which the appellant complained of delay between transfer and initial appearance. Indeed, some part of the oral hearing before the Trial Chamber on 11 September 1998 was taken up with this very fact - that the prosecution had not submitted a reply, with the consequential difficulty, about which the appellant remonstrated, that he did not know exactly what issues the prosecution intended to challenge at the hearing before the Trial Chamber. In the words then used by his counsel, "... in an adversarial system we should not leave leeway for ambush". In his reply, counsel for the prosecution simply said, "We didn't do it in this case and I have no explanation for that. ... we don't have an explanation for why we haven't followed our *usual practice"*. In turn, the Presiding Judge, though not sanctioning the prosecution, noted that what was done was contrary to the established procedure. At the oral hearing before the Appeals Chamber on 22 February 2000, counsel for the prosecution took the position that there was no rule requiring the prosecution to file a response. Counsel for the prosecution before the Trial Chamber had earlier made the same point. They were both right. But that circumstance was not determinative. As the Presiding Judge of the Trial Chamber had made clear, it was the practice to file a response; and, as counsel for the prosecution later conceded at the oral hearing before the Appeals Chamber on 22 February 2000, the Presiding Judge "did draw the conclusion that [what was done] was contrary ... to the practice of the Tribunal". Indeed, at the hearing before the Trial Chamber on 11 September 1998, counsel for the prosecution accepted, as has been seen, that the failure of the prosecution to submit a written reply was contrary to the "usual practice" of the prosecution itself.
16. The failure of the prosecution to respond to the appellant's complaint of undue delay between transfer and initial appearance did not of course remove the complaint. The dismissal of the appellant's motion included dismissal of that complaint. The complaint and its dismissal formed part of the record before the Appeals Chamber. This being so, it appears to me that at this stage the question of substance is whether the Prosecutor knew that the Appeals Chamber intended to deal with the complaint, and, if so, whether the Prosecutor had an opportunity to address it. The answer to both questions is in the affirmative. This results from the Appeals Chamber's scheduling order of 3 June 1999, referred to above.
17. That order required the parties "to address the following questions and provide the Appeals Chamber with all relevant documentation: ....4). The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance". The requisition was made on the stated basis that the Appeals Chamber needed "additional information to decide the appeal". At the oral hearing in the Appeals Chamber on 22 February 2000, a question from the bench to counsel for the Prosecutor was this: "Did the prosecution understand from that, that the Appeals Chamber was proposing to consider reasons for any delay between transfer of the Appellant and his initial appearance?". Counsel for the Prosecutor correctly answered in the affirmative. He also agreed that the prosecution did not object to the competence of the Appeals Chamber to consider the matter and did not ask for more time to respond to the request by the Appeals Chamber for additional information. In fact, in paragraphs 17-20 of its response of 21 June 1999, the prosecution sought to explain the delay in so far as it then said that it could, stating that it had no influence over the scheduling of the initial appearance of accused persons, that these matters lay with the Trial Chambers and the Registrar, that assignment of defence counsel was made only on 5 December 1997, and that there was a judicial holiday from 15 December 1997 to 15 January 1998. In stating these things (how adequate they were being a different matter), the prosecution fell to be understood as having accepted that the Appeals Chamber would be dealing one way or another with the question to which those things were a response.

18. Focusing on the issues as she saw them, the Prosecutor, as I understood her, submitted that the Appeals Chamber was confined to the issues presented by the parties. As indicated above, that is not entirely correct. The cases show that the leading principle is that the overriding task of the Tribunal is to discover the truth. Since this has to be done judicially, limits obviously exist as to permissible methods of search; and those limits have to be respected, for the Appeals Chamber is not an overseer. It cannot gratuitously intervene whenever it feels that something wrong was done: beyond the proper appellate boundaries, the decisions of the Trial Chamber are unquestionable. However, as is shown by *Erdemovic*, the Appeals Chamber can raise issues whether or not presented by a party, provided, I consider, that they lie within the prescribed grounds of appeal, that they arise from the record, and that the parties are afforded an opportunity to respond. I think that this was the position in this case.
19. As has been demonstrated above, the record before the Appeals Chamber included both a claim by the appellant that there was impermissible delay between transfer and initial appearance and dismissal by the Trial Chamber of the motion which included that claim. Where an issue lying within the prescribed grounds of appeal is raised on the record, the Appeals Chamber can properly require the parties to submit additional information on the point; there is not any basis for suggesting, as the Prosecutor has done, that in this case the Appeals Chamber went outside of the appropriate limits in search of evidence.
20. In conclusion, it appears to me that the substance of the matter is that the Prosecutor had notice of the intention of the Appeals Chamber to deal with the point, had an opportunity to address the point both before the Trial Chamber and the Appeals Chamber, and did address the point in her written response to the Appeals Chamber. In particular, the Prosecutor knew that the Appeals Chamber would be passing on the point and did not object to the competence of the Appeals Chamber to do so. Her approach fell to be understood as acquiescence in such competence. I accordingly return to my previous position that it is not possible to set aside the previous decision and to reopen the appeal, and that the only way of revisiting the matter is through the more limited method of review on the basis of discovery of new facts.

