DISSENTING OPINION OF JUDGE POCAR

While I agree with the conclusion of the majority that the Trial Chamber erred in its failure to determine that a nexus existed between the ETO and Nyanza crimes and the armed conflict, I dissent from the majority's decision to reverse the acquittals entered by the Trial Chamber in relation to Counts 4 and 6, and to enter new convictions on appeal.

Article 24 of the ICTR Statute provides that the Appeals Chamber may hear appeals from the Prosecutor on errors of law invalidating the decision, or errors of fact which have occasioned a miscarriage of justice. It further provides that the Appeals Chamber may affirm, reverse, or revise the decisions taken by the Trial Chambers. By its literal terms, the Statute may not appear to prohibit the reversal by the Appeals Chamber of an acquittal entered by a Trial Chamber and the subsequent entry of a conviction on appeal – even in the absence of the possibility to appeal that initial decision to convict taken by the Appeals Chamber.

Indeed, the ICTR Statute might even be interpreted as allowing the reversal of an acquittal and entry of conviction on appeal, in light of some case law of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). The corresponding article governing appeals in the Statute of the ICTY is Article 25, and its terms are identical to those of Article 24 of the ICTR Statute.

In the *Tadić* case, a Trial Chamber of the ICTY had acquitted Duško Tadić on the basis that Article 2 of the ICTY Statute, concerning grave breaches of the Geneva Conventions, was inapplicable because it had not been proven that the victims at any relevant time were protected persons within the meaning of the Conventions. The Appeals Chamber, however, found that the victims referred to were indeed protected persons, and it reversed the Trial Chamber's verdict on the various counts concerned. It also found that the Trial Chamber had erred when it held that it could not, on the evidence before it, be satisfied beyond a reasonable doubt that the Appellant was criminally liable for the offenses charged in three other counts of the indictment, and it proceeded to find him guilty of these counts as well. The Appeals Chamber remitted the matter of sentencing to a Trial Chamber, and in its decision on the remittal, it noted the oral arguments of the parties wherein they had indicated that they recognized the competence of the Appeals Chamber itself to pronounce sentences but considered "that the Appeals Chamber was also competent to remit sentencing to a Trial Chamber, which latter course they considered preferable in the circumstances of the case."[1]

In the *Aleksovski* Appeal Judgment,[2] however, the Appeals Chamber, finding that the Trial Chamber had erred in its exercise of discretion in imposing sentence, did not remit the question, but proceeded to increase the sentence itself, despite the impossibility of an appeal from its decision.

In the *Čelebići* Appeal Judgment,[3] on the other hand, a number of issues related to sentence were remitted to a Trial Chamber. The Appeals Chamber departed from its previous practice, where it had rendered decisions reversing acquittals (*Tadić*) or increasing sentence (*Aleksovski*) which were not subject to appeal. In the chapter of the judgment related to sentencing, the Appeals Chamber began by noting its decision to quash certain convictions on the basis of cumulative convictions considerations. It then stated:

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[1] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Order Remitting Sentencing to a Trial Chamber, 10 Sept. 1999, p. 3.
[2] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 Mar. 2000.
[3] *Prosecutor v. Delalić et al*, Case No. IT-96-21-A, Judgement, 20 Feb. 2001 (hereinafter "*Čelebići* Appeal Judgment").

> Because the Appeals Chamber has had no submissions from the parties on these issues and, because there may be matters of important principle involved, it will be necessary for such consideration to be given after the parties have had the opportunity to make relevant submissions. As the Appeals Chamber cannot be reconstituted in its present composition, and as, *in any event, a new matter of such significance should be determined by a Chamber from which an appeal is possible*, the Appeals Chamber proposes to remit these issues for determination by a Trial Chamber.[4]

Hence, in the *Čelebići* Appeal Judgment, the Appeals Chamber expressly recognized that certain issues are so important that they should be determined by a Chamber from which it is possible to lodge an appeal – in order to preserve the right of appeal.[5]

Such an approach is in full conformity with the principle articulated in Article 14(5) of the International Covenant on Civil and Political Rights ("ICCPR"), which states: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[6] This provision was explicitly referred to in the Report of the Secretary General (S/25704) pertaining to the establishment of the ICTY, approved by the Security Council in Resolution 827 (1993). Paragraph 116 of this Report states:

> The Secretary-General is of the view that the right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has, inter alia, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary-General has proposed that there should be an Appeals Chamber.