(iii) The Prosecutor's argument that the Appeals Chamber did not apply the proper test for determining whether there was a breach of the appellant's rights

21. In dealing with this argument by the Prosecutor, it would be useful to distinguish between the breach of a right and the remedy for a breach. The former will be dealt with in this section; the latter in the next.
22. An opinion which I appended to the decision given on 2 July 1998 by the Appeals Chamber of the ICTY in *Prosecutor v. Kovacevic* included an observation to the effect that, because of the preparatory problems involved, the jurisprudence recognises that there is "need for judicial flexibility" in applying to the prosecution of war crimes the principle that criminal proceedings should be completed within a reasonable time. The prosecution correctly submits that, in determining whether there has been a breach of that principle, a court must weigh competing interests. As it was said in one case, the court "must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in" the territory concerned. To do this, the court "should assess such factors as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant". The reason for the delay could of course include the complexity of the case and the conduct of the prosecuting authorities as well as that of the court as a whole.
23. These criteria are correct; but I do not follow why it is thought that they were not applied by the Appeals Chamber. Their substance was considered in paragraphs 103-106 of the previous decision of the Appeals Chamber, footnote 268 whereof specifically referred to the leading cases of *Barker v. Wingo* and *R. v. Smith*, among others. Applying that jurisprudence in this case, it is difficult to see how the balance came out against the appellant. On the facts as they appeared to the Appeals Chamber, the delay was long; it was due to the Tribunal; no adequate reasons were given for it; the appellant repeatedly complained of it; and, there being nothing to rebut a reasonable presumption that it prejudiced his position, a fair inference could be drawn that it did.
24. The breach of the appellant's rights appears even more clearly when it is considered that the jurisprudence which produced principles about balancing competing interests developed largely, if not wholly, out of cases in which the accused was in fact brought before a judicial officer shortly after being charged, but in which, for one reason or another, the subsequent trial took a long time to approach completion. By

contrast, the problem here is not that the proceedings had taken too long to complete, but that they had taken too long to begin. It is not suggested that those principles are irrelevant to the resolution of the present problem; what is suggested is that, in applying them to the present problem, the difference referred to has to be taken into account. To find a solution it is necessary to establish what is the proper judicial approach to detention in the early stages of a criminal case, and especially in the pre-arraignment phase.

25. The matter turns, it appears to me, on a distinction between the right of a person to a trial within a reasonable time and the right of a person to freedom from arbitrary interference with his liberty. The right to a trial within a reasonable time can be violated even if there has never been any arrest or detention; by contrast, a complaint of arbitrary interference with liberty can only be made where a person has been arrested or detained. I am not certain that the distinction was recognised by the prosecution. In the view of its counsel, which he said was based on the decision of the Appeals Chamber and on other cases, the object of the Rule 62 requirement for the accused to be brought "without delay" before the Trial Chamber was to allow him "to know the formal charges against him" and to enable him "to mount a defence". The submission was that, in this case, both of these purposes had been served before the initial appearance, the indictment having been given to the appellant while he was still in Cameroon. But it seems to me that, as counsel later accepted, there was yet another purpose, and that that purpose could only be served if there was an initial appearance. That purpose – a fundamentally important one – was to secure to the detained person a right to be placed "without delay" within the protection of the judicial power and consequently to ensure that there was no arbitrary curtailment of his right to liberty. That purpose is a major one in the work of an institution of this kind; it is worthy of being marked.

26. For present purposes, the law seems straightforward. It is not in dispute that the controlling instruments of the Tribunal reflect the internationally recognised requirement that a detained person shall be brought "without delay" to the judiciary as required by Rule 40*bis*(J) and Rule 62 of the Tribunal's Rules of Procedure and Evidence, or "promptly" as it is said in Article 5(3) of the European Convention on Human Rights and Article 9(3) of the ICCPR, the latter being alluded to by the appellant in paragraph 11 of the brief in support of his motion of 19 February 1998, as mentioned above. It will be convenient to refer to one of these provisions, namely, Article 5(3) of the European Convention on Human Rights. This provides that "[e] veryone arrested or detained in accordance with the provisions of paragraph 1.*c* of this article [relating to arrests for reasonable suspicion of having committed an offence] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...".

27. So first, as to the purpose of these provisions. Apart from the general entitlement to a trial within a reasonable time, it is judicially recognised that the purpose is to guarantee to the arrested person a right to be brought promptly within the protection of the judiciary and to ensure that he is not arbitrarily deprived of his right to liberty. The European Court of Human Rights, whose case law on the subject is persuasive, put the point by observing that the requirement of promptness "enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty.... Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5§3 [of the European Convention on Human Rights] , which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, 'one of the fundamental principles of a democratic society ...'".

28. Second, as to the tolerable period of delay, the decision of the Appeals Chamber of 3 November 1999 correctly recognised that this is short. The work of the United Nations Human Rights Committee shows that it is about four days. In *Portorreal v. Dominican Republic*, a period of 50 hours was held to be too short to constitute delay. But a period of 35 days was considered too much in *Kelly v. Jamaica.* In *Jijón v. Ecuador* a five-day delay was judged to be violative of the rule.

29. The same tendency in the direction of brevity is evident in the case law of the European Court of Human Rights. In *McGoff,* on his extradition from the Netherlands to Sweden, the applicant was kept in custody for 15 days before he was brought to the court. That was held to be in violation of the rule. *De Jong, Baljet and van den Brink* concerned judicial proceedings in the army. "[E] ven taking due account of the exigencies of military life and military justice", the European Court of Human Rights considered that a delay of seven days was too long.

30. In *Koster,* which also concerned judicial proceedings in the army, a five-day delay was held to be in breach of the rule. The fact that the period included a weekend and two-yearly military manoeuvres, in which members of the court - a military court - had been participating was disregarded; in the view of the

European Court of Human Rights, the rights of the accused took precedence over matters which were "foreseeable". The military manoeuvres "in no way prevented the military authorities from ensuring that the Military Court was able to sit soon enough to comply with the requirements of [Article 5(3) of the European Convention on Human Rights] , *if necessary on Saturday or Sunday*".

31. No doubt, as it was said in *de Jong, Baljet and van den Brink*, "The issue of promptness must always be assessed in each case according to its special features". The same thing was said in *Brogan*. But this does not markedly enlarge the normal period. *Brogan* was a case of terrorism; the European Court of Human Rights was not altogether unresponsive to the implications of that fact, to which the state concerned indeed appealed. Yet the Court took the view that a period of six days and sixteen and a half hours was too long; indeed, it considered that even a shorter period of four days and six hours was outside the constraints of the relevant provision. The Court began its reasoning by saying:

> No violation of Article 5§3 [of the European Convention on Human Rights] can arise if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible ... If the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer.

32. Thus, in measuring permissible delay, the Court started out by having regard to the time within which it would have been "feasible" to establish judicial control of the detention in the circumstances of the case. The idea of feasibility obviously introduced a margin of flexibility in the otherwise strict requirement of promptness. But how to fix the limits of this flexibility? The Court looked at the "object and purpose of Article 5", or, as it said, at the "aim and ... object" of the Convention", and stated that –

> the degree of flexibility attaching to the notion of 'promptness' is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features ..., the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5§3 [of the European Convention on Human Rights] , that is to the point of effectively negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.

33. In paragraph 62 of its judgment in *Brogan*, the European Court of Human Rights again mentioned that the "scope for flexibility in interpreting and applying the notion of 'promptness' is very limited". Thus, although the Court appreciated the special circumstances which terrorism represented, it said that "[t] he undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5§3".
34. To refer again to *McGoff,* in that case the European Commission of Human Rights recalled that, in an earlier matter, it had expressed the view that a period of four days was acceptable; "it also accepted five days, but that was in exceptional circumstances".
35. In the case at bar, counting from the time of transfer to the Tribunal's detention unit in Arusha (19 November 1997) to the date of initial appearance before a Trial Chamber (23 February 1998), the period - the Arusha period - was 96 days, or *nearly 20 times the maximum acceptable period of delay.*
36. As a matter of juristic logic, any flexibility in applying the requirements concerning time to the case of war crimes has to find its justification not in the nature of the crimes themselves, but in the difficulties of investigating, preparing and presenting cases relating to them. Consequently, that flexibility is not licence for disregarding the requirements where they can be complied with. It is only "the austerity of tabulated legalism", an idea not much favoured where, as here, a generous interpretation is called for, which could lead to the view that, once a crime is categorised as a war crime, that suffices to justify the conclusion that the requirements concerning time may be safely put aside.
37. In this case, it is not easy to see what difficulty beset the authorities in bringing the appellant from the Tribunal's detention unit to the Trial Chamber. That scarcely inter-galactic passage involved no more than a fifteen minute drive by motor car on a macadamised road. To plead the character of the crimes in justification of the manifest breach of an applicable requirement which was both of overriding importance

and capable of being respected with the same ease as in the ordinary case is to transform an important legal principle into a statement of affectionate aspiration.

38. On the facts as they earlier appeared to it, the Appeals Chamber could not come to any conclusion other than that the rights of the appellant in respect of the period between transfer and initial appearance had been breached, and very badly so. As today's decision finds, the new facts do not show that they were not breached. I agree, however, that the new facts show that the breach was not as serious as it at first appeared, it being now clear that defence counsel, although having opportunities, did not object and could be treated as having acquiesced in the passage of time during most of the relevant period.