The Report sets out an important principle, and it is entirely possible to interpret the Statute in conformity with this principle, through a decision to remit a case to a Trial Chamber when the Appeals Chamber considers that a new conviction should be entered or a sentence increased. As a result, even if the text of the Statute would literally allow for a different interpretation, the interpretation that is in conformity with the principle affirmed should be chosen.

Furthermore, the ICCPR is not only a treaty between States which have ratified it, but, like other human rights treaties, also a document that was adopted – unanimously – as a resolution by the General Assembly. As such, it also expresses the view of the General Assembly as to the principles enshrined therein. It would therefore have to be assumed that the Security Council, as a UN body, would act in compliance with that declaration of principles of the General Assembly. Only a clear-cut decision to depart from it would lead to a different conclusion. But in this case, as mentioned, the intention of the Security Council to comply with the ICCPR was explicitly demonstrated through its approval of the Report of the Secretary General. It does not matter, in this context, that the principle contained in Article 14(5) has been subjected to reservations by a few States which have ratified the ICCPR – out of 149 State parties, only about 10 have expressed reservations, and some of these reservations have a different scope as compared with the case at issue – or that other regional legal instruments such as the Seventh Protocol to the European Convention on Human Rights may have taken a different approach.

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[4] *Čelebići* Appeal Judgment, para. 711 (emphasis provided).

[5] Within the ICTR, the issue as to whether the Appeals Chamber may itself enter a new conviction on appeal has not arisen prior to this appeal. Although an appeal from the Prosecution was heard following the entry of acquittals by the Trial Chamber in the *Bagilishema* case, the Appeals Chamber affirmed the acquittals and ordered Bagilishema's immediate release. Hence the issue concerning the ability of the Appeals Chamber to reverse an acquittal and enter a conviction, in the absence of the possibility of the defense to appeal the fresh conviction, did not arise. See *Le Procureur c/ Ignace Bagilishema*, Affaire no ICTR-95-1A-A, Arrêt, 3 juillet 2002.

[6] The French text provides: "Toute personne déclarée coupable d'une infraction a le droit de faire examiner par une juridiction supérieure la déclaration de culpabilité et la condamnation, conformément à la loi. "

It should also be noted that the right of appeal has been preserved in the jurisprudence and Rules of Procedure and Evidence of the ICTY, in contempt cases. In the *Tadić* case, the Appeals Chamber, ruling in the first instance, found former counsel Milan Vujin guilty of contempt.[7] Mr. Vujin sought leave to appeal this judgment, and leave was granted by a bench.[8] In its appeal judgment, the Appeals Chamber began by noting that Rule 77 of the Rules (as it then existed) did not expressly provide for the right to appeal a contempt conviction of the Appeals Chamber.[9] It then considered, however, that the Rules must be interpreted "in conformity with the International Tribunal's Statute which, as the United Nations Secretary-General state[d] in his report of 3 May 1993 (S/25704) must respect the 'internationally recognized standards regarding the rights of the accused' including Article 14 of the [ICCPR]".[10] The Appeals Chamber then recalled the guarantees contained in Article 14(5) of the ICCPR and stated that "Article 14 of the International Covenant reflects an *imperative norm of international law* to which the Tribunal must adhere."[11] It proceeded to consider the merits of Mr. Vujin's complaint, pointing out that while the preferred course "would have been for the contempt trial to have been initially referred to a Trial Chamber, thereby providing for the possibility of appeal, rather than being heard by the Appeals Chamber, ruling in the first instance[,] … it is the duty of the International Tribunal to guarantee and protect the rights of those who appear as accused before it."[12]

Following this decision of the ICTY Appeals Chamber, Rule 77 of the ICTY Rules was amended to provide: "In the case of decisions under this Rule by the Appeals Chamber sitting as a Chamber of first instance, an appeal may be submitted in writing to the President within fifteen days of the filing of the impugned decision. Such appeal shall be decided by five different Judges as assigned by the President." If the right of appeal is preserved in cases of contempt arising before the Appeals Chamber sitting in the first instance, it is difficult to imagine that this right may be denied to an appellant for whom possible convictions of genocide, war crimes, or crimes against humanity are at issue.