(iv) Whether a breach could be remedied otherwise than by release

39. Now for the question of remedy, assuming the existence of a breach. In this respect, the prosecution argues that, if there was a breach of the appellant's rights, it was open to the Appeals Chamber to grant some form of compensatory relief short of release and that it should have done so. In support, notice may be taken of a view that, particularly though not exclusively in the case of war crimes, the remedy for a breach of the principle that a trial is to be held within a reasonable time may take the form of payment of monetary compensation or of adjustment of any sentence ultimately imposed, custody being meanwhile continued.
40. That view is useful, although not altogether free from difficulty; it is certainly not an open-ended one. If the concern of the law with the liberty of the person, as demonstrated by the above-mentioned attitude of the courts, means anything, it is necessary to contemplate a point of time at which the accused indisputably becomes entitled to release and dismissal of the indictment. In this respect, it is to be observed that, according to the European Commission of Human Rights, contrary to an opinion of the German Federal Court, in 1983 a committee of three judges of the German Constitutional Court held that "unreasonable delays of criminal proceedings might under certain circumstances only be remedied by discontinuing such proceedings". As is shown by the last paragraph of the report of *Bell's* case, *supra*, the only reason why a formal order prohibiting further proceedings was not made in that case by the Privy Council was because it was understood that the practice in Jamaica was that there would be no further proceedings. Paragraph 108 of the decision of the Appeals Chamber of 3 November 1999 cites cases from other territories in which further proceedings were in fact prohibited. I find no fault with the position taken in those cases; true, those cases concerned delay in holding and completing the trial, but I do not accept that the principle on which they rest is necessarily inapplicable to extended pre-arraignment delay.
41. More importantly, the view that relief short of release is possible is subject to any statutory obligation to effect a release. In this respect, in its previous decision the Appeals Chamber held that Rule 40*bis* of the Tribunal's Rules of Procedure and Evidence applied to the Cameroon period of detention. I respectfully disagreed with that view and still do, but it is the decision of the Appeals Chamber which matters; and so I proceed on the basis that the Rule applied. Now, Sub-Rule (H) of that Rule provided as follows:

> The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event that the indictment has not been confirmed and an arrest warrant signed, the suspect *shall be released* ... (emphasis added).

42. Consistently with the judicial approach to detention in the early phases of a criminal case, the object of the cited provision is to control arbitrary interference with the liberty of the person by guaranteeing him a right to be released if he is not charged within the stated time. In keeping with that object, the Rule, which has the force of law, provides its own sanction. Where that sanction comes into operation through breach of the 90-day limit set by the Rule, release is both automatic and compulsory: a court order may be made but is not necessary. The detained person has to be mandatorily released in obedience to the command of the Rule: no consideration can be given to the possibility of keeping him in custody and granting him a remedy in the form of a reduction of sentence (if any) or of payment of compensation; any discretion as to alternative forms of remedy is excluded, however serious were the allegations.
43. In effect, the premise of the conclusion reached by the Appeals Chamber that the appellant had to be released was the Chamber's interpretation, on the facts then before it, that the Rule applied to the

Cameroon period of detention. These being review proceedings and not appeal proceedings, the premise would continue to apply, and so would the conclusion, unless displaced by new facts.

(v) Whether there are new facts

44. So now for the question whether there are new facts. The temptation to use national decisions in this area may be rightly restrained by the usual warnings of the dangers involved in facile transposition of municipal law concepts to the plane of international law. Such borrowings were more frequent in the early or formative stages of the general subject; now that autonomy has been achieved, there is less reason for such recourse. It is possible to argue that the current state of criminal doctrine in international law approximates to that of the larger subject at an earlier phase and that accordingly a measure of liberality in using domestic law ideas is both natural and permissible in the field of criminal law. But it is not necessary to pursue the argument further. The reason is that, altogether apart from the question whether a particular line of municipal decisions is part of the law of the Tribunal, no statutory authority needs to be cited to enable a court to benefit from the scientific value of the thinking of other jurists, provided that the court remains master of its own house. Thus, nothing prevents a judge from consulting the reasoning of judges in other jurisdictions in order to work out his own solution to an issue before him; the navigation lights offered by the reflections of the former can be welcome without being obtrusive. This is how I propose to proceed.
45. The books are full of statements, and rightly so, concerning the caution which has to be observed, as a general matter, in admitting fresh evidence. Latham CJ noted that "[t] hese are general principles which should be applied to both civil and criminal trials". Accordingly, there is to be borne in mind the principle familiar in civil cases, somewhat quaintly expressed in one of them, that it is the "duty of [a party] to bring forward his whole case at once, and not to bring it forward piecemeal as he found out the objections in his way".
46. The prosecution advanced a claim to several new facts. Agreeably to the caution referred to, the Appeals Chamber has not placed reliance on all of them. I shall deal with two which were accepted, beginning with the statement of Ambassador Scheffer as to United States intervention with the government of Cameroon. Five questions arise in respect of that statement.
47. The first question is whether the Ambassador's statement concerns a "new fact" within the meaning of Article 25 of the Statute. It has to be recognised that there can be difficulty in drawing a clear line of separation between a new fact within the meaning of that Article of the Statute and additional evidence within the meaning of Rule 115 of the Tribunal's Rules of Procedure and Evidence. A new fact is generically in the nature of additional evidence. The differentiating specificity is this: additional evidence, though not being merely cumulative, goes to the proof of facts which were in issue at the hearing; by contrast, evidence of a new fact is evidence of a distinctly new feature which was not in issue at the trial. In this case, there has not been an issue of fact in the previous proceedings as to whether the government of the United States had intervened. True, the intervention happened before the hearing, but that does not make the fact of the intervention any the less new. As is implicitly recognised by the wording of Article 25 of the Statute and Rule 120 of the Rules of Procedure and Evidence of the Tribunal, the circumstance that a fact was in existence at the time of trial does not automatically disqualify it from being regarded as new; the newness has to be in relation to the facts previously before the court. In my opinion, Ambassador Scheffer's statement is evidence of a new fact.
48. The second question is whether the new fact "could not have been discovered [at the time of the proceedings before the original Chamber] through the exercise of due diligence" within the meaning of Rule 120 of the Rules. The position of the prosecution is that it did ask Ambassador Scheffer to intervene with the government of Cameroon. This being so, it is reasonable to hold that the prosecution knew that the requested intervention was needed to end a delay caused by Cameroon, and that it was also in a position to know that the intervention had in fact taken place and that it involved the activities in question. It is therefore difficult to find that the material in question could not have been discovered with due diligence. In this respect, I agree with the appellant.
49. But, for the reasons given in today's judgment, that does not end the matter. Certainly the general rule is that " the interests of justice" will not suffice to authorise the admission of material which was available at trial, diligence being a factor in determining availability. The principle of finality supports that view. But,

as has been recognised by the Appeals Chamber of the ICTY, "the principle [of finality] would not operate to prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice". As was also observed by that Chamber, "the principle of finality must be balanced against the need to avoid a miscarriage of justice". I see no reason why the necessity to make that balance does not apply to a review.

50. Thus, there has to be recognition of the possibility of there being a case in which, notwithstanding the absence of diligence, the material in question is so decisive in demonstrating mistake that the court in its discretion is obliged to admit it in the upper interests of justice. This was done in one case in which an appeal court observed, "All the evidence tendered to us could have been adduced at the trial: indeed, three of the witnesses, whom we have heard... did give evidence at the trial. Nevertheless we have thought it necessary, exercising our discretion in the interests of justice, to receive" their evidence. It is not the detailed underlying legislation which is important, but the principle to be discerned.
51. The principle was more recently affirmed by the Supreme Court of Canada in the case of *R v. Warsing*. There the leading opinion recalled an earlier view that "the criterion of due diligence… is not applied strictly in criminal cases" and said: "It is desirable that due diligence remain only one factor and its absence, particularly in criminal cases, should be assessed in light of other circumstances. If the evidence is compelling and the interests of justice require that it be admitted then the failure to meet the test should yield to permit its admission". In the same opinion, it was later affirmed that "a failure to meet the due diligence requirement should not 'override accomplishing a just result'".
52. It may be thought that an analogous principle can be collected from *Aleksovski,* in which the Appeals Chamber of the ICTY held "that, in general, accused before this Tribunal have to raise all possible defences, where necessary in the alternative, during trial ..." , but stated that it "will nevertheless consider" a new defence. Clearly, if the new defence was sound in law and convincing in fact, it would have been entertained in the higher interests of justice notwithstanding the general rule.
53. Thus, having regard to the superior demands of justice, I would read the reference in Rule 120 to a new fact which "could not have been discovered through the exercise of due diligence" as directory, and not mandatory or peremptory. In this respect, it is said that the "language of a statute, however mandatory in form, may be deemed directory whenever legislative purpose can best be carried out by [adopting a directory] construction". Here, the overriding purpose of the provision is to achieve justice. Justice is denied by adopting a mandatory interpretation of the text; a directory approach achieves it. This approach, it is believed, is consonant with the broad view that, as it has been said, "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case". That remark was made about rules of civil procedure, but, with proper caution, the idea inspiring it applies generally to all rules of procedure to temper any tendency to rely too confidently, or too simplistically, on the maxim *dura lex, sed lex.* I do not consider that this approach necessarily collides with the general principle regulating the interpretation of penal provisions and believe that it represents the view broadly taken in all jurisdictions.
54. The question then is whether, even if there was an absence of diligence, the material in this case so compellingly demonstrates mistake as to justify its admission. Ambassador Scheffer's statement makes it clear that the delay in Cameroon was due to the workings of the decision-making process in that country, that that process was expedited only after and as a result of his and his government's intervention with the highest authorities in Cameroon, that Cameroon was otherwise not ready to effect a transfer, and that accordingly the Tribunal was not to blame for any delay, as the Appeals Chamber thought it was. Has the Appeals Chamber to close its eyes to Ambassador Scheffer's statement, showing, as it does, the existence of palpable mistake bearing on the correctness of the previous conclusion? I think not.
55. The third question is which Chamber should process the significance of the new fact: Is it the Appeals Chamber? Or, is it the Trial Chamber? In the *Tadic* Rule 115 application, the ICTY Appeals Chamber took the position, in paragraph 30 of its Decision of 15 October 1998, that the "proper venue for a review application is the Chamber that rendered the final judgement". Well, this is a review and it is being conducted by the Chamber which gave the final judgement - namely, the Appeals Chamber. So the case falls within the *Tadic* proposition.
56. I would, however, add this: On the basis of the statement in question, there could be argument that the Appeals Chamber cannot itself assess a new fact where the Appeals Chamber is sitting on appeal.