In any event, it should be evident that, where the rights of the accused are concerned, in case of doubt as to whether a particular right exists, such a doubt must operate in favor of the accused. Indeed, whereas the right of the defendant to appeal his post-trial conviction is a general principle of law applicable in many domestic jurisdictions, the right of the prosecution to appeal an acquittal does not enjoy the same degree of universality. As a result, such a right should be interpreted restrictively, taking into account the rights of the accused, and preserving his right of appeal. Certainly, decisions taken more recently by the Appeals Chamber of the ICTY (*Čelebići* Appeal Judgment and *Tadić* (Vujin) contempt appeal judgment), as well as amendments to its Rules of Procedure and Evidence, manifestly incline in this direction.

Against this approach, one might argue that, an error having been identified by the Appeals Chamber in this case, the necessary consequence is that the acquittal entered by the Trial Chamber was erroneous. If remitted to a Trial Chamber, the latter would reach the same conclusion as the Appeals Chamber would, and, the argument might continue, such a remittal would only incur a waste of judicial resources. However, such an argument is not an excuse to derogate from a

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[7] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan. 2000.

[8] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-AR77, Decision on the Application for Leave to Appeal, 25 Oct. 2000. The Bench concluded that "the arguments advanced in support of the Application … justify a more thorough review by the Appeals Chamber." *Id.* at p. 4.

[9] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 Feb. 2001, p. 3.

[10] *Id.*

[11] *Id.* (emphasis provided).

[12] *Id*. at p. 4.

fundamental human right. Furthermore, it presupposes that in no case would an appellant be able to identify an issue warranting fresh consideration by the Appeals Chamber in an appeal from a conviction or increased sentence entered by a Trial Chamber following a remittal by the Appeals Chamber.

However, a remittal to a Trial Chamber is not the only remedy possible when an error is identified by the Appeals Chamber.[13] The Appeals Chamber always possesses a margin of discretion in its choice of remedy, provided that this discretion is exercised on proper judicial grounds, balancing factors such as "fairness to the accused, the interests of justice, the nature of the offenses, the circumstances of the case [at] hand and considerations of public interest"[14] – and provided that the exercise of this discretion does not cause prejudice to the parties.

In the present case, the acts committed at the ETO school (para. 14 of the indictment) and at Nyanza (paras 15 and 16 of the indictment), also formed the basis, in part, of the charges contained in Counts 1 and 2. The convictions entered under these two counts have been affirmed by the Appeals Chamber. Therefore, a remittal to a Trial Chamber would unduly prolong the proceedings and would not be in the interests of justice. In addition, the error made by the Trial Chamber having been corrected, no prejudice could result to the Prosecution. For these reasons and in the circumstances of this case, it would not be appropriate to order that the case be remitted for further proceedings. The acquittals entered by the Trial Chamber should be left undisturbed.

Done on the 26th of May 2003,
at Arusha, Tanzania.

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Judge Fausto Pocar

[13] *See Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001, paras 72, 73, 77 (where the Appeals Chamber found that the Trial Chamber's conclusion that there was insufficient evidence to show an intent to destroy the group, did not meet the standard for acquittal under Rule 98*bis*(B), and sustained the prosecution's appeal on this point; however, after pointing out that the choice of remedy lay in its discretion and that this discretion must be exercised on proper judicial grounds, the Appeals Chamber declined to reverse the acquittal entered by the Trial Chamber and to remit the case for further proceedings, including a retrial, considering that it was not in the interests of justice to do so and that the facts of the case did not constitute "appropriate circumstances").
[14] *Id.* at para. 73.