However, it appears to me that the statement need not be construed as intended to neutralise the implication of Rule 123 of the Rules of Procedure and Evidence of the Tribunal that the Appeals Chamber may itself determine the effect of a new fact in an appeal pending before it. That Rule states: "If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion". The word "may" shows that the Appeals Chamber need not send the matter to the Trial Chamber but may deal with it itself. The admissibility of this course is supported by the known jurisprudence, which shows that matter in the nature of a new fact may be considered on appeal. Thus, in *R. v. Ditch* (1969) 53 Cr. App. R. 627, at p. 632, a post-trial confession by a co-accused was admitted on appeal as fresh or additional evidence, having been first heard *de bene esse* before being formally admitted. Structures differ; it is the principle involved which matters. The jurisprudence referred to above in relation to mandatory and directory provisions also works to the same end. In my view, that end means this: where the new fact is in its nature conclusive, it may be finally dealt with by the Appeals Chamber itself; a reference back to the Trial Chamber is required only where, without being conclusive, the new fact is of such strength that it might reasonably affect the verdict, whether the verdict would in fact be affected being left to the evaluation of the Trial Chamber.

57. The fourth question is whether the new fact brought forward in Ambassador Scheffer's statement "could have been a decisive factor in reaching the decision", within the meaning of Article 25 of the Statute. The simple answer is "yes". As mentioned above, the decision of the Appeals Chamber proceeded on the basis that the Tribunal was responsible for the delay in Cameroon and that the latter was always ready to make a transfer. The Ambassador's statement shows that these things were not so.
58. The fifth and last question relates to a submission by the appellant that the Appeals Chamber should disregard Ambassador Scheffer's activities because he was merely prosecuting the foreign policy of his government and had no role to play in proceedings before the Tribunal. As has been noticed repeatedly, the Tribunal has no coercive machinery of its own. The Security Council sought to fill the gap by introducing a legal requirement for states to co-operate with the Tribunal. That obligation should not be construed so broadly as to constitute an unacceptable encroachment on the sovereignty of states; but it should certainly be interpreted in a manner which gives effect to the purposes of the Statute. I cannot think that anything in the purposes of the Statute prevents a state from using its good offices with another state to ensure that the needed cooperation of the latter with the Tribunal is forthcoming; on the contrary, those purposes would be consistent with that kind of *démarche*. Thus, accepting that Ambassador Scheffer was prosecuting the foreign policy of his government, I cannot see that he was acting contrary to the principles of the Statute. Even if he was, I do not see that there was anything so inadmissibly incorrect in his activities as to outweigh the obvious relevance for this case of what he in fact did.
59. The statement of Judge Mballe of Cameroon is equally admissible as a new fact. It corroborates the substance of Ambassador Scheffer's statement in that it shows that, whatever was the reason, the delay was attributable to the decision-making process of the government of Cameroon; it was not the responsibility of the Tribunal or of any arm of the Tribunal.

(vi) The effect of the new facts

60. The appellant, along with others, was detained by Cameroon on an extradition request from Rwanda from 15 April 1996 to 21 February 1997. During that period of detention, he was also held by Cameroon at the request of the Prosecutor of the Tribunal for one month, from 17 April 1996 to 16 May 1996. In the words of the Appeals Chamber, on the latter day "the Prosecutor informed Cameroon that she only intended to pursue prosecutions against four of the detainees, *excluding* the Appellant". Later, on "15 October 1996, responding to a letter from the Appellant complaining about his detention in Cameroon, the Prosecutor informed the Appellant that Cameroon was not holding him at her behest". Today's judgment also shows that the appellant knew, at least by 3 May 1996, of the reasons for which he was held at the instance of the Prosecutor. These things being so, it appears to me that, from the point of view of proportionality, the Appeals Chamber focused on the subsequent period of detention at the request of the Tribunal, from 21 February 1997 to 19 November 1997, on which latter date the appellant was transferred from Cameroon to the Tribunal's detention unit in Arusha. How would the Appeals Chamber have viewed the appellant's detention during this period had it had the benefit of the new facts now available?

61. Regard being had to the jurisprudence, considered above, on the general judicial attitude to delay in the early phases of a criminal case, it is reasonable to hold that Rule 40*bis* contemplated a speedy transfer. If the transfer was effected speedily, no occasion would arise for considering whether the provision applied to extended detention in the place from which the transfer was to be made. In this case, the transfer was not effected speedily and the Appeals Chamber thought that the Tribunal (through the Prosecutor) was responsible for the delay, for which it accordingly looked for a remedy. In searching for this remedy, it is clear, from its decision read as a whole, that the central reason why it was moved to hold that the protection of that provision applied was because of its view that there was that responsibility. In this respect, I note that the appellant states that it "is the Prosecutor's failure to comply with the mandates of Rule 40 and Rule 40*bis* that compelled the Appeals Chamber to order the Appellant's release". I consider that this implies that the appellant himself recognises that the real reason for the decision to release him was the finding by the Appeals Chamber that the Prosecutor (and, through her, the Tribunal) was responsible for the delay in Cameroon. It follows that if, as is shown by the statements of Ambassador Scheffer and Judge Mballe, the Tribunal was not responsible, the Appeals Chamber would not have had occasion to consider whether the provisions applied and whether the appellant should be released in accordance with Rule 40*bis*(H).
62. Thus, without disturbing the previous holding, made on the facts then known to the Appeals Chamber, that Rule 40*bis* was applicable to the Cameroon period (with which I do not agree), the conclusion is reached that, on the facts now known, the Appeals Chamber would not have held that the Rule applied to that period, with the consequence that the Rule would not have been regarded as yielding the results which the Appeals Chamber thought it did.
63. Argument may be made on the basis of the previous holding (with which I disagreed) that Cameroon was the constructive agent of the Tribunal. On that basis, the contention could be raised that, even if the delay was caused by Cameroon and not by the Tribunal, the Tribunal was nonetheless responsible for the acts of Cameroon. However, assuming that there was constructive agency, such agency was for the limited purposes of custody pending speedy transfer. Cameroon could not be the Tribunal's constructive agent in respect of delay caused, as the new facts show, by Cameroon's acts over which the Tribunal had no control, which were not necessary for the purposes of the agency, and which in fact breached the purposes of the agency. Hence, even granted the argument of constructive agency, the new facts show that the Tribunal was not responsible for the delay as the Appeals Chamber thought it was on the basis of the facts earlier known to it.
64. There are other elements in the case, but that is the main one. Other new facts, mentioned in today's judgment, show that the violation of the appellant's rights in respect of delay between transfer and initial appearance was not as extensive as earlier thought; in any case, it did not involve the operation of a mandatory provision requiring release. The new facts also show that defence counsel acquiesced in the non-hearing of the habeas corpus motion on the ground that it had been overtaken by events. Moreover, as is also pointed out in the judgment, the matter has to be regulated by the approach taken by the Appeals Chamber in its decision of 3 November 1999. Paragraphs 106-109 of that decision made it clear that the conclusion reached was based not on a violation of any single right of the appellant but on an accumulation of violations of different rights. As has now been found, there are new facts which show that important rights which were thought to have been violated were not, and that accordingly there was not an accumulation of breaches. Consequently, the basis on which the Appeals Chamber ordered the appellant's release is displaced and the order for release vacated.

(vii) Conclusion

65. There are two closing reflections. One concerns the functions of the Prosecutor; the other concerns those of the Chambers.
66. As to her functions, the Prosecutor appeared to be of a mind that the independence of her office was invaded by a judicial decision that an indictment was dismissed and should not be brought back. She stated that she had "never seen" an instance of a prosecutor being prohibited by a court "from further prosecution ...". In her submission, such a prohibition was at variance with her "completely independent" position and was "contrary to [her] duty as a prosecutor". Different legal cultures are involved in the work of the Tribunal and it is right to try to understand those statements. It does appear to me, however, that the

framework provided by the Statute of the Tribunal can be interpreted to accommodate the view of some legal systems that the independence of a prosecutor does not go so far as to preclude a court from determining that, in proper circumstances, an indicted person may be released and may not be prosecuted again for the same crime. The independence with which a function is to be exercised can be separated from the question whether the function is itself exercisable in a particular situation. A judicial determination as to whether the function may be exercised in a given situation is part of the relief that the court orders for a breach of the person's rights committed in the course of a previous exercise of those functions. This power of the courts has to be sparingly used; but it exists.

67. Also, the Prosecutor stated, in open court, that she had personally seen "5000 skulls" in Rwanda. She said that the appellant was "responsible for the death of over ... 800,000 people in Rwanda, and the evidence is there. Irrefutable, incontrovertible, he is guilty. Give us the opportunity to bring him to justice." Objecting on the basis of the presumption of innocence, counsel for the appellant submitted that the Prosecutor had expressed herself in "a more aggressive manner than she should ..." and had "talked as if she was a depository of justice before" the Appeals Chamber. I do not have the impression that the latter remark was entirely correct, but the differing postures did appear to throw up a question concerning the role of a prosecutor in an international criminal tribunal founded on the adversarial model. What is that role?
68. The Prosecutor of the ICTR is not required to be neutral in a case; she is a party. But she is not of course a partisan. This is why, for example, the Rules of the Tribunal require the Prosecutor to disclose to the defence all exculpatory material. The implications of that requirement suggest that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel "ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice". The prosecution takes the position that it would not prosecute without itself believing in guilt. The point of importance is that an assertion by the prosecution of its belief in guilt is not relevant to the proof. Judicial traditions vary and the Tribunal must seek to benefit from all of them. Taking due account of that circumstance, I nevertheless consider that the system of the Statute under which the Tribunal is functioning will support a distinction between an affirmation of guilt and an affirmation of preparedness to prove guilt. In this case, I would interpret what was said as intended to convey the latter meaning, but the strength with which the statements were made comes so close to the former that I consider it right to say that the framework of the Statute is sufficiently balanced and sufficiently stable not to be upset by the spirit of the injunction referred to concerning the role of a prosecutor. I believe that it is that spirit which underlies the remarks now made by the Appeals Chamber on the point.
69. As to the functions of the Chambers, whichever way it went, the decision in this case would call to mind that, on the second occasion on which *Pinochet's* case went to the British House of Lords, the presiding member of the Appellate Committee of the House noted that:-

> [t] he hearing of this case ... produced an unprecedented degree of public interest not only in this country but worldwide. ... The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. ... This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions.

Naturally, however, (and as in this case), "the members of the Appellate Committee were in no doubt as to their function ...".

70. Here too there has been interest worldwide, including a well-publicised suspension by Rwanda of cooperation between it and the Tribunal. On the one hand, the appellant has asked the Appeals Chamber to "disregard ... the sharp political and media reaction to the decision, particularly emanating from the Government of Rwanda". On the other hand, the Prosecutor has laid stress on the necessity for securing the cooperation of Rwanda, on the seriousness of the alleged crimes and on the interest of the international community in prosecuting them.
71. These positions have to be reconciled. How? This way: the sense of the international community has to be respectfully considered by an international court which does not dwell in the clouds; but that sense has to be collected in the whole. The interest of the international community in organising prosecutions is only

half of its interest. The other half is this: such prosecutions are regarded by the international community as also designed to promote reconciliation and the restoration and maintenance of peace, but this is possible only if the proceedings are seen as transparently conforming to internationally recognised tenets of justice. The Tribunal is penal; it is not simply punitive.

72. It is believed that it was for this reason that the Security Council chose a judicial method in preference to other possible methods. The choice recalls the General Assembly's support for the 1985 Milan Resolution on Basic Principles on the Independence of the Judiciary, paragraph 2 of which reads: "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason". That text, to which counsel for the appellant appealed, is a distant but clear echo of the claim that the law of Rome was "of a sort that cannot be bent by influence, or broken by power, or spoilt by money". The timeless constancy of that ancient remark, cited for its substance rather than for its details, has in turn to be carried forward by a system of international humanitarian justice which was designed to function in the midst of powerful cross-currents of world opinion. Nor need this be as daunting a task as it sounds: it is easy enough if one holds on to the view that what the international community intended to institute was a system by which justice would be dispensed, not dispensed with.
73. But this view works both ways. In this case, there are new facts. These new facts both enable and require me to agree that justice itself has to regard the effect of the previous decision as now displaced; to adhere blindly to the earlier position in the light of what is now known would not be correct.

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

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Mohamed Shahabuddeen

Dated this 31st day of March 2000
At The Hague
The Netherlands

DECLARATION OF JUDGE LA CHAND VOHRAH

1. I would like to reiterate that I fully agree with the conclusions of the Appeals Chamber in the present decision and with the disposition that follows this Review. This agreement, however, calls for a few observations on my part. In the original decision the Appeals Chamber invoked the abuse of process doctrine. In the light of the facts which where then before it, the Chamber found that to proceed with the trial of the Appellant in the face of the egregious violations of his rights would be unjust to him and injurious to the integrity of the judicial process of the Tribunal. Consequently, the Appeals Chamber decided that the proceedings against the Appellant should be discontinued.
2. In its previous decision, the Appeals Chamber proceeded on the basis of, *inter alia*, its finding that the Prosecutor was responsible for the delays of which the Appellant complained. In this Review a different picture has been shown by the disclosure of new facts which now diminish substantially the blameworthiness attributed to the Prosecutor on the ground of lack of diligence, and the seriousness of the violations suffered by the Appellant. Had the Appeals Chamber been apprised of these facts on appeal, the original decision would have been different and the abuse of process doctrine would not have been called in aid and applied with all the vigour that was implicit in the "with prejudice" order that was made.
3. I must say that I have had the benefit of reading the Declaration in draft of my brother Judge Nieto-Navia and would like to state that I subscribe fully to the views he has expressed therein on the overriding principle relating to the independence of the judiciary (in the light of the considerations which the Prosecutor and the Representative of the Government of Rwanda as amicus curiae have, perhaps unwittingly, asked the Appeals Chamber to take into account), and on the principles of human rights.

4. In conclusion, I am satisfied that there are new facts which now require that the previous decision be modified in the way stated in the disposition of the present decision.

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

S/.
Lal Chand Vohrah

Dated this 31st day of March 2000
At The Hague,
The Netherlands.

[**Seal of the Tribunal]